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Diversity and Equal Protection in the Marketplace: The *Metro Broadcasting* Case in Context

Allen S. Hammond, IV*

I. INTRODUCTION

In 1990, the United States Supreme Court decided *Metro Broadcasting, Inc. v. FCC*.¹ In what has been described as a victory for the civil rights forces by some,² and judicial perpetuation of reverse discrimination by others,³ the Court affirmed two of the Federal Communication Commission's (FCC's) three policies encouraging minority ownership of broadcast media. Although essentially "non remedial" in nature, the Court found these two policies—the enhancement for minority ownership and management in comparative licensing

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1. 110 S. Ct. 2997, *reh'g denied*, 111 S.Ct. 15 (1990).
2. See O'Conner, *High Court Backs Preference Given to Minorities by FCC*, *Boston Globe*, June 28, 1990, at 1.
3. See *The Strange Career of Jim Crow*, *Washington Times*, July 5, 1990, at D2; *Will, Legislating Racial Spoils*, *Washington Post*, July 5, 1990, at A19, col. 1.

cases⁴ and the distress sale transfer to a minority enterprise⁵—to be consistent with the constitutional guarantee of equal protection of the laws. The Court determined the policies are substantially related to the achievement of government's important interest in broadcast diversity.⁶ Indeed, the affirmance of the congressionally mandated FCC minority ownership policies turned, in major part, on the majority's acknowledgement of the continuing importance of the American public's right to a diversity of ideas.⁷ A third FCC policy, the tax certificate policy, which allows owners of broadcast stations or cable systems who sell their properties to minority owned or controlled entities to defer payment of capital gains tax on the sale, was not before the Court.⁸

By contrast, the dissent argued that the minority ownership policies violated the constitutional guarantee of equal protection because the government, through its policies, did not treat all citizens as "individuals" but as components of a racial or ethnic class.⁹ The dissent also argued that the gov-

4. In comparative proceedings for new broadcast licenses, the FCC considers the minority ownership of the proposed licensee as one of many factors in determining which potential licensee would best serve the public interest and is therefore most deserving of the license. *Metro Broadcasting*, 110 S.Ct. at 3004-05.

5. Under the distress sale policy, a broadcaster whose has been designated for a revocation hearing or a hearing on potentially disqualifying issues may, at his or her election and prior to start of such hearings, elect to transfer the license to an entity which is more than 50% owned by a minority entrepreneur. *Id.* at 3005.

6. *Id.* at 3010-11. The Court applied "intermediate scrutiny," rather than "strict scrutiny," to the FCC's policies. Professor Smolla notes, "The application of a the more lax intermediate scrutiny test was surprising, because the Court had appeared to be settling on the strict scrutiny test as the appropriate standard of review for racial affirmative action." Smolla, *Affirmative Action in the Marketplace of Ideas*, 44 ARK. L. REV. 935, 938 (1991). See *infra* note 24.

7. *Id.*

8. Under the tax certificate policy, the FCC issues tax certificates to owners of broadcast stations or cable systems who elect to sell their properties to minority-owned or controlled entities or entrepreneurs. If, within a specified period of time, the seller re-invests the proceeds from the sale of the property in another broadcast company or in another property deemed to be "similar or related in purpose," the prior sale is treated as an involuntary conversion, and the gain derived is not taxable until the replacement property is sold. The tax certificate component is authorized pursuant to I.R.C. § 1071 (1982). See Wilde, *FCC Tax Certificates for Minority Ownership of Broadcast Facilities: A Critical Re-examination of Policy*, 138 U. PA. L. REV. 979 (1990).

9. *Metro Broadcasting*, 110 S.Ct. at 3028-29 (O'Connor, J., dissenting). It should be noted that Justice O'Connor filed a dissenting opinion in which the Chief Justice and Justices Scalia and Kennedy joined. Justice Kennedy wrote an additional dissenting

ernment's interest in enhancing broadcast diversity is not compelling,¹⁰ basing this conclusion on the presumed impact of the marketplace on an owner's exercise of editorial control and the FCC's alleged failure to establish a factual predicate for the nexus between ownership and programming.¹¹ The dissent went on to conclude that the diversity interest, as manifested by the minority ownership policies, is not substantial.¹²

This article explores the underpinnings of the Court's debate over the relative merits of the first amendment based diversity doctrine and the fourteenth amendment based affirmative action doctrine within the context of the *Metro Broadcasting* decision. While either or both doctrines may be relied upon to justify the policies at issue in *Metro Broadcasting*,¹³ the doctrines are in fact separate areas of jurisprudence encompassing separate notions of entitlement for distinct but related ends.

Under the diversity doctrine, increasing the number of minority viewpoints by increasing minority ownership of the media is important to achievement of the critical first amendment goal of diversifying control over the means of communication. This goal is appropriate because the right to speak (the right to create, select and edit what may be said) is vested, in significant part, in the owner. Under an expansive interpretation of the equal protection doctrine, increasing minority ownership of the mass media is important to the critical fourteenth amendment goal of removing the results of historical societal discrimination. This goal is appropriate because alternative means are unlikely to alter the under-representation and because the government's efforts are appropriately limited in their impact.

opinion, joined by Justice Scalia. This article focuses primarily on Justice O'Connor's dissent.

10. *Id.* at 3034.

11. *Id.* at 3041-42.

12. *Id.* at 3037.

13. See Devins, *Metro Broadcasting, Inc. v. FCC: Requiem for a Heavyweight*, 69 *Tex. L. Rev.* 125, 150-155 (1990) (arguing that the diversity interest coupled with a remedial purpose passes constitutional muster); Sedler, *The Constitution, Racial Preference, and the Supreme Court's Institutional Ambivalence: Reflections on Metro Broadcasting*, 36 *WAYNE L. REV.* 1187, 1215-18 (1990) (arguing that the articulation of differing standards of review was, in the majority's viewpoint, a function of their recognition of the government's interest in diversity).

By including previously under-represented groups in the ownership of electronic media, *Metro Broadcasting* affirms the government's interest in affirmatively enhancing the public's first amendment right to diverse and conflicting ideas and sources of information in the electronic media. It also affirms the federal government's ability to use properly circumscribed race conscious remedies to address current recalcitrant results of societal discrimination.

Metro Broadcasting is unquestionably the law of the land at this point in history.¹⁴ However, because the dissenting Justices in *Metro Broadcasting* are perceived by many scholars of the Court to compose the nucleus of the "new" majority,¹⁵ their views on the relationship between ownership, speech and the changing electronic mass media marketplace are likely to have a profound impact on future government efforts to meet what Professor Emerson would refer to as the government's affirmative obligation to assure diversity consistent with the first amendment.¹⁶ Their views on equal protection have already severely undermined state and municipal efforts to alleviate the pernicious legacy of racial discrimination and exclusion.¹⁷

14. See Devins, *supra* note 13, at 129.

15. See Wohl, *What's Left*, A.B.A. J., Feb. 1991, at 41 ("The resignation of Justice William J. Brennan last summer reignited the continuing discussion surrounding the growing conservative majority of the Supreme Court."); McDaniels, *Judicial Flash Points*, NEWSWEEK, July 30, 1990, at 18; Thomas, McDaniels, DeFrank and Cohn, *The Bush Court*, NEWSWEEK, July 30, 1990, at 14 ("Brennan's departure finally ensures the long awaited rightward shift. Indeed, no matter whom Bush chooses, the court in the 1990s is likely to render conservative decisions on the highly charged social issues of racial discrimination, free speech, the rights of criminal defendants and the separation of church and state."); Greenhouse, *The Year the Court Turned Right*, N.Y. Times, July 7, 1989, at A1, col. 2; Savage & Lautner, *Court Backs Government Against Citizen: Rehnquist Gavels an End to Era of Judicial Activism*, L.A. Times, July 7, 1989, § 1, at 1, col. 1.

Now, with the retirement of Associate Justice Thurgood Marshall, and his replacement by Clarence Thomas, the Court's perceived shift to the right will be a "fait accompli." See Kennedy, *Thurgood's Legacy: Equal Justice For All*, EMERGE, Oct. 1991, at 32; *Marshall Retires from U.S. Supreme Court*, NEW YORK L.J., June 28, 1991, at 1, col. 3.

16. See Emerson, *The Affirmative Side of the First Amendment*, 15 GA. L. REV. 795, 804 (1981).

17. In *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), Justices O'Connor, Scalia, Kennedy, Stevens, White and Chief Justice Rehnquist, struck down a Richmond, Virginia set-aside program for minority-owned construction companies. The majority concluded that the plan violated the equal protection clause of the Four-

This article concludes that *Metro Broadcasting* is more than the Supreme Court's pronouncement of the relationship between first amendment diversity and fourteenth amendment equal protection jurisprudence in the limited context of the FCC's minority broadcast ownership policies. Rather, the case has immediate and possible long range implications for regulation of electronic media in terms of the Court's understanding of the relationship between ownership, speech, and the diversity of viewpoints, as well as the scope of the government's duty and authority to increase diversity in the current marketplace.¹⁸ It also has immediate implications for the future use of equal protection jurisprudence to remedy the effects of societal discrimination.¹⁹

II. THE METRO BROADCASTING OPINION

A. Context

The *Metro Broadcasting* case was decided in the summer of 1990 in the midst of what many perceive as a critical juncture in the history of American race relationships. An extended economic recession has sparked historical, and cyclical, friction between Americans of predominantly African and European descent.²⁰ Many have asserted that this fric-

teenth Amendment. The decision was the first instance in which the Court invalidated a government initiated affirmative action program by applying the strict scrutiny standard of review. The Richmond plan was deemed unsupported by evidence of past discrimination and insufficiently tailored to achieve its stated remedial purpose. *Id.* at 498, 507-10.

18. The market for the electronic distribution and receipt of aural and video information is increasingly perceived by the government, industry, scholars and consumers to include a growing number of new and potential wire, fiber and spectrum based competitors besides broadcast stations. The *Metro Broadcasting* opinion may provide some guidance to the legislative and administrative branches of government regarding the enhancement of ownership diversity in these other "competitive" electronic distribution technologies.

19. *Metro Broadcasting*, 110 S.Ct. at 3028 ("Today the Court squarely rejects the proposition that a governmental decision that rests on a racial classification is never permissible except as a remedy for a past wrong.").

20. From the animosity of free-soilers in the pre-Civil War decades to that of the northern labor unions and white southern craftsmen in the 1860s; from the economic exploitation of sharecropping and "Jim Crow" laws enforced by the physical intimidation of lynchings to the race riots spawned in part by the northern reactions to the "Great Migration" between 1915 and 1940; from the civil rights battles of the 1950s and 1960s to the current battles over affirmative action and "quotas," Americans of predominantly African and European ancestry have historically fought over the distri-

tion has been exacerbated by current efforts of the Bush administration to capitalize on the division between such Americans.²¹ Meanwhile, an extended debate over the virtues and excesses of affirmative action and multicultural diversity rages between and among conservative, minority and feminist members of academe and the larger American intellectual community.²²

The "racial" tensions, political machinations and debates occur at a time of impending demographic and cultural change. American society is undergoing a population and cultural shift from a more European composition and focus to one of increasing pluralism composed of Asian, Hispanic, and African American as well as Native and European American

distribution of economic opportunity and benefits. See generally R. KLUGER, *SIMPLE JUSTICE* (1977); Boris & Honey, *Gender, Race, and the Policies of the Labor Department*, 111 MONTHLY LAB. REV. 26 (1988); Whitaker, Starr, McCormick, Smith, Mabry, Wright, and Carrol, *A Crisis of Shattered Dreams*, NEWSWEEK, May 6, 1991, at 28; Mathews, *Quotas*, NEWSWEEK, Dec. 31, 1990, at 28; *Black Americans Still Trailing Behind*, THE ECONOMIST, Mar. 3, 1990, at 17; *Gone Up North, Gone Out West, Gone: Exhibition of the Great Migration at the National Museum of American History*, 18 SMITHSONIAN, May, 1987, at 72; Arnebeck, *Two Centuries of Two Races*, Washington Post Magazine, Oct. 17, 1982, at 24.

21. See generally Fineman, McCormack, Carrol and Smith, *The New Politics of Race*, NEWSWEEK, May 6, 1991, at 22; Mathews, *supra* note 20, at 29; De Witt, *U.S. Eases College Aid Stand, But Not All the Way: Change on Race Based Scholarships Brings New Criticism*, N.Y. Times, Dec. 19, 1990, at A1, col. 1.

22. Henry, *Beyond the Melting Pot*, TIME, Apr. 9, 1990, at 28 ("At stake at the college level is whether the traditional 'canon' of Greek, Latin and West European humanities study should be expanded to reflect the cultures of Africa, Asia and other parts of the world."). See also D'Souza, *Illiberal Education: Current Controversies in American Higher Education*, 267 ATLANTIC 51 (1991); Menand, *Books: Illiberalisms*, NEW YORKER, May 20, 1991, at 101.

The larger society is in the midst of debates over the extent to which minorities and women may be viewed and treated as victims of racism and sexism as opposed to being required to take responsibility for their economic and social station in life. See generally S. STEELE, *THE CONTENT OF OUR CHARACTER* (1990); Stanfill, *Woman Warrior*, NEW YORK, Mar. 4, 1991, at 22-30; Applebome, *Stirring a Debate on Breaking Racism's Shackles*, N.Y. Times, May 30, 1990, at A18, col. 1; Bold, *The Pathetic Phalluses of Art*, The Sunday Times, May 13, 1990, Features Section.

Yet another growing controversy concerns the extent and manner in which minority, female, and gay individuals may be addressed and the issues concerning them may be discussed. A significant portion of this controversy also takes place on many of the nation's college campuses. See Morganthau, Mabry, Genao, and Washington, *Race on Campus: Failing the Test?*, NEWSWEEK, May 6, 1991, at 26; Adler, Starr, Chideya, Wright, Wingert, and Haac, *Taking Offense: Is This the New Enlightenment on Campus or the New McCarthyism?*, NEWSWEEK, Dec. 24, 1990, at 48; Rieff, *The Case Against Sensitivity*, ESQUIRE, Nov. 1990, at 120.

influences,²³ leavened by changing relationships between the sexes.

In this context, *Metro Broadcasting* may provide some insight into the Court's reasoning when faced with intersecting issues of race, cultural diversity and government regulation. The reasoning is especially informative where, as in *Metro Broadcasting*, the views of the Court's membership may fairly be argued to reflect, in part, the conflicting ideologies on merits of cultural diversity, race, and regulation currently evident in American society.²⁴

There is an added critical nuance, however. While the FCC's minority ownership policies are arguably the products of particular ideologies of cultural diversity, race, and govern-

23. See, Henry, *supra* note 22.

24. The *Metro Broadcasting* majority retains the traditional liberal view that the government has a bona fide role in assuring the diversity of cultural as well as political viewpoints and in remedying the adverse social impact of the history of racial discrimination on groups as well as individuals. In sanctioning the use of race related remedies, the majority balances equities and concludes that the ownership policies' impact on non-minorities is slight. This viewpoint is espoused by significant portions of the Congress and many civil rights groups.

The dissent insists on a direct causal link between discrimination and the individual. This insistence, coupled with its refusal to recognize societal discrimination against groups as actionable, and its concern for "innocent victims" of affirmative action, reflects the conservative position currently voiced by the Bush Administration and some Americans of European ancestry. See *supra* notes 20-21.

The positions of the *Metro Broadcasting* Court on equal protection and affirmative action bespeak an inability on the part of the Justices to engage in meaningful dialogue and compromise. This hardening of the lines of debate reflects the same polar schism that infects the national debate and undermines the prospects for honest debate and equitable resolution.

Nevertheless, as Professor Smolla has explicitly recognized and Professor Sedler implies, the difference between the intermediate scrutiny standard of the *Metro Broadcasting* majority and the strict scrutiny standard of the dissenters is one of degree, not of kind. See Sedler, *supra* note 13, at 1232-33; Smolla, *supra* note 6, at 954-56. Both the majority and the dissent endorse some amount of affirmative action, the disagreement is over how much and under what circumstances. Professor Smolla argues that ultimately, the moral distinction between the two modes of review (and the consequent impact of the remedies), is meaningless. He suggests that even the strict scrutiny formulation allows transfers of benefits to persons who may not have suffered from an institution's prior discrimination. At the same time, the formulation still allows the cost of the transfer to be borne by those who may be neither the perpetrators nor beneficiaries of the prior discrimination. Smolla, *supra* note 6, at 955-56.

Issues of respective morality aside, however, the operative effect of the employment of the strict scrutiny standard in most cases is likely to be the denial of affirmative action as a remedy for racially manifested current and socio-historical inequalities. Sedler, *supra* note 13, at 1235-36.

ment, they arose out of and concern the scope of government regulation of the broadcast electronic mass media, an industry originally created in Congress' image (i.e. as representative of the respective local service areas and the nation). The policies are a direct attempt by the government to enhance the participation of members of the broadcasters' service area in local and national debate. Thus, a decision about these FCC policies is a decision about the extent to which under-represented groups may acquire government sponsored access to and participation in electronic broadcast fora. These fora often set the parameters of the debate on race, culture and regulation by determining how such issues are described, debated and decided.

B. The Opinion

At issue in the *Metro Broadcasting* case were two of the FCC's minority ownership policies—the minority enhancement policy and the distress sale policy. In comparative hearings for the initial award of broadcast licenses, the FCC awards an enhancement for minority ownership and participation in the day to day management of the proposed licensee.²⁵ The enhancement is then weighed with a host of other factors in determining which applicant will be awarded the license.²⁶ The FCC's distress sale policy allows a radio or television broadcaster whose license has been set for hearing on disqualifying issues to transfer that license to a minority owned entity prior to an FCC adjudication of the issues.²⁷ The FCC adopted these two policies, along with others,²⁸ to promote the diversification of broadcast programming. The policies were adopted after the FCC determined that its prior efforts to encourage minority participation in the broadcast industry had not resulted in greater broadcast diversity and that the lack of greater broadcast diversity was detrimental to both the

25. *Metro Broadcasting*, 110 S.Ct. at 3004-05.

26. *Id.*

27. *Id.* at 3005.

28. The FCC also established the tax certificate policy and its female ownership policy. *Id.* See *Steele v. FCC*, 770 F.2d 1192 (D.C. Cir. 1985) (holding that the FCC lacked the statutory authority to grant enhancement credits in a comparative hearing for a new license to applicants having significant female ownership). See also *supra* note 8 (describing the tax certificate policy).

minority and majority viewing and listening audiences.²⁹

The policies under review were challenged in separate proceedings and consolidated for consideration by the Supreme Court.³⁰ In one case, Metro Broadcasting, Inc. sought review of a decision by the FCC and the D.C. Circuit Court of Appeals affirming the award of a new television license to Rainbow Broadcasting Co. in a comparative hearing. In that case, the court of appeals affirmed the FCC's determination that Rainbow's minority ownership substantially outweighed factors favoring Metro Broadcasting.³¹

In the second case, a different panel of the same circuit court of appeals invalidated an FCC order approving Faith Center, Inc.'s distress sale of its television license to Astroline Communications Co. In that case, the court ruled that the FCC order allowing the distress sale deprived Shurberg Broadcasting of Hartford, Inc. of its right to equal protection under the fifth amendment.³² The Supreme Court, in a 5 to 4 decision, affirmed the *Metro Broadcasting* decision and reversed the *Shurberg* decision.³³

The majority held that the minority ownership policies, although not intended to be remedial, do not violate equal protection. Justice Brennan, writing for the majority, found the policies, which were specifically approved and mandated by Congress, serve the important government interest of broadcast diversity and are substantially related to that interest.³⁴ The finding of a substantial relationship between the policies and the government's interest in broadcast diversity was deemed to be supported by the government's conclusion that there is an empirical nexus between minority ownership and greater diversity.³⁵ The FCC's conclusion was found to

29. *Metro Broadcasting*, 110 S.Ct. at 3004 (citing *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 F.C.C. 2d 979, 980-81 (1978)).

30. *Id.* at 3002.

31. *Winter Park Communications, Inc. v. FCC*, 873 F.2d 347, 349 (D.C. Cir. 1989). The FCC approved its Review Board's determination that Rainbow's credit for 90% minority ownership outweighed Metro Broadcasting's credits for local residence, civic participation and 19.8% minority ownership.

32. *Shurberg Broadcasting of Hartford, Inc. v. FCC*, 876 F.2d 902, 903 (D.C. Cir. 1989).

33. *Metro Broadcasting*, 110 S.Ct. at 3028.

34. *Id.* at 3010-16.

35. *Id.* at 3011.

be consistent with its long held view that ownership is a primary determinant of program diversity.³⁶ Further, the majority determined that the ascertained link between minority ownership and greater diversity was not a function of impermissible stereotyping, but the product of educated expectation corroborated by empirical evidence.³⁷

In contrast, the dissent argued that the minority ownership policies violate the constitutional guarantee of equal protection because the government does not treat all citizens as "individuals" but as components of a racial or ethnic class.³⁸ It argued that the government's interest in diversity of broadcast viewpoints is not sufficiently compelling to justify use of racial classifications. Likening the government's interest in diversity to concerns of societal discrimination which it had recently discounted in *City of Richmond v. J.A. Croson Co.*,³⁹ the dissent argued that the diversity interest is too amorphous.⁴⁰ According to Justice O'Connor, the government has no ability to define or measure a particular "race related" viewpoint or assess the diversity of broadcast viewpoints. Consequently, the interest could support arbitrary measures that could amount to "outright racial balancing."⁴¹

Surprisingly, the dissent also asserted—without providing support—that Congress's and the FCC's interest in the diversity of viewpoints in broadcasting is not "weighty enough," even when not used as a justification for the use of racial classifications.⁴² It came to this conclusion despite acknowledging that the FCC, pursuant to the statutory public interest mandate, legitimately could be concerned with broadcast diversity. It also conceded that the FCC may adopt "lim-

36. *Id.* at 3010.

37. *Id.* at 3016.

38. *Id.* at 3028-29 (O'Connor, J., dissenting).

39. 488 U.S. 469 (1989). In *Croson*, the members of the *Metro Broadcasting* dissent were in the majority. In that case the majority ruled that a municipal government's policy to remedying the effects of societal discrimination violated the equal protection clause of the Fourteenth Amendment. Societal discrimination was deemed too amorphous a basis for the imposition of a race based remedy because it might be used to justify unconstrained racial preferences linked solely to proportional representation of various races, i.e. quotas. *Id.* at 505-07. See *supra* note 17 and accompanying text.

40. *Metro Broadcasting*, 110 S.Ct. at 3034-35 (O'Connor, J., dissenting).

41. *Id.* at 3035 (quoting *Croson*, 488 U.S. at 507).

42. *Id.* at 3036.

ited measures to increase the number of competing licensees and to encourage licensees to present varied views on issues of public concern," because of the "peculiarly constrained broadcast spectrum."⁴³ The dissent maintained, however, that the FCC's statutory authority to promote constitutional measures to enhance diversity of viewpoints does not establish its interest as important for equal protection purposes. Following on the same tack, the dissent (not surprisingly), found the use of the government's interest in diversity as justification for the minority ownership policies to be an "unsettled First Amendment issue."⁴⁴ According to the dissent, the Court has never approved policies which serve to "amplify a distinct set of views or the views of a particular class of speakers."⁴⁵

The dissent was particularly critical of the evidentiary basis for the majority's finding of a nexus between minority ownership and program content. It questioned the FCC's assertion of a strong correlation of race and behavior based on the low percentage of minority owned stations.⁴⁶ The dissent would not allow the FCC to rely on minority under-representation as a justification for its policies unless it could establish that minority owned stations provide minority views while majority owned stations cannot or do not. It further suggested—without elaboration—that the marketplace would mediate a minority owner's exercise of editorial control such that there is a reduced assurance that the owners' viewpoint will emerge unrestrained.⁴⁷ Also, the dissent found particularly troubling the inability of the FCC's policies to exclude members of the favored group who do not possess the desired viewpoints and to include members of disfavored groups who do.⁴⁸

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* at 3039-41.

47. *Id.* The dissent apparently cannot conceive of instances in which the minority viewpoint, while unrepresented, is still commercially viable. Instances of such occurrences, nevertheless, do exist. *See, e.g., infra* note 98 (discussion between Ted Koppel and Ray Nunn).

48. *Metro Broadcasting*, 110 S.Ct. at 3039 (O'Connor, J., dissenting). The dissent's formulation of such a high standard of proof in this instance is an attempt to ignore the extensive evidence actually adduced by the Congress, the FCC, and various scholars. The insistence on such a stringent standard of proof has been cited as evi-

III. ANALYSIS

A. Conflicting Doctrines: *Diversity v. Equal Protection*

As earlier stated, *Metro Broadcasting's* holding could have been based on either a diversity or an equal protection basis—or both. Under either doctrine, the government may affirmatively act to assure the inclusion of previously under-represented groups. The underlying purposes and goals of the doctrines, however, are quite different.

Under the first amendment, diversity is considered an important goal because it is believed that “truth” and social, as well as political, consensus will emerge from the clash of diverse and often times conflicting ideas and beliefs.⁴⁹ In the specific context of electronic mass media, diversity is enhanced by governmental efforts to affirmatively expand the public's access to the media to increase the variety of ideas and beliefs disseminated so that the public may be better informed.⁵⁰ Enhanced access may be accomplished by diversifying the ownership of the media and/or by requiring that those who own the media provide diverse programming responsive to the public.⁵¹ In *Metro Broadcasting*, the Court addressed and ultimately upheld the government's efforts to increase diversity—the presentation of minority viewpoints—by diversi-

dence of the bias and unrestrained activism members of the dissent are said to possess. See Chang, *Discriminatory Impact, Affirmative Action, and Innocent Victims: Judicial Conservatism of Conservative Justices*, 91 COLUM. L. REV. 790 (1991).

It is true that minority oriented programming may be provided by non-minority entrepreneurs, just as it has been in the past. Indeed, dating back to the 1950s, most minority oriented radio stations have been majority-owned. Minorities have criticized these stations for their lack of responsive programming for more than three decades. See Hammond, *Now You See It, Now You Don't: Minority Ownership In An "Unregulated" Video Marketplace*, 32 CATH. U.L. REV. 633, 648 (1983).

The dissent also criticized the policies as unduly burdensome on non-minority individuals. *Metro Broadcasting*, 110 S.Ct. at 3043 (O'Connor, J., dissenting). In doing so, the dissent failed to acknowledge that to a very significant extent, non-minorities and minorities form joint ventures to acquire broadcast and cable properties under the FCC's minority ownership policies. Indeed, given the chronic lack of funding experienced by minorities, joint venturing with non-minorities possessing capital is often a must.

49. See Emerson, *supra* note 16.

50. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

51. *Report and Statement of Policy Re: Commission En Banc Programming Inquiry*, 25 Fed. Reg. 7291 (1960).

fyng media ownership through the use of its minority ownership policies.

Under an expansive interpretation of the fourteenth amendment, public and/or private efforts to prevent individuals or groups of individuals from participating in the social, political and economic activity of the nation because of immutable characteristics such as race are prohibited. The government may affirmatively address and remedy both current societal inequities resulting from prior historical discrimination against groups and specific identifiable acts of discrimination against individuals.⁵²

In *Metro Broadcasting*, it can be argued that the Court addressed and ultimately upheld the government's efforts to "remedy" a current (and prior) societal inequity—the extreme under-representation of minorities in the ownership of mass media—through the use of the minority ownership policies which furthered the important government interest in diversity of viewpoints.⁵³ In contrast, the dissent, espousing a far more restrictive interpretation of equal protection, argued that because the policies were not established to remedy specific identifiable acts of prior discrimination and because the diversity interest is, in its opinion, non-remedial and ill-defined, it is not compelling.

B. Conflict of Ideologies

The sharp division between the majority and the dissent in *Metro Broadcasting* centered on their respective evaluations of the government's interest in diversity of viewpoints and conceptualizations of the requirements of equal protection of the laws. It may be argued that the hardening lines of debate on equal protection colored the dissent's exchange concerning the government's asserted interest in diversity of viewpoints. Nevertheless, inherent in the dissent's dismissal of the interest as "too amorphous [and] too insubstantial"⁵⁴ is a value laden assessment which should be carefully explored.

52. See, e.g., *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

53. Devins, *supra* note 13, at 150-55.

54. *Metro Broadcasting*, 110 S.Ct. at 3034 (O'Connor, J., dissenting).

1. Equal Protection

The division between the majority and dissenting positions in *Metro Broadcasting* mirror the conflict in the broader social debate regarding affirmative action. The division on the Court regarding affirmative action has been variously categorized as a conflict between notions of formal equality versus real equality,⁵⁵ theories of racial neutrality and racial preference,⁵⁶ and philosophies of liberal individualism versus group-oriented collectivism.⁵⁷ Inherent in these categorizations is the recognition that the members of the *Metro Broadcasting* Court strongly disagree on notions of equal rights and remedies in the context of affirmative action.

The majority embraces the belief that the government, under appropriately limited circumstances, may use race specific remedies to combat extremely recalcitrant societal discrimination. The dissent espouses the belief that there are no appropriate circumstances in which government may use race specific remedies to address current societal discrimination no matter how egregious or debilitating.⁵⁸ For the members of

55. Jones, *Unrightable Wrongs: The Rehnquist Court, Civil Rights, and an Elegy for Dreams*, 25 U.S.F.L. REV. 1, 12 (1990) (“[T]here is a dividing line that separates formal equality and real equality. . . it is the same line which separates fault modeled notions of intentional wrongdoing from broad social patterns of racial exclusion.”).

56. See Sedler, *supra* note 13.

The “unresolvable dilemma” that American society faces today is that on the one hand, without positive intervention, such as racial preference, the present consequences of the social history of racism will not be overcome in the remotely foreseeable future, if ever. On the other hand, intervention by means of racial preference is inconsistent with the ideal of racial neutrality and unfairly imposes costs on innocent individual whites.

Id. at 1190.

57. Fried, *Metro Broadcasting, Inc. v. FCC: Two Concepts of Equality*, 104 HARV. L. REV. 107, 108-09 (1990) (“[T]he liberal [individualistic] conception [of equal protection] insists on the primacy of individuals, not groups, in our constitutional scheme and views the individual as the object of fundamental rights [I]t resists a basic separation of the polity into racial groupings from which the individual cannot escape.”).

58. As one author has expressed:

From the interpretive vantage point of the [dissent], formal equality marks the boundary of its normative world. Under the Court’s regime of formal equality, there is no constitutional problem if blacks in overwhelming disproportion do not participate in the market. This is true even if their disproportionate absence, is in a general historical sense, traceable to social discrimination. It becomes in the distorting half light of the Court’s common law baselines, a speculative wrong: How do we know intentional discrimination is the cause of the exclusion?

the dissent, race specific remedies may only be employed in circumstances in which there is a specific identifiable instance of individualized prior discrimination. The approach to equal protection taken by the dissent has been criticized as employing unjustified notions of "white innocence and black abstraction,"⁵⁹ as well as intentionally limited contractarian notions of entitlement.⁶⁰

In *Metro Broadcasting*, this division of opinion on affirmative action meant that the majority could assess the government's minority ownership policies in the context of the historic and current evidence of minority under-representation in broadcast ownership and misrepresentation in programming provided by the majority owned broadcast media.⁶¹ The majority could also acknowledge the FCC's finding that there is an increase in positive minority portrayals and responsive programming facilitated by increased minority ownership.⁶² Based on the evidence and given the policies' relationship to more than a half century of judicially approved congressional and administrative policy and statutory law val-

Jones, *supra* note 55, at 39-40.

It is appropriate to ask what motivates such a fierce and unremitting adherence to formal equality in the face of overwhelming evidence of inequality. Ellis Cose, in a recent essay in *Time Magazine*, may provide some illumination when he states:

White complacency about discrimination is not derived from mere opposition to preference programs. It is an example of how stereotypes, as they interact with a belief in meritocracy, add up to a firm conviction that members of racial minorities deserve no better than they get.

Many Hispanics and blacks do poorly on certain tests, and this provides plausibly objective support for such ideas. Yet even before ability tests existed, society assumed that whites were an intellectually and morally superior race. Such a presumption is, in effect, a white American's birthright. Minorities face a society convinced that they are less fit, unless proved otherwise.

Cose, *Are Quotas Really The Problem?*, *TIME*, June 24, 1991, at 70.

59. Ross, *The Rhetorical Tapestry of Race: White Innocence and Black Abstraction*, 32 *WM. & MARY L. REV.* 1, 7 (1990). Ross continues

[T]he rhetorical themes of the nineteenth-century cases on race are still the essential themes of our contemporary legal rhetoric of race. In the contemporary legal rhetoric created by those Justices who seek to limit efforts to undo the contemporary reality of racial segregation and economic subjugation, we see the insistence on white innocence and the abstract depiction of the black person.

Id.

60. *Williams, Metro Broadcasting, Inc. v. FCC: Regrouping in Singular Times*, 104 *HARV. L. REV.* 525, 527-28 (1990).

61. *See Metro Broadcasting*, 110 S.Ct. at 3021.

62. *Id.* at 3017 n.31.

uing diversity, it is understandable that the majority could conclude that the government's interest in diversity is important and the remedy appropriate.

Because the dissent views the use of racial preferences to advance any asserted government interest in remedying societal discrimination as impermissible, it could not conclude other than that the government's interest in diversity is "too amorphous, too insubstantial and too unrelated to any legitimate basis for employing racial classifications."⁶³ Nor could it conclude other than that enhanced representation for minorities in the electronic media via the ownership policies is impermissible. In the process, the dissent apparently ignored recent Court precedent in *Regents of the University of California v. Bakke*⁶⁴ and mischaracterized the evidence upon which the FCC and Congress relied in developing the policies.

There is an inherent problem with the dissent's reasoning. Where discrimination has been the pattern and practice of business, it is not confined to isolated instances. Instead, it disadvantages all individuals within the group or class. Under Justice O'Connor's reasoning, the government would be required to refrain from using the ownership remedy unless specific victims of discrimination are involved.⁶⁵ Absent a

63. *Id.* at 3034 (O'Connor, J., dissenting). Justice O'Connor continued:

Under the appropriate standard, strict scrutiny, only a compelling interest may support the Government's use of racial classifications

An interest capable of justifying race-conscious measures must be sufficiently specific and verifiable, such that it supports only limited and carefully defined uses of racial classifications. In *Croson*, we held that an interest in remedying societal discrimination cannot be considered compelling.

Id. See also Sedler, *supra* note 13, at 1229 ("Justice O'Connor's application of 'strict scrutiny' to the use of racial preferences to advance the asserted interests cannot be separated from her view as to the impermissibility of the asserted interest in the first place.").

64. 438 U.S. 265 (1978). As one author has stated:

If the interest in achieving "racial diversity" in a university student body was "compelling" because it contributed to the presentation of diverse viewpoints within the student body, then it is difficult to see why the FCC's interest in achieving "racial diversity" in broadcasting for the benefit of the viewing and listening public would not be equally compelling.

Sedler, *supra* note 13, at 1217. For a further discussion of *Bakke's* relevance, see *id.* at 1194-97, 1216-19.

65. See Dixon, *The Dismantling of Affirmative Action Programs: Evaluating City of Richmond v. J. A. Croson Co.*, 7 N.Y.L. SCH. J. HUM. RTS. 35, 47 (1991) (identifying the same difficulty with O'Connor's position in *Croson*).

showing of discriminatory intent by some identifiable actor, racial exclusion, no matter how chronic, is not actionable.⁶⁶ As a result, the uncontrovertible fact that an entire group of individuals has been victimized is ignored.

2. Diversity

In exploring the *Metro Broadcasting* dissent's views on the diversity rationale, it is necessary to discuss the "weightiness" of the government's interest in diversity, the nexus between ownership, speech, and diversity in general, and specifically, the nexus between minority ownership and diversity.

a. *What Does the Government's Interest in Diversity Weigh?*

Justice O'Connor argued that the government's interest in diversity of viewpoints in broadcasting is not "weighty enough" even when not used as a justification for the use of racial classifications. She offered little to explain this assertion other than to state that the interest is "amorphous" because the government allegedly has "no way of assessing the diversity of viewpoints."⁶⁷ Her reading of prior precedent would not support a finding that the FCC has the statutory authority, consistent with the first amendment, to justify the inclusion of minority viewpoints via increased ownership of the broadcast medium.

Justice O'Connor's assertions notwithstanding, the government has, on occasion, ascertained that a diversity of viewpoints has not, in fact, been presented. Prior to the repeal of the fairness doctrine,⁶⁸ the FCC determined that a number of

66. Hart, *supra* note 59, at 35.

67. *Id.* at 45.

68. The fairness doctrine required that broadcast licensees affirmatively cover controversial issues of public importance in their respective areas of license. And, when information on such issues was to be broadcast as part of a licensee's public interest obligations, the licensee was required to provide a reasonable opportunity for the presentation of opposing or contrasting viewpoints on the controversial issues covered. The underlying justification for the fairness doctrine was the scarcity of available broadcast outlets in relation to all who sought to broadcast. In this context, it was believed that government efforts to assure a more balanced presentation of competing views tended to enhance the flow of diverse viewpoints to the public.

In 1985, the FCC concluded that the public's interest in diverse viewpoints was

broadcasters had failed to present contrasting views on issues of public controversy.⁶⁹ Further, some of the more egregious instances in which the FCC was requested and/or ultimately required to deny the renewal of licenses concerned the chronic and repeated refusal of some broadcast licensees to present diverse minority oriented programming.⁷⁰ In these cases, the FCC ultimately decided to “amplify a distinct set of views which in fact constituted the views of a distinct class of speakers.”⁷¹ Thus the FCC, albeit reluctantly in some cases, has ascertained what constitutes a viewpoint and assessed whether or not a diversity of viewpoints exists.

better served by the increasing number of broadcast and new technology outlets in the marketplace. It further found that government efforts to enhance diversity through the enforcement of the doctrine restricted the editorial freedom of broadcasters and inhibited the presentation of controversial issues of public importance. *See Inquiry Into Section 73.1910 of the Commission's Rules and Regulations Concerning General Fairness Doctrine Obligations of Broadcast Licensees (1985 Fairness Doctrine Report)*, 102 F.C.C.2d 143 (1985). After a subsequent judicial determination that Congress had not codified the fairness doctrine into statutory law, the FCC repealed the fairness doctrine in 1987. Its decision was affirmed two years later. *See Telecommunications Research and Action Center v. FCC*, 801 F.2d 501, *reh'g denied*, 806 F.2d 1115 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 919, (1987) (holding that Congress had not codified the fairness doctrine into law). *See also*, *Syracuse Peace Council*, 2 F.C.C.R. 5043, *recon. denied*, 3 F.C.C.R. 2035, *aff'd*, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 717 (1990). (affirming the FCC's determination that the fairness doctrine was contrary to the public interest and the first amendment.)

Opponents of the FCC's minority ownership policies cited the FCC's decision to repeal the fairness doctrine as grounds for repealing the ownership policies as well. They argued that the FCC's determination that the increasing number of broadcast and other electronic distribution outlets were sufficient to address the public's need for increased diversity precluded the need for the minority ownership policies. *See Shurberg Broadcasting of Hartford, Inc. v. FCC*, 876 F.2d 902, 920-21, (D.C. Cir. 1989). As the *Metro Broadcasting* majority noted, however, the FCC concluded that the increasing number of outlets had not served as a basis for questioning the continuing efficacy of its minority ownership policies. *Metro Broadcasting*, 110 S. Ct. at 3022 n.41, (citing *Syracuse Peace Council*, 3 F.C.C.R. 2035, 2041 n.56 (1988)).

69. *See Red Lion Broadcasting v. FCC*, 395 U.S. 367 (1969); *Public Media Center v. FCC*, 587 F.2d 1322 (D.C. Cir. 1978); *Brandywine-Main Line Radio, Inc.* 24 F.C.C.2d 18 (1970), *recon. denied*, 27 F.C.C. 2d 565 (1971); *In re Alan F. Neckritz*, 29 F.C.C.2d 807 (1971), *aff'd*, 37 F.C.C.2d 528 (1972), *sustained*, 502 F. 2d 411 (D.C. Cir. 1974); *Wilderness Society*, 30 F.C.C.2d 643 (1971). *See also Fairness Report of 1974*, 48 F.C.C.2d 1 (1974), *recon. denied*, 58 F.C.C.2d 691 (1976), *aff'd*, *NCCB v. FCC*, 567 F. 2d 1095 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 926 (1978).

70. *See Alabama Educ. Television Comm'n*, 50 F.C.C.2d 461 (1975); *Leflore Broadcasting Co.*, 46 F.C.C.2d 980 (1974); *Lamar Life Broadcasting Co.*, 38 F.C.C. 1143 (1965), *rev'd sub nom.* *Office of Communication of the United Church of Christ v. FCC*, 425 F.2d 543 (D.C. Cir. 1969).

71. *Metro Broadcasting*, 110 S.Ct. at 3036 (O'Connor, J., dissenting) (arguing that

The assertion that the diversity interest enjoys little weight is puzzling. The interest, which is admittedly societal in nature, is to assure the widest possible dissemination of information from diverse and antagonistic sources because it is essential to the welfare of the public and the democracy. The constitutional purpose is to foster the public's right to speech by assuring access to the means of expression as widely as is possible.⁷² The critical importance of the interest and its underlying purpose to the political, social and cultural process of the nation has long been recognized by Congress, the Court and numerous scholars.⁷³

At the inception of broadcasting, 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.⁷⁴

the Court has never upheld a broadcast measure to amplify a distinct set of views, or the views of a particular class of speakers).

The FCC's action in the *United Church of Christ and Alabama Educational Television* cases, see *supra* note 69 and accompanying text, point out the fallacy in Justice O'Connor's assertion. While the views of the black citizens of Mississippi and Alabama were not totally unique to blacks, the views were the outgrowth of their experience of racial prejudice as a distinct cultural, economic, and political community. Moreover, their assertion of a right to a fair and balanced portrayal of the issues surrounding segregation versus integration was an assertion made by a group of black citizens and their respective communities (a class of potential and previously disenfranchised speakers). Given the Justice's concession that the FCC enjoys sufficient authority to regulate licensee programming, it is unlikely that she would find such action constitutionally suspect.

72. *Metro Broadcasting*, 110 S.Ct at 3010-11.

73. See J. ABRAMSON, F. ARTERTON & G. ORREN, *THE ELECTRONIC COMMONWEALTH* 239-42 (1988); T. EMERSON, *TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT* (1966). See also Carter, *Technology, Democracy and the Manipulation of Consent*, 93 YALE L. J. 581 (1984); Emerson, *supra* note 19; Fiss, *Why The State?* 100 HARV. L. REV. 781 (1987).

74. The Supreme Court has recognized that part of the reason for the enactment of the Communications Act of 1934 was that "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).

The balancing of broadcaster and public interests in speech predates the enactment

The *Metro Broadcasting* majority recognized the essential intent of Congress as interpreted by the Court in prior precedent:

'[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.'⁷⁵

Taking into account the relationship between the government's interest in diversity and the constitutional purpose of enhancing speech, as well as the long-standing precedent acknowledging the relationship, the majority concluded "that the interest in enhancing broadcast diversity is, at the very least, an important governmental objective"⁷⁶

b. *The Nexus Between Ownership, Speech, and Diversity*

From the inception of regulation, the government has recognized a nexus between broadcast ownership and a licensee's right to speak. While Congress in 1927 and 1934 apportioned the speech right between its nascent broadcast licensees and the public, it specifically declined to divorce the speech right from ownership of the license altogether. On several oc-

of the Communications Act of 1934. As early as 1925, Herbert Hoover, then Secretary of the Commerce, stated "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." Fourth Radio Conference, at 6. During hearings on the adoption of the Radio Act of 1927, the predecessor to the 34 Act, Representative Johnson 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" 67 Cong. Rec. 5557 (1926).

75. *Metro Broadcasting*, 110 S.Ct. at 3010 (quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969) and *FCC v. League of Women Voters of California*, 468 U.S. 364, 377 (1984)) (citations omitted).

76. *Id.*

casions, Congress addressed legislative proposals to extend common carrier obligations to broadcasters. Had these obligations been imposed, broadcasters, like telephone companies, would have no right to control the content of speech over their facilities. Instead, Congress has consistently refused to impose common carrier regulation on broadcasters and has elected, as a statutory matter, to recognize the nexus between ownership and speech.⁷⁷ The nexus is deemed to exist because "ownership carries with it the power to select, to edit, and to choose the methods, manner and emphasis of presentation"⁷⁸ Ownership has "proved to be significantly influential with respect to editorial comment and the presentation of news."⁷⁹

Some may argue, however, that recognizing a broadcast licensee has a right of electronic speech and may exercise editorial control is not the same as finding a close nexus between the identity and characteristics of the broadcaster and the viewpoints expressed and programming selected. This is the gist of the dissent's "stereotyping" argument.⁸⁰ There are, however, instances in which evidence of such a nexus have been found.⁸¹

Similarly, Congress and its administrative agencies have recognized the relationship between ownership, speech and diversity. Because of the scarcity of available broadcast spectrum and the consequent limited number of stations transmitting to the public, many representatives of diverse viewpoints and disciplines were unable to secure stations. As

77. *Columbia Broadcasting Sys. v. Democratic Nat'l Comm.*, 412 U.S. 94, 105 (1973). Title I of the Communications Act of 1934 specifically exempts broadcasters from the obligations imposed on common carriers. See Wollenberg, *Title III the FCC as Arbiter of "The Public Interest, Convenience, and Necessity"* 61, 73 in A LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT OF 1934 (Paglin ed. 1989).

78. *Metro Broadcasting*, 110 S.Ct. at 3012 n.16 (quoting the Amendment of sections 73.34, 73.240, and 73.636 of the FCC's rules on *Multiple Ownership of Standard, FM and Television Broadcast Stations, Second Report and Order*, 50 F.C.C.2d 1046, 1050 (1975)).

79. *TV 9, Inc. v. FCC*, 495 F. 2d 929, 938 (1978).

80. *Metro Broadcasting*, 110 S.Ct. at 3037-38 (O'Connor, J., dissenting). See also *id.* at 3045-47 (Kennedy, J., dissenting).

81. See *Office of the United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966); *In re Fairness Doctrine Requirements*, 40 F.C.C. 641 (1965); *Lamar Life Broadcasting Co.*, 38 F.C.C. 1143 (1965); *Capitol Broadcasting Co.*, 38 F.C.C. 1135 (1965).

a result, Congress required the licensee of each broadcast station to be responsive to diverse community interests.⁸² Despite this requirement, the FCC concluded that minority interests and viewpoints were inadequately represented in the broadcast media.⁸³

c. *The Nexus Between Minority Ownership and Diversity*

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.⁸⁴ According to some, the conclusion is still applicable today.⁸⁵ Whether one examines recent commentary on media stories involving race,⁸⁶ portrayals of minorities in prime time televi-

82. See Wollenberg, *supra* note 76, at 66-67 (citing Great Lakes Broadcasting Co., 3 F.R.C. Ann. Rep. 32 (1929), *aff'd in part and rev'd in part*, 37 F.2d 993 (D.C. Cir.), *cert. denied*, 281 U.S. 706 (1930)).

83. Minorities as citizen/consumers have historically exercised little economic or regulatory control over broadcasting. They traditionally have not been the preferred customers nor are their preferences accurately determined by advertisers and rating services. Because they own so few electronic media, they are unable to exercise direct editorial control over much of what is said about them. And, they have historically received limited regulatory assistance in enforcing the provision of responsive programming. See Hammond, *supra* note 48, at 639-45. See also Wimmer, *Deregulation and Market Failure in Minority Programming: The Socioeconomic Dimensions of Broadcast Reform*, 8 COMM./ENT. 329, 334-88 (1986).

84. *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 F.C.C.2d 979, 980-81 (1978) ("[W]e are compelled to observe that the views of racial minorities continue to be inadequately represented in the broadcast media. This situation is detrimental not only to the minority audience but to all of the viewing and listening public.")

85. Reynolds, *Blacks in TV, Film, Media Complain of Being Thwarted*, Gannett News Service, August 2, 1990 ("Entertainers and newsmen at the National Association of Black Journalists conference here voiced a common lament: The image of minorities is being distorted mediawide—from the silver screen to TV to the newsrooms.")

86. Commentators have addressed the difference in perspectives which attend the reporting of stories by the black-owned and majority-owned press where race is an integral part of the story. Too often, perspectives of the black individuals and/or community are ignored, misrepresented or under-reported. See Dates, *Print News, in Split Image: African Americans in the Mass Media* (Dates and Barlow eds. 1990). It has been argued persuasively that the majority-owned media exacerbated the racial animosity created by the Stuart murder/Hoax in Boston: "If [Charles] Stuart's lie was the spark, the media's sensationalism provided fuel and bellows for the burning suspicion and public furor." Edley, *Racist Media, Politicians Sustained Boston Hoax*, MANHATTAN LAW., March 1990, at 18.

In Page, *News, Crime and Double Standards*, Chicago Tribune, May 14, 1989, at 3, Page commented on the coverage (and lack of coverage) assigned to other rapes,

sion,⁸⁷ or recent television programs and movies about the civil rights struggle,⁸⁸ 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.

Criticism of the majority media's portrayal of minorities is not new. It predates the FCC's conclusions by many decades.⁸⁹ Moreover, 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

murders and assaults of women occurring on the same night or a few weeks before the Central Park "Wilding Incident." He argued that part of the reason the Central Park story was covered nationally while others of a similar nature were not is because of the differences between the victims and their respective assailants. "[T]he Central Park victim was white and upwardly mobile and the others were not . . . and, . . . the Central Park victim was not of the same race as her attackers." *Id.*

Among the "seven murders and eight shootings [which] occurred the same . . . night as the Central Park "Wilding" episode . . . was a woman shot in the back of her head, bashed with a cinder block, sexually abused with a 5-inch-long pipe, and found under an elevated highway. . . . Another was a woman beaten to death in her home with a telephone and a plaster statue of the Virgin Mary." *Id.* A few weeks before the "Wilding" incident, "a 29-year-old woman was raped by two men at gunpoint when she went to the top of a 21 story building to watch a sunrise . . . after the men forced her to jump from the roof, she grabbed a television cable that—miraculously—broke her fall . . . [and] . . . held on, naked and screaming, until residents of the building saved her life." *Id.* The last story made the inside of New York city's newspapers.

87. Gates, *TV's World Turns—But Stays Unreal*, N.Y. Times, § 2, at 1, 40 ("There is little connection between the lives of black Americans and the images of blacks that Americans view daily.").

88. Professor Julian bond has noted:

Today the popular culture has discovered the civil rights movement The lessons we are taught—in superficial film and television treatments of the heroic Southern struggle for human rights—is that a war was fought against racism by noble white Americans and the good guys finally won.

. . . Nearly thirty movies and television shows, both projected and completed, focus on the southern movement; their heroes and heroines are Klan wives, FBI agents, northern summer student volunteers, white southern college coeds, everyone except the black women and men who lived and died for freedom's cause.

These shallow treatments of America's finest hour are a reflection, not of the movement but of our world, a world where white men control the process of production and ensure their product perpetuates the supremacy of white America.

Bond, *Where We've Been, Where We're Going: A Vision of Racial Justice in the 1990s*, 25 HARV. C.R.-C.L. L. REV. 273, 279 (1990).

89. See Hammond, *supra* note 48; Wimmer *supra* note 82.

and other minorities.⁹⁰ Whether it be race riots in early 20th century America,⁹¹ recent racially motivated suspicions and fears among neighbors in American cities,⁹² or racially strati-

90. For discussions of racial stereotyping by the press, see Edley, *supra* note 85; Page, *supra* note 85; Reynolds, *supra* note 84.

Regarding stereotyping in television, see Gates, *supra* note 86; Hammond, *supra* note 48; Horowitz, *Snookums! Steve Urkel is a Hit*, N.Y. Times, Apr. 17, 1991, at C11, col. 1; Wimmer, *supra* note 82.

Regarding film and movies, see D. BOGLE, TOM, COONS, MULATTOES, MAMMIES, AND BUCKS, AN INTERPRETIVE HISTORY OF BLACKS IN AMERICAN FILMS (1989); Snow, *Morning Report: Movies*, L.A. Times, Feb. 25, 1991, at F2, col. 1; Samuels, *This Time It Isn't About Jokes*, L.A. Times, Sep. 9, 1990, (Calendar) at 19; Wilson, *Trying to Crash the Party*, L.A. Times, Mar. 4, 1990, (Calendar) at 3; *Spike Lee Says He Does Not Have All the Answers*, UPI Regional News, Mar. 1, 1990; *'Do the Right Thing': Issues and Images*, N.Y. Times, July 9, 1989, § 2, at 1, col. 2 (Arts and Leisure Desk); Kempley, *Spike Lee, Mastering the Havoc*, Washington Post, Oct. 22, 1986, at C1 (Style Section); Sawyers, *Passions Erupt Over 'Birth of A Nation'*, Chicago Tribune, Oct. 11, 1987, (Sunday Magazine) at 9; Siskel, *Pioneering 'Lying Lips' Launches Weekend of Black Films*, Chicago Tribune, May 17, 1985, at A2 (Sports Final Ed., Zone N).

Regarding the stereotypic portrayal of blacks in art, see Wilson, *Robert Colescott Sharpens his Edge*, L.A. Times, Jan. 1, 1991, at F8, col. 1; Iverem, *A Controversial Exhibit Opens*, NEWSDAY, Apr. 17, 1990, § II, at 11; Wilson, *'Facing History': Insights Into Racism*, L.A. Times, Feb. 18, 1990, (Calendar) at 6; Kimmelman, *Black Images of the Past: Servile, Subhuman*, N.Y. Times, Jan. 18, 1990, at C21, col. 3; Vromen, *Show Traces History of White Stereotypes of Blacks*, REUTERS LIBRARY REPORT, Jan. 7, 1990; Welzenbach, *Images on the Other Side*, Washington Post, Nov. 14, 1989, at C6 (Style Magazine); Richard, *Robert Colescott's Perspectives on Black and White*, Washington Post, Jan. 20, 1988, at C1 (Style Magazine).

With regard to the portrayals of blacks in theatre, see Breslauer, *Gotta Sing? Gotta Dance?*, L.A. Times, Nov. 11, 1990, (Calendar) at 5; Williams, *Stage: Two Trips Through the 'Colored Museum'; More Apologies for Racism*, L.A. Times, Jun. 12, 1988, (Calendar) at 47; Freedman, *After 50 Years, 'Porgy' Comes to the Met as a Certified Classic*, N.Y. Times, Feb. 3, 1985, § 2, at 1, col. 6.

91. See Fairlie, *What Is This About America Being Politically Violent?*, Washington Post, April 5, 1981, at C1 (Outlook Section, Fairlie at Large). See also Sawyers, *supra* note 89; *Gone Up North, Gone Out West, Gone*, *supra* note 20; Arnebeck *supra* note 20.

92. Racially motivated fears and misunderstandings can have extremely dangerous consequences. For instance,

[O]ne woman's bizarre behavior, combined with rumor and speculation, fueled latent racial fears and sparked a potentially volatile situation [in a quiet middle class Islip Terrace community]. By the time Magrone, [who is white], was arrested [for writing and surreptitiously distributing anti-white letters], terror had spread throughout the all-white [block]. Several families bought dogs for protection. Residents took to carrying sticks, and children, scared to sleep alone, were crawling into their parents' beds at night. . . . Residents speculated the letters were being dispatched by members of a black family that had [recently moved from the block].

Before long, people were "sighting" intruders in their yards and calling police to report on what turned out to be shadows falling across their bushes. . . . [P]olice officers said the atmosphere on the street was so tense that

fied ignorance among whites,⁹³ portions of the majority-owned mass media are fairly perceived as contributing to negative racial tensions and continued ignorance. There is a current, as well as an historical, nexus between majority culture, majority ownership, and negative or incomplete portrayals of minorities. There is, therefore, a nexus between majority-owned media and a discernable, palpable lack of diversity regarding the portrayal of minority viewpoints and interests.⁹⁴

By contrast, the Congress, the FCC and the *Metro Broadcasting* Court found that a minority owner's status tends to influence the selection of news coverage and editorial viewpoint and the presentation of minority images in local news programming.⁹⁵ Despite this evidence and the concomitant historical lack of diversity provided by major portions of the majority-owned media, Justice O'Connor finds no ascertainable nexus between minority ownership and diversity. In her mind, the government's reliance on such evidence is merely reliance on stereotypes, aggregate tendencies, and probabilities which inevitably do not apply to certain individuals.⁹⁶

There is literal truth to the observation that one cannot expect all minorities to "think alike." For instance, the simple

it could have sparked a Bensonhurst-scale incident. . . 'After one of the sightings of the prowler, there were twenty neighbors out there with baseball bats,' said a neighbor. . . 'I don't see how a black person could have walked down that street without having their head taken off.'

Rabin, *Hoax Fed on Prejudice; Frightened by Notes, Neighbors Suspected Black Family*, NEWSDAY, Oct. 10, 1990, at 3 (News). See also Edley, *supra* note 85.

93. See Duke, *White's Racial Stereotypes Persist; Most Retain Negative Beliefs About Minorities, Survey Finds*, Washington Post, Jan. 9, 1991, at A1 ("A majority of whites questioned in a nationwide survey [conducted by the National Opinion Research Center at the University of Chicago] said they believe blacks and Hispanics are likely to prefer welfare to hard work and tend to be lazier than whites, more prone to violence, less intelligent and less patriotic."). See also May, *The Racial Gap*, L.A. Times, Jan. 9, 1989, Pt. 1, at 1, col. 1; Williams, *Closed Doors: Benign Racism in America*, NEW REPUBLIC, Nov. 10, 1986.

94. Williams, *supra* note 60, at 535.

95. *Metro Broadcasting*, 110 S.Ct. at 3016-19 & nn.31-35 (citing various studies supporting the finding of a nexus between minority ownership and diversity).

96. *Id.* at 3038-43 (O'Connor, J., dissenting). Professor Smolla suggests that some critics of the FCC minority ownership policies might require that the policies address the ownership/diversity nexus issue by requiring the would-be minority licensees (the beneficiaries of the policies) to demonstrate some kind of "minority orientation" in programming. See Smolla, *supra* note 6, at 960-64. This requirement, which is consistent with a proposal rejected in *TV 9, Inc. v. FCC*, 495 F.2d 929 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974) has some merit, especially in light of the Court's disagree-

fact of being born "black," or Hispanic, or Asian, or Native American does not bring with it a corresponding genetic preference for things associated with that group. What Justice O'Connor fails to see, or perhaps more correctly, refuses to see, is that the classification "black" for instance, also defines a culture; a shared heritage of language patterns, habits, history, and experience.⁹⁷ While black culture is understandably diverse, a major part of its history and experience "is that of battling cultural suppression if not obliteration, as well as discrimination and exclusion from the larger society."⁹⁸ This history and experience cuts across economic divisions albeit with sometimes overlapping and sometimes differing manifestations.⁹⁹ It is, therefore, a licensee's Afro-American (or Eu-

ment over the weight to be accorded the evidence of a nexus in the *Metro Broadcasting* case.

Diversity of viewpoint, however, is important not only to minorities whose viewpoints are under-represented and whose needs are under-served, but also to the non-minority audience—indeed to the entire American society as well. There was no disagreement on the Court regarding this basic premise. Any requirement to demonstrate a nexus between the minority ownership of the proposed licensee and its proposed programming must not rest solely on the demonstrable lack of diversity which may attend markets in which significant minority citizens remain under-represented and under-served. This is so despite the argument that a better case is made for finding a nexus under such circumstances. See Spitzer, *Justifying Minority Preferences in Broadcasting*, 64 S. CAL. L. REV. 293 (1991). This same lack of diversity of viewpoint may be even more pronounced in a market having a negligible minority population. See *West Michigan Broadcasting Co. V. FCC*, 735 F.2d 601 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1027 (1985).

97. Williams, *supra* note 60, at 529.

98. *Id.*

99. See *Nightline: Black in White America* (ABC television broadcast, Aug. 29, 1989) (transcript of Show No. 2157).

Ted Koppel, ABC News: Charles, . . . one of the black men you talked to in the project used . . . [i]he . . . word genocide. Explain for a moment why there are some in the black community who regard what has happened and continues to happen to blacks in this country as the moral equivalent of genocide. It doesn't fit the strict definition of the word, certainly.

Charles Thomas, ABC News: Well, it doesn't just happen to blacks who live in housing projects. It happens to me when I get in my car and drive to the grocery store. I realize that if I'm stopped by a white police officer—who happens to be a racist who's having a bad day—I might not see the sun set that night. But in their case, they're dying every day. When they wake up in the morning, they might not see the sun set that day and they realize that. But its something we live with every day. . . . You're taught this very young when you're black in America. . . . [M]any white editorial staffs might dismiss the comment as paranoia or looniness, but its real."

Id. at 5.

ropean-American) cultural heritage that is likely to be manifest in their choice of editorials, news, and other programming. This is, in essence, what the majority concluded Congress and the FCC had found.

IV. CONCLUSIONS

A. An Affirmation of the Importance of Cultural and Electronic Diversity

Whether viewed as the last gift of the enlightened jurisprudence of Justices Brennan and Marshall, the political acumen of Justice Brennan, the reassertion of the collectivist philosophies of the Court's liberal justices, or the harbinger of the long feared or heralded shift to the right engineered by the emerging conservative Court majority, *Metro Broadcasting* is the Court's most recent statement on diversity and on equal protection. As such, *Metro Broadcasting* is a case of critical importance.

It reaffirms the government's role in affirmatively enhancing the public's first amendment right to diversity of viewpoints. It also reasserts as law, the proposition that the federal government, under appropriately limited circumstances, may use race conscious policies to address current structural societal inequalities resulting from historical societal discrimination. These critical legal pronouncements are made in affirming the federal government's efforts to enhance the diversity of viewpoints made available to the American public by the inclusion of previously under-represented groups in the ownership of electronic media.

These legal affirmations come at a critical juncture in American political, economic and social life. The 1990s are a time in which the economic fortitude and moral substance of a significant portion of America's historically disenfranchised minority citizens is being debated in the mass media. The debate is increasingly characterized by a hardening of liberal (congressional) and conservative (Bush administration) positions. Liberals propose "a more sober version of the best of the New Deal and the Great Society" as the appropriate response to the lingering malignant malaise of poverty, drugs

and crime that infests our inner cities.¹⁰⁰ Conservatives insist that “a cultural revival of the protestant [work] ethic in [communities of disenfranchised black] America”¹⁰¹ is the one true cure. These terms and the adversarial postures taken too often fail to inform this debate.¹⁰² Moreover, what is too often lacking is the presentation of views representative of the culturally and economically diverse black community which is the subject of the debate.¹⁰³ For the present at least, the Court in the *Metro Broadcasting* case has stated that the government may seek to assure a more representative debate by making available to the members of the black community greater opportunities to participate in setting the parameters of the debate as well as participating in the debate as owners of electronic media.¹⁰⁴

100. West, *Nihilism in Black America: the Danger that Corrodes from Within*, *DISSENT*, April 1, 1991, at 221.

101. *Id.*

102. *See id.* at 221-22. West asserts:

[T]he ‘liberal structuralists’ . . . and the ‘conservative behavioralists’ . . . have nearly suffocated the crucial debate that should be taking place about the prospects for black America. . . . The liberal/conservative discussion conceals the most basic issue now facing black America: the nihilistic threat to its very existence. This threat is not simply a matter of relative economic deprivation and political powerlessness—though economic well-being and political clout are requisites for meaningful black progress. It is primarily a question of speaking to the profound sense of psychological depression, personal worthlessness, and social despair so widespread in [disenfranchised] black America.

Id.

103. *See Nightline: Black in White America*, *supra* note 98.

Ted Koppel, ABC News: So Ray, . . . [i]t had to be . . . an enormously complex paradox. Each of you is a professional: you could have done a purely objective job, but if you’d done that, then why bother doing a program [on blacks in the United States] staffed principally by blacks? On the other hand, if you go too far in the other direction, you’re going to alienate everyone who’s watching. Give us a little . . . insight into . . . what you wanted to achieve.

Ray Nunn, ABC News: Well, Ted, . . . [i]t was not so much in terms of tone, it was in terms of focus. . . . We show people for the first time not just one aspect of black America, but a variety of black Americans, from various walks of life. We don’t cover all black Americans, but we certainly give you a notion . . . that black Americans cover a wide range of endeavors and success and poverty and wealth. . . . [T]hat was key to us.

Id. at 4.

104. It has been suggested that the minority ownership programs “do not benefit the broad mass of minority group members who suffer from disproportionately high rates of poverty and unemployment and all the social ills that accompany those conditions” Fried, *supra* note 57, at 120. Heightened economic or political status has not removed the unwarranted stigma associated with being black. *See supra* notes 85, 91, 98 and accompanying text. Moreover, blacks as a group do share a common cul-

Concomitantly, the value and importance to be accorded the cultures and values of America's growing minority population of citizens is likewise the subject of intense debate. Here again, what is too often lacking is an informed articulation of the broad range and variety of positions and viewpoints resident in the various minority populations and communities. As the number of these communities increases, so too will differences in perspectives on history and culture between groups composed of American citizens of predominantly European, African, "Hispanic," Native American and/or Asian ancestry will increase.¹⁰⁵ No doubt, many of the differences will be explored in the electronic mass media. Through the *Metro Broadcasting* holding, the Court seeks to assist the FCC in assuring that the debates over differences (and hopefully similarities) will include representatives of all those whose differences (and similarities) will be debated.

B. The Future of Diversity Jurisprudence

Both the majority and dissent viewed the diversity interest in broadcasting as resting on the fact that access to broadcasting is constrained by spectrum scarcity.¹⁰⁶ For both then,

tural heritage. See *supra* notes 94-98 and accompanying text. As the Congress and the Court noted, the perspectives and sensitivities which attend the common experience of racism and the cultural heritage of "blackness," are more likely to be manifested in the minority entrepreneur's programming choices, and will benefit the disenfranchised as well.

Having questioned the likelihood that the economically disenfranchised would benefit from the policies, however, Fried then castigates the financial arrangement employed by the litigant Astroline, which allowed the minority entrepreneur with substantial broadcast expertise but limited finances to become a part owner! The practice of trading on "sweat equity" is not new, nor is it limited to minorities. To categorize it as a "naked financial advantage accorded on the basis of race," is at best, highly misleading. See *Fried, supra* note 57, at 120-21.

105. See *Henry, supra* note 22.

The deeper significance of America's becoming a majority nonwhite society is what it means to the national psyche, to individual's sense of themselves and their nation—their idea of what it is to be American. . . . Rather than accepting U.S. history and its meaning as settled, citizens will feel ever more free to debate where the nation's successes sprang from and what its unalterable beliefs are. They will clash over which myths and icons to invoke in education, in popular culture, in ceremonial speechmaking from political campaigns to the State of the Union Address.

Id. at 28.

106. *Metro Broadcasting*, 110 S.Ct. at 3010; *id.* at 3036 (O'Connor, J., dissenting).

scarcity is the linchpin for affirmative efforts to enhance broadcast diversity through regulation of broadcast ownership and speech. While technical scarcity yet remains as the statutory basis for much of broadcast regulation, scarcity has not enjoyed the same judicial support as a justification for regulation of cable and other new technologies. There is a lack of uniformity in lower court rulings regarding the ability of the government to justify regulation of other technologies such as cable, by resort to the scarcity rationale.¹⁰⁷ As a consequence, the scarcity rationale may have questionable utility as justification for affirmative protection of the public's right to diversity and access outside the broadcast industry.

Because the dissent characterizes diversity as unimportant due to the allegedly imprecise manner in which the government measures diverse viewpoints, future government efforts to extend or expand regulation on the basis of the interest may be subject to heightened scrutiny by the "new majority" of the Court. It will be hard to justify extending or expanding the scope of regulation over speech activity the government allegedly cannot adequately define or measure. And, to the extent the Court's new majority continues to perceive the government as advancing the diversity interest based on assumption rather than empirical findings that ownership is related to content, there is little likelihood the Court will look favorably upon any expansion of the diversity interest beyond its limited applicability in the broadcast arena.

The likelihood decreases further if the Court becomes enamored of the marketplace theory of regulation. The dissent's view of the marketplace as a real, albeit ill-defined constraining influence on editorial discretion may ultimately

107. See, e.g., *Quincy Cable TV, Inc. v. FCC*, 768 F. 2d 1434 (D.C. Cir. 1985) (holding that economic scarcity is an improper justification for government regulation of cable); *Preferred Communications, Inc. v. City of Los Angeles*, 754 F. 2d 1396 (9th Cir. 1985) (same). But see *Omega Satellite Products v. City of Indianapolis*, 694 F.2d 119 (7th Cir. 1982); *Berkshire Cablevision of Rhode Island, Inc. v. Burke*, 571 F. Supp. 976 (D.C.R.I. 1983); *Hopkinsville Cable TV, Inc. v. Pennroyal Cablevision, Inc.*, 562 F. Supp. 543, (W.D. Ky. 1982) (all holding that economic scarcity is an appropriate justification for government regulation).

See generally, Meyerson, *The First Amendment and the Cable Television Operator: An Unprotective Shield Against Public Access Requirements*, 4 COMM./ENT. 1 (1981); Worth & Cobb-Reiley, *A First Amendment Critique of the 1984 Cable Act*, 31 J. BROADCASTING & ELECTRONIC MEDIA 391 (Fall 1987).

prove incompatible with the government's intuitively logical expectation that ownership carries with it the right to exert control over the content of electronic speech. This conclusion may prove particularly apt given the dissent's disinclination to accord any weight to the empirical evidence supporting the nexus between ownership and diversity.¹⁰⁸

108. Although asserted with regard to *Crosan*, Dixon's observation is appropriate here:

What is most disturbing about th[e] [dissent's] position is that it [would have the] effect of completely altering the nature of 'acceptable' evidence in [diversity jurisprudence]. The dissent dismisses outright evidence which heretofore had been deemed probative in establishing the present day effects [justifying the government's efforts to enhance diversity]

Dixon, *supra* note 65, at 43.

The *Metro* Court's debate regarding the value to be accorded the evidence of a nexus between minority ownership and diversity of viewpoint requires further scrutiny. The debate highlights the conflict between the dissent's market-oriented economic approach and the majority's socially-oriented approach to the definition of broadcast diversity. In questioning the ability of minority broadcasters to program differently, the dissent focuses on the policy goal of economic efficiency to "achieve a maximum match between individual preferences and communication industry production." See Entman & Wildman, *Toward A New Analytical Framework For Media Policy: Reconciling Economic and Non-Economic Perspectives On The Marketplace of Ideas* 28 (Conference paper prepared for presentation at the Annual Telecommunications Policy Research Conference, Airlie Virginia, October 1-2, 1991). However, an emphasis on economic efficiency to the exclusion of other policy goals may be ill-advised.

An economic efficiency analysis is morally questionable if the communication industry production is geared to the satisfaction of a demand for programming featuring racist stereotypes. Brennan, *The Fairness Doctrine As Public Policy*, 33 J. BROADCASTING & ELECTRONIC MEDIA 419 (Fall 1989). Moreover, "satisfying viewer preferences cannot serve as a basis for evaluation when the actions affect fundamental belief systems." *Id.*

An excellent though little addressed case in point is the current nomenclature of race. "Blacks" or Afro-Americans, "whites" or Euro-Americans, as well as Asian Americans and Hispanic Americans are too often treated by the media as (and assumed by the public and government institutions to be) monolithic groups composed of internally homogeneous stock. Historically in the United States, multi-racial people have been considered to be the race of their non-white parent. This practice dates back to the European settlers who married Native Americans and the European slave owners who impregnated African women. Moreover, the American population is continually blending. Currently, at least two percent of all marriages in the United States are "interracial." See Atkins, *When Life Isn't Simply Black or White*, N.Y. Times June 5, 1991, at C1, col. 1; Norwood & Klein, *Developing Statistics to Meet Society's Needs*, 112 MONTHLY LAB. REV. 14, (Oct. 1989); Schlangenstein, *State's 1-32nd "Negro" Blood Law Revisited*, UPI, May 14, 1983; Gloster, *Witness Says All American Whites 5 Percent Black*, UPI, Sept. 14, 1982.

As the historical and current melding of America ought to make clear, humanity's "present biological nature developed, and is still developing, in the course of continuous cross-breeding processes. In this context, therefore, the concept of purity is no more

C. Un-Equal Protection?

Finally, several Court watchers have suggested that the Court, with the departure of Brennan, contains at least four solid votes against the government's use of policies based on racial classifications in order to address the current inequities brought about by historical societal discrimination.¹⁰⁹ If Justice Souter sides with the conservative justices,¹¹⁰ the conservative members could muster five votes in favor of the narrow reading of equal protection jurisprudence set forth in *Croson*.

Commentators on the Court (and at least one justice) have asserted that the new majority of the Court manifests a proclivity for conservative activism as opposed to judicial re-

than metaphor, wishful thinking, fantasy." Memmi, *Racism Today: 'Us' and 'Them,'* UNESCO COURIER, Nov. 1983, at 11. Finally, while humans do differ from each other culturally and biologically, "most scientific research reveals . . . that the differences are so fragmented that it is impossible to make a given social group coincide with any one biological profile." *Id.* See also Stringer, *The Emergence of Modern Humans*, 263 SCI. AM. 98, (Dec. 1990). Nevertheless, the majority of American citizens, regardless of heritage, as well as the media and government that serve them, paint our society as one of Blacks, Whites, Asians, Hispanics and Native Americans. This creates significant difficulties for many people. See generally Scales-Trent, *Commonalities on Being Black and White, Different and the Same*, 2 YALE J.L. & FEMINISM 305 (1990).

As the above example may illustrate, consumers may seek to avoid diversity in order to "avoid challenging and disturbing ideas that violate conventional wisdom or raise complexities." Entman & Wildman, *supra*, at 35-36. In the absence of a diverse ideas marketplace, the public will be at best uninformed and hence unmotivated to demand such a marketplace. Under such circumstances, reliance on consumer demand perpetuates the status quo. *Id.* at 36.

109. See Sedler, *supra* note 13, at 1218 ("The sharp division of the Court in *Metro Broadcasting* may be an indication that positions on the Court have hardened, and that the Court's seeming institutional ambivalence toward the permissibility of racial preference is now the result of a fundamental disagreement within the Court over the basic value question of the constitutional permissibility of any racial preference."). Sedler goes on to note that "at the the present time it appears that Justices, Rehnquist, Scalia, Kennedy and possibly Justice O'Connor, have made the value judgement against the constitutional permissibility of racial preference." *Id.* at 1231.

110. See Greenhouse, *Conservatively Speaking, It's An Activist Supreme Court*, N.Y. Times, May 26, 1991, § 4, at E1, col. 4.

At his confirmation hearing last fall, David Souter . . . indicated that while he might not have chosen many of the Warren Court's expansive departures, he now regarded that legacy not as an aberration but as part of the law's modern fabric. But if he is troubled by the developments this term, he has not indicated so either by his vote or his voice. If his silent assent indicates that he is comfortable with the Rehnquist camp, it is hard to see what obstacles remain in the way of the Court's activist course.

Id. at E3, col. 5.

straint.¹¹¹ Thus it is possible that this new majority might, despite *stare decisis*, revisit the *Metro Broadcasting* decision in a challenge to the tax certificate policy which was not before the Court in *Metro Broadcasting*.¹¹² In such a challenge, they might apply their narrow interpretation of the equal protec-

111. Professor David Chang has argued that the new majority of Chief Justice Rehnquist and Justices Kennedy, O'Connor, Scalia and Stevens, professes judicial conservatism while in actuality pursuing activist agendas which seriously intrude upon the valid democratic discretion of the electorate. See, Chang, *supra* note 48, at 810-21.

Ironically, Justice O'Connor apparently concurs (at least in part) when she articulates the problem clearly in her dissent in a recent family planning decision:

"It is a fundamental rule of judicial restraint . . . that this Court will not reach constitutional questions in advance of the necessity of deciding them."

. . . It is enough in this case to conclude that neither the language nor the history of § 1008 compels the Secretary's interpretation and that the interpretation raises serious First Amendment concerns. On this basis alone, I would reverse the judgement of the Court of Appeals and invalidate the challenged regulations.

Rust v. Sullivan, 111 S.Ct. 1759, 1788-89 (1991) (O'Connor, J., dissenting) (quoting Three Affiliated Tribes of Fort Berthold Reservation v. World Eng'g, P.C., 467 U.S. 138 (1984)) (addressing the majority's decision to declare constitutional rules prohibiting employees of federally funded clinics from discussing abortion with the clinics' patients). See also, *Excerpts from Court Ruling Curbing Family Planning Clinics*, N.Y. Times, May 24, 1991, at A19, col. 6.

The Court's new majority is already perceived as failing to adhere to the precepts of judicial conservatism many of its members espoused not so long ago. "There is a distinct sense at the Court now of competing long-held agendas. The Chief Judge and his allies appear to believe that for much of their adult lifetimes, the Court went seriously astray in ways that can finally be rectified, by conventionally conservative means if possible, by activists methods if necessary." Greenhouse, *supra* note 109, at E3, col. 4, and at E3, col. 5. See also 5 Justices Uphold U.S. Curbing Abortion Advice, N.Y. Times, May 24, 1991, at A1, col. 5.

112. *Metro Broadcasting*, 110 S.Ct. at 3005, n.7. Indeed, at least one commentator believes that the recently confirmed Judge Thomas would vote against the minority preference policy, and would not defer to Congress. See Taylor, *Beware the Judicial Override*, N.Y. Times, Oct. 3, 1991, at A25, col. 1.

According to sources within the Court of Appeals for the D.C. Circuit, Judge Thomas, while still a member of that court, recently authored a draft opinion in *Lamprecht v. FCC*, a 2-1 decision which will overturn an FCC award of a broadcast license to an applicant under the FCC's female ownership policy. Berke, *Two Democrats On Senate Panel Say They Will Oppose Thomas*, N.Y. Times, Sept. 27, 1991, A1, col. 1. According to the *Washington Legal Times*, Thomas may have made a distinction between the FCC's female ownership policy and its minority policy. In the oral argument of the case before the court of appeals, counsel for the FCC argued that *Metro Broadcasting* was controlling in the *Lamprecht* case. Thomas is said to have responded: "At least in the case of minorities, there was documented evidence that there was a difference in programming." See Sturges, *Delayed Release Sparks Concern: Thomas Drafted Ruling in Controversial Case*, LEGAL TIMES, Oct. 30, 1991. Apparently, "Thomas, in both oral argument and his draft opinion, . . . focussed on the need for more proof from the FCC—and Congress—that the gender preferences enhanced programming diver-

tion doctrine to the tax certificate policy and effectively overrule *Metro Broadcasting*.¹¹³ Should the "new activist" majority succeed in overturning *Metro Broadcasting*, the successful resolution of critical debates over the future of our multi-cultural and multi-ethnic society may be placed in even greater jeopardy.¹¹⁴

sity." Because of the perceived lack of evidence, Thomas was apparently disinclined to defer to Congress' findings regarding the importance of female ownership. *Id.*

If the *Lamprecht* opinion is published as it is reported to have been written, it may be premature to assert with any certitude how Justice Thomas may ultimately rule on an award to a minority-owned applicant under the FCC distress sale policy. However, if he maintains his current distinction between *Lamprecht* and *Metro*, and a challenge to the tax certificate policy is heard by the Court, he might vote, albeit reluctantly, to uphold the minority ownership policies.

113. See *supra* note 10.

114. Sedler suggests that the conservative majority's hostility to racial preferences does not belie a hostility to the use of "race neutral" means to achieve racial objectives of equality. Pursuit of this tack may have inherent problems, however. Sedler, *supra* note 13, at 1232-33.