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NOTES

SHOULDN'T THE CONSTITUTION BE COLOR BLIND? *METRO BROADCASTING, INC. v.* *FCC TRANSMITS A SURPRISING* *MESSAGE ON RACIAL* *PREFERENCES*

For nearly two decades, Americans witnessed affirmative efforts throughout society to increase both educational and vocational opportunities for minority groups. During those same twenty years, Congress, governmental agencies, and federal courts labored to exact the constitutional limits on efforts to integrate minorities into society's mainstream.¹ By nature, affirmative action programs grant special benefits to some groups or individuals and not to others. The question central to the debate, then, is whether affirmative action programs violate the equal protection guarantees of the United States Constitution.²

In addressing numerous challenges to affirmative action programs, the United States Supreme Court has determined that government action based on race, although suspect, is not always unconstitutional.³ The Court has struggled, however, to delimit the particular circumstances under which racial preferences will survive scrutiny.⁴ The Court has traditionally subjected racial classifications to a strict scrutiny analysis, finding race-conscious measures constitutional if narrowly tailored to achieve a compelling government interest.⁵

1. See, e.g., *NAACP v. Federal Power Comm'n*, 425 U.S. 662 (1976).

2. The fourteenth amendment commands that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. The equal protection requirement applies to the federal government as well, as an aspect of fifth amendment due process. See *Bolling v. Sharpe*, 347 U.S. 497 (1954) (racial segregation in the District of Columbia public schools violated the due process clause of the fifth amendment). Chief Justice Warren's opinion in *Bolling* stated: "The Fifth Amendment . . . does not contain an equal protection clause But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive." *Id.* at 499.

3. See, e.g., *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

4. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Wygant v. Jackson Board of Educ.*, 476 U.S. 267 (1986); *Fullilove*, 448 U.S. 448 (1980); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

5. See, e.g., *Wygant*, 476 U.S. at 274.

In the late 1980's, the Supreme Court continued to wrestle with the issue of affirmative action.⁶ Finding racial preferences by state and local governments unconstitutional, the Court's decisions evidenced a trend toward strict scrutiny of such programs to ensure protection of the rights of nonminorities.⁷ Nevertheless, the question remained whether the same scrutiny would apply to race-conscious measures imposed by the federal government.

Affirmative action plans with the imprimatur of Congress include those used by the Federal Communications Commission (FCC or Commission) to encourage minority ownership of radio and television stations.⁸ The FCC, as regulator of the electronic media, assumed a unique role in the evolution of affirmative action programs. Since its inception in 1934 as a "trafficker of the airwaves," the FCC has expanded its role in telecommunications regulation to become a promulgator of social policy.⁹ For instance, the Commission's minority preference policies sprang from governmental concern that a lack of presentation of minority issues in the media contributed to the racial unrest of the 1960's.¹⁰ Responding to suggestions that a change in the structure of media control could effect changes in the content of the media's portrayal of minorities,¹¹ the FCC created rules to encourage minority¹²

6. See *Croson*, 488 U.S. at 469; *Wygant*, 476 U.S. at 274.

7. See *Croson*, 488 U.S. at 495; see also *Martin v. Wilks*, 490 U.S. 755 (1989) (white firefighters allowed to challenge consent decrees setting goals for hiring of blacks); *Wards Cove Packing v. Antonio*, 490 U.S. 642 (1989) (statistical evidence of a disparity between a racial group's representation in a given job category and the population at large is insufficient to shift the burden of proof to the employer in a discrimination claim).

8. Reexamination of the Commission's Comparative Licensing, Distress Sales and Tax Certificate Policies Premised on Racial, Ethnic, or Gender Classifications, 1 F.C.C. Rcd 1315 (1986).

9. Kalmanir, *A Strange Animal: The FCC and Broadcast EEO*, 6 COMM. & L. 25 (1984).

10. Nondiscrimination in Employment Practices of Broadcast Licensees, 13 F.C.C.2d 766 (1968).

11. See REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 210-13 (1968).

12. For the purposes of this Note, minorities include those groups that the FCC considers minorities: Blacks, Hispanics, American Indians, Asians, Alaska Natives, and Pacific Islanders. See 47 U.S.C. § 309(i)(3)(C)(ii) (1988).

ownership of radio and television stations.¹³ Congress subsequently voiced its approval of those policies.¹⁴

While the Supreme Court exhibited greater concern for the equal protection of both minorities and nonminorities, challenges arose in the lower courts and at the agency level alleging that the FCC's racial preference policies violated the fifth amendment.¹⁵ Congress intervened in these proceedings by exercising its power to regulate federal spending.¹⁶ Specifically, Congress included a provision in the FCC's appropriations for fiscal years 1988 and 1989 that divested the FCC of authority to eliminate or reexamine policies designed to expand minority control of broadcasting.¹⁷ The result-

13. See Reexamination of the Commission's Comparative Licensing, Distress Sales and Tax Certificate Policies Premised on Racial, Ethnic, or Gender Classifications, 1 F.C.C. Rcd 1315 (1986); Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting, 92 F.C.C.2d 849 (1982). The Commission's incentives include tax certificates, distress sales, and minority enhancement credit in the comparative hearing process. The tax certificate permits substantial tax savings to broadcasters who sell their properties to minority purchasers. Congress granted the Commission authority to issue a certificate which treats the sale of a broadcast property as a deferred capital gain if the sale helps the Commission to effectuate a new policy or to implement a policy change relevant to the ownership of broadcast stations. 28 U.S.C. § 1071 (1988). Under the tax certificate policy, a broadcaster qualifies for a deferred capital gain if he sells his facilities to an entity with at least fifty percent minority ownership. Regarding the Advancement of Minority Ownership in Broadcasting Commission Policy, 92 F.C.C.2d at 853 (1982). For a discussion of the distress sale and the comparative hearing preference, see *infra* text accompanying notes 49-80.

14. H.R. REP. NO. 208, 97th Cong., 1st Sess. 897 (1981), reprinted in 1981 U.S. CODE CONG. & ADMIN. NEWS 396, 1259. Congress stated "[i]t is the firm intention of the conferees that ownership by minorities, such as blacks and hispanics, as well as by women, and ownership by other underrepresented groups . . . is to be encouraged through the award of significant preferences." *Id.* Congress made this statement in relation to its amendment of the Communications Act to empower the FCC to grant radio broadcasting licenses through the use of a random selection system. Communications Amendments Act of 1982, Pub. L. No. 97-259, 96 Stat. 1087, 1094-95 (codified at 47 U.S.C. § 309(i)(3)(A) and (C)(ii) (1988)). Congress amended § 309(i) to provide that "[t]o further diversify the ownership of the media of mass communications, an additional significant preference shall be granted to any applicant controlled by a member or members of a minority group." 47 U.S.C. § 309(i)(3)(A) (1988). To date, the Commission has not instituted the lottery system and still relies on the comparative hearing process in granting broadcast licenses.

15. See *Shurberg Broadcasting of Hartford, Inc. v. FCC*, 876 F.2d 902, 934 (D.C. Cir. 1989) (invalidating the Commission's distress sale policy), *rev'd sub nom. Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997 (1990); *Winter Park Communications, Inc. v. FCC*, 873 F.2d 347 (D.C. Cir. 1989) (upholding FCC's minority enhancement credit policy), *aff'd sub nom. Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997 (1990).

16. See Continuing Appropriations, Fiscal Year 1988, Pub. L. No. 100-202, 101 Stat. 1329, 1329-31 (1987); Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriation Act, 1989, Pub. L. No. 100-459, 102 Stat. 2186, 2216-17 (1988) [hereinafter Related Agencies Appropriation Act].

17. Related Agencies Appropriation Act, *supra* note 16, at 2217. The appropriations legislation prohibits the Commission from using funds "to repeal, to retroactively apply changes in, or to continue a reexamination of" the Commission's policies premised on racial, ethnic or

ing confrontation involving the courts, Congress, and the federal agency ultimately reached the Supreme Court. Considering its recent precedent on race-based programs,¹⁸ the Court used challenges to two of the FCC's minority preference policies to transmit a surprising message on racial preference programs sanctioned by the federal government.¹⁹

In *Metro Broadcasting, Inc. v. FCC*,²⁰ the Court held that the two challenged FCC minority preference policies, the "distress sale"²¹ and the award of a plus-factor to minority-owned companies when deciding among competing applicants for new licenses,²² did not violate equal protection principles.²³ The Court, for the first time, upheld Congress' power to adopt affirmative action plans to promote racial and ethnic diversity rather than simply to remedy past discrimination.²⁴

In *Metro*, the FCC awarded a television license to the Rainbow Broadcasting Corporation (Rainbow) over the competing Metro Broadcasting Corporation (Metro).²⁵ Because the Commission's broadcast licensing policy favored minority applicants, Rainbow's 90 percent minority ownership gave it a comparative advantage over the 19.8 percent minority ownership of Metro.²⁶ Metro appealed the award of the license to Rainbow.²⁷

After the FCC's order awarding the license to Rainbow, but before the United States Court of Appeals for the District of Columbia Circuit heard Metro's appeal, the Commission began an inquiry to explore the validity of its minority preference policies.²⁸ In light of the inquiry, the D.C. Circuit remanded the appeal to the Commission for further consideration.²⁹ Before the FCC could complete its investigation, however, Congress enacted the

gender classifications, except to (1) close its proceeding investigating the preference policies, (2) reinstate prior policy, and (3) lift any suspension imposed on implementing the policies pending the FCC's investigation. *Id.* For a discussion of the FCC's proceeding investigating the preference policies, see *infra* note 178.

18. The *Metro* Court distinguished its decisions in *Wygant* and *Croson* to uphold the FCC's minority preference policies. See *infra* notes 203-05 and accompanying text.

19. See *Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997 (1990).

20. *Id.*

21. The distress sale allows broadcasters whose licenses are threatened with revocation to sell to a minority at a discounted price. See *infra* notes 76-80 and accompanying text.

22. Minority owners who propose to manage the station are awarded an enhancement credit during the comparative hearing proceedings. See *infra* notes 49-75 and accompanying text.

23. *Metro*, 110 S. Ct. at 3026-28.

24. *Id.* at 3009-10.

25. *Id.* at 3005-06.

26. *Id.*

27. *Id.* at 3006.

28. For a discussion of the FCC's inquiry, see *infra* note 178 and accompanying text.

29. *Metro*, 110 S. Ct. at 3006.

FCC appropriations legislation for fiscal year 1988, prohibiting the FCC from "spending any appropriated funds to examine or change its minority . . . policies."³⁰ The FCC closed its inquiry and reaffirmed its grant of the license to Rainbow, and the court of appeals affirmed.³¹

Meanwhile, Shurberg Broadcasting of Hartford, Inc. (Shurberg), sought review in the D.C. Circuit of an FCC order approving Faith Center Inc.'s "distress sale" of its television license to a minority enterprise, Astroline Communications.³² The court delayed disposition of Shurberg's appeal pending resolution of the same FCC inquiry that delayed the court's review in *Metro*.³³ The FCC, upon closing the inquiry, reaffirmed its order allowing the distress sale to Astroline.³⁴ The appellate court then invalidated the distress sale policy, ruling that the policy deprived Shurberg, a nonminority applicant for a license in the relevant market, of its right to equal protection under the fifth amendment.³⁵

The United States Supreme Court consolidated the two cases for opinion in *Metro*, and ultimately upheld both FCC policies.³⁶ Writing for the majority, Justice Brennan reasoned that the minority preferences involved did not violate equal protection because they "b[ore] the imprimatur of longstanding congressional support and direction and [were] substantially related to the achievement of the important governmental objective of broadcast diversity."³⁷ Although the Court had traditionally applied strict scrutiny to race based classifications, in *Metro*, the Court applied an intermediate standard of review to the FCC's race-based programs.

Writing for the dissent, Justice O'Connor criticized the majority for applying an intermediate level of scrutiny to racial classifications employed by Congress.³⁸ Asserting that the fourteenth amendment applies to the federal government as well as the states, Justice O'Connor declared that strict scrutiny is the proper test for analyzing any race-based program.³⁹ The dissent concluded that the FCC's policies would fail to pass constitutional muster under such an analysis, because they were not narrowly tailored to achieve a compelling governmental interest.⁴⁰

30. *Id.*

31. *Id.*

32. *Id.* at 3007.

33. *Id.*

34. *Id.*

35. *Id.* at 3007-08.

36. *Id.* at 3027-28.

37. *Id.*

38. *Id.* at 3029 (O'Connor, J., dissenting).

39. *Id.* at 3030.

40. *Id.* at 3041.

In a separate dissent, Justice Kennedy noted that the majority decision repeated the errors of *Plessy v. Ferguson*.⁴¹ In that 1896 decision, which resulted in the infamous "separate but equal" doctrine, the Court gave its blessing to race conscious measures.⁴² Justice Kennedy concluded that the Court's decision in *Metro* resulted in a doctrine of "unequal but benign," a philosophy indistinguishable from *Plessy*'s holding of separate but equal.⁴³

This Note examines how the Court's decision upholding the FCC's minority preference policies weakened the constitutional barriers to racial discrimination. First, it focuses on the FCC's statutory authority to regulate in the context of the public interest standard and traces the development of the FCC's minority preference policies. It then analyzes the underlying assumption of the minority preference policies, namely, that minority control in the media necessarily leads to the programming of diverse information. Next, the Note traces the judiciary's struggle to define constitutional limits on affirmative action programs. This Note then examines the Supreme Court's majority and dissenting opinions in *Metro*, and concludes that the *Metro* majority failed to apply the correct level of scrutiny to the race-based classifications employed by the FCC. As a result, this Note suggests, the *Metro* Court set a dangerous precedent by making discrimination on the basis of race easily justifiable. In addition, this Note argues that the Court's decision in *Metro* sets the ideal of achieving racial equality back one hundred years by perpetuating stereotypes that have come to be anathema in the United States, and by endorsing the concept of a nation divided into racial blocs.

I. GAUGING THE PUBLIC'S INTEREST: THE NATURE OF THE FCC'S REGULATORY AUTHORITY

Before examining the constitutionality of the FCC's minority preference policies, it should be clear where the policies "fit" within the FCC's regulatory scheme. The FCC performs a unique balancing act in regulating the broadcasting industry. Specifically, the Commission must consider the rights of both broadcasters and their audiences in promulgating regulations and granting licenses. Underlying the Commission's decisions are concerns about the scarcity of broadcasting frequencies, the high capital costs neces-

41. *Id.* at 3044 (Kennedy, J., dissenting). Justice Scalia joined in the dissent.

42. *Plessy v. Ferguson*, 163 U.S. 537 (1896). After 58 years, the Court finally announced the demise of *Plessy* in *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

43. 110 S. Ct. at 3047 (Kennedy, J., dissenting).

sary to operate a station, and the potential dangers of a concentration of media control.⁴⁴

A. The Public Interest Standard

The Communications Act of 1934 (Communications Act)⁴⁵ mandates that the FCC fulfill its regulatory duties as the "public convenience, interest, or necessity requires."⁴⁶ The public interest concept is the sine qua non of federal broadcast regulation. This standard equips the FCC with broad discretionary powers to grant, renew, and modify broadcast licenses, as well as to make rules and regulations.⁴⁷ Central to the FCC's regulatory framework is the notion that the "scarcity" of broadcasting frequencies requires broadcasters to act as "public trustees" in exchange for the privilege of frequency use.⁴⁸

44. See generally Fowler & Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207 (1982) (emphasizing the need to treat broadcasters not as fiduciaries but as marketplace competitors).

45. 47 U.S.C. § 151 (1988).

46. *Id.* § 303.

47. FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775, 793 (1978); FCC v. WOKO, Inc., 329 U.S. 223, 229 (1946); FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 138 (1940); see 47 U.S.C. § 303(r), which states that the "Commission . . . as public convenience, interest, or necessity requires shall . . . [m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of [the Act]." The Supreme Court has deferred to FCC regulation of broadcast licensees, acknowledging the Commission's expertise in determining the means necessary to effect the public interest goal. *Red Lion Broadcasting v. FCC*, 395 U.S. 367, 380 (1969) (the Court declared that it would normally bow to agency interpretation of the Communications Act); *National Broadcasting Co. v. United States*, 319 U.S. 190, 215-17 (1943) (the Court gave the Commission power to construe the public interest standard broadly).

On the other hand, the Supreme Court has recognized that Congress did not intend by the Communications Act to vest an unlimited power in the FCC. See, e.g., *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 90 (1953) (stating that Congress did not intend "to transfer its legislative power to the unbounded discretion of the regulatory body"); *National Broadcasting Co.*, 319 U.S. at 216 (1943) (the public interest standard is "not to be interpreted as setting up a standard so indefinite as to confer an unlimited power") (quoting *Federal Radio Comm'n v. Nelson Bros. Co.*, 289 U.S. 266, 285 (1933)).

48. See Fowler & Brenner, *supra* note 44, at 213-21; see also *Red Lion*, 395 U.S. at 394 ("[l]icenses to broadcast do not confer ownership of designated frequencies, but only the temporary privilege of using them." (citing 47 U.S.C. § 301); Comment, *Minority and Gender Enhancements: A Necessary and Valid Means to Achieve Diversity in the Broadcast Marketplace*, 40 FED. COMM. L.J. 89 (1988) [hereinafter *Minority and Gender Enhancements*]; Comment, *The Constitutionality of the FCC's Use of Race and Sex in the Granting of Broadcast Licenses*, 83 NW. U.L. REV. 665, 670 n.40 (1989). See generally *Broadcast Regulation Reform, 1983: Hearings Before the Subcomm. on Telecommunications, Consumer Protection and Finance of the House Comm. on Energy and Commerce*, 98th Cong., 1st Sess. (1983) (Congress also adheres to the standard that broadcasters are trustees of a public good).

B. The FCC's Minority Preference Policies

1. The Comparative Hearing Process

Because the broadcast spectrum is limited, competition for licenses is fierce; many competitors file applications with the FCC for each available license.⁴⁹ The Commission attempts to achieve two fundamental objectives when choosing a broadcast licensee from among qualified applicants. The first is to select the broadcaster that would provide "the best practicable service to the public."⁵⁰ The second is to create diversification, "a maximum diffusion of control of the media of mass communications."⁵¹

When faced with several competing applicants for a single available broadcasting frequency, the FCC conducts a comparative hearing proceeding to determine which applicant will best help the Commission reach its two primary objectives.⁵² The comparative hearing is divided into two stages. First, each applicant is evaluated under certain minimum qualification standards prescribed by the Communications Act.⁵³ These qualifications mandate that the applicant be legally,⁵⁴ technically,⁵⁵ and financially⁵⁶

49. For example, for an available FM frequency in New York, the number of applicants can reach over 300; in Richmond, Virginia, approximately 50, and in San Francisco, between 50 and 75 applications per frequency. *Minority and Gender Enhancements*, *supra* note 48, at 93 n.29.

50. Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393, 394 (1965).

51. *Id.*

52. See *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 331 n.2, 333 (1945).

53. 47 U.S.C. § 308(b) (1988) ("all applicants for station licenses . . . shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station . . ."). The Commission first looks at whether the applicant is legally, technically, financially and otherwise qualified. See *infra* notes 54-56; Application for Construction Permit for Commercial Broadcast Station, FCC Form 301; Reexamination of the Commission's Comparative Licensing, Distress Sales and Tax Certificate Policies Premised on Racial, Ethnic, and Gender Classifications, 1 F.C.C. Red 1315 (1986); Spitzer, *Multicriteria Choice Processes: An Application of Public Choice Theory to Bakke, the FCC, and the Courts*, 88 YALE L.J. 717, 732-33 (1979).

54. Legal qualifications include citizenship, history of legal difficulties, ownership of other broadcast interests, and proposed arrangements for station operations. See, e.g., 47 U.S.C. § 310(b) (requiring applicant, its directors, officers, and four-fifths of its stockholders to be United States citizens); 47 C.F.R. § 73.3555 (1990) (an applicant may not own any AM station in the same market as the AM station that is being awarded).

55. Technical factors include availability of frequency, coverage and clarity of signal, studio location, antenna location and equipment requirements. See Application for Construction Permit, FCC Form 301.

56. Financial considerations center on the sources from which the applicant will meet application and construction costs, as well as operating expenses for the first year. See, e.g., *West Michigan Telecasters, Inc. v. FCC*, 396 F.2d 688 (D.C. Cir. 1968); 47 U.S.C. § 319(a); Application for Construction Permit, FCC Form 301.

qualified. Applicants meeting the preliminary requirements are "designate[d] . . . for a comparative hearing" before an administrative law judge.⁵⁷

The Commission⁵⁸ evaluates the applicants in each comparative licensing proceeding according to six specific criteria: (1) diversification of control, specifically, whether the applicant holds any other mass communications outlets; (2) integration, simply put, whether the owners intend to work at the station as managers; (3) proposed program service; (4) the applicant's past broadcast record; (5) efficient use of the frequency; and (6) the applicant's character.⁵⁹

When the FCC set forth these comparative criteria, it did not address whether minority ownership should play a role in selecting licensees from among competing applicants. Rather, the current racial preference policies sprang from a mandate of the D.C. Circuit. In *TV 9, Inc. v. FCC*,⁶⁰ the court of appeals overturned the Commission's refusal to award comparative merit to a corporate applicant with two minority shareholders.⁶¹ In refusing to accord the applicant merit, the Commission focused solely on how the applicant proposed to serve the public, and did not consider the applicant's minority status. The Commission reasoned that the applicant made no demonstration of how its minority ownership would translate into a public ser-

57. Spitzer, *supra* note 53, at 733-34.

58. "The Commission," as used here, may mean the Administrative Law Judge (ALJ), the Commission's Review Board, or the Commission in its entirety, as the following discussion of FCC procedural rules for comparative licensing illustrates. The ALJ's decision becomes final if no party files exception within thirty days after its release, and the Commission does not within an additional twenty days stay the initial decision so that it may consider the case. 47 C.F.R. §§ 1.276(a),(b),(d) (1990). Any party may appeal the ALJ's decision by filing exception with the FCC's Review Board, which possesses by delegation the Commission's review authority in initial licensing cases. *Id.* §§ 1.276(a), 0.365(a), 1.271.

Reconsideration of a Review Board decision may be sought by petition filed within thirty days. *Id.* § 1.104(b). After disposition of the petition by the Review Board, the petitioner may seek Commission review. *Id.* § 1.104(d). As an alternative to petitioning the Review Board for reconsideration, the disappointed party may apply directly for review by the full Commission. *Id.* § 1.104(b).

The Commission may, at its discretion, accept the case for review. 47 U.S.C. §§ 155(c)(4),(5) (1988); 47 C.F.R. § 1.115(g) (1990). The Commission may deny the application for review without specifying reasons for its action. 47 U.S.C. § 155(c)(5); 47 C.F.R. § 1.115(g). In the alternative, the Commission may, with or without further proceedings such as the receipt of briefs and oral argument, affirm, modify or set aside the Review Board's action, or remand for further consideration. 47 U.S.C. § 155(c)(6); 47 C.F.R. § 1.115(h)-(i). Judicial review of an FCC licensing action is obtainable exclusively in the United States Court of Appeals for the District of Columbia Circuit. 47 U.S.C. § 402(b).

59. Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393, 394-99 (1965). The Commission also reserves the right to consider other "relevant and substantial factors" on an ad hoc basis. *Id.* at 399-400.

60. 495 F.2d 929 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974).

61. *Id.* at 935-36.

vice that the prevailing applicant could not provide.⁶² Moreover, the Commission argued that the Communications Act required the agency to be "color blind," and that minority ownership should not be a comparative factor unless proven to result in some public interest benefit.⁶³

On appeal, the D.C. Circuit held that the FCC *should* favor applications that make entrepreneurs of local minority groups.⁶⁴ The court, emphasizing that "maximum diversification of ownership" is a primary public interest goal, concluded that when it is likely to foster diversity in programming, minority ownership should be given substantial weight.⁶⁵ The court then remanded the case to the Commission with orders to grant the minority owners comparative merit.⁶⁶

In *TV 9*, the court did not require the FCC to offer *proof* that minority ownership and participation would result in programming diversity.⁶⁷ Instead, the court held that comparative merit should be granted given a "reasonable expectation" of some public interest benefit.⁶⁸ Two years later, in *Garrett v. FCC*,⁶⁹ the D.C. Circuit reinforced its *TV 9* mandate. In *Garrett*, Leroy Garrett, a member of a recognized minority group, was the sole owner of a radio station competing to change its status from daytime to full time.⁷⁰ Because Garrett failed to show how he would improve minority programming, the Commission refused to grant him comparative merit.⁷¹ On appeal, the D.C. Circuit held that the Commission erred in failing to grant Garrett's minority status any weight.⁷² The court directed the FCC to *assume* that minority ownership would result in minority programming.⁷³ Together, *TV 9* and *Garrett* eliminated any requirement for an empirical demonstration of a nexus between minority ownership of stations and diversity of programming.

The Commission eventually decided to treat minority ownership and participation as an enhancement to the standard comparative criterion of inte-

62. *Id.* at 936.

63. *Id.* (quoting *Mid-Florida Television Corp.*, 33 F.C.C.2d 1, 17 (1970), *review denied*, 37 F.C.C.2d 559 (1972)).

64. *Id.*

65. *Id.* at 937.

66. *Id.* at 940.

67. *Id.* at 938. The court stated that the FCC should grant merit because of the "stock ownership . . . and . . . participation in station affairs" of the two black shareholders. *Id.* at 941 (Fahy, J., supplemental) (footnote omitted).

68. *Id.* at 938.

69. 513 F.2d 1056 (D.C. Cir. 1975).

70. *Id.* at 1057.

71. *Id.* at 1061.

72. *Id.* at 1063.

73. *Id.*

gration of management, an element used to evaluate which competing applicant is likely to provide the best practicable service to the public.⁷⁴ In other words, the FCC grants a preference to minority applicants in comparative hearings only if the minority applicant proposes to participate in the management of the station.⁷⁵

2. *The Distress Sale Policy*

A second measure adopted by the FCC to foster minority ownership in broadcasting is the distress sale policy.⁷⁶ The distress sale permits a licensee, whose license or renewal application is designated for hearing before the FCC because the licensee's basic qualifications are in question, to transfer or assign its license to a qualified minority purchaser at a distress sale price.⁷⁷ Typically, the FCC would not permit a licensee in danger of losing its license to sell its facility until the Commission resolved allegations regarding the licensee's qualifications.⁷⁸ The distress sale policy is an exception that enables licensees to mitigate potential financial losses by selling the station to a minority-controlled entity for up to seventy-five percent of the station's fair market value.⁷⁹ Ordinarily, the loss of a license under these circumstances is a total economic loss for the license holder.⁸⁰

C. *The Diversity Principle as a Means for Justifying the Minority Preference Policies Under the Public Interest Standard*

The FCC has long offered a nexus between minority ownership and programming diversity, which the D.C. Circuit ordered the Commission to assume in *TV 9* and *Garrett*, as justification for implementing minority enhancement credit and distress sale policies.⁸¹ The constitutionality of

74. See *WPIX, Inc.*, 68 F.C.C.2d 381, 411-12 (1978).

75. *Id.*

76. See Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 F.C.C.2d 979, 983 (1978); see also *Stereo Broadcasters, Inc. v. FCC*, 652 F.2d 1026, 1028 (D.C. Cir. 1981) (stating that the purpose of the distress sale exception was "clearly . . . the promotion of minority ownership of broadcasting facilities").

77. Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting, 92 F.C.C.2d 849, 853 (1982). A qualified minority enterprise is one which meets the Commission's basic qualifications and which also maintains a minority ownership interest exceeding fifty percent. A special policy, however, applies to limited partnerships: if a general partner who holds a twenty percent interest is a member of a recognized minority group, the enterprise is qualified. *Id.* at 855.

78. See *Northland Television, Inc.*, 72 F.C.C.2d 51, 54-56 (1979).

79. See *Lee Broadcasting Corp.*, 76 F.C.C.2d 462, 463 (1980).

80. *Id.*

81. See *Reexamination of the Commission's Comparative Licensing, Distress Sales and Tax Certificate Policies Premised on Racial, Ethnic, or Gender Classifications*, 1 F.C.C. Rec 1315 (1986); *Commission Policy Regarding the Advancement of Minority Ownership in*

these preference policies must be analyzed in terms of whether programming diversity survives scrutiny as a compelling governmental objective.

Media regulation attempts to ensure that Americans receive a broad spectrum of information from multiple sources.⁸² Diversity, an underlying goal of the first amendment, is an integral part of the FCC's public interest standard.⁸³ The definition of public interest, as it applies to broadcast directives, incorporates the ideal that the government has a duty to the nation's listening and viewing audiences to guarantee a lively and varied debate on controversial issues.⁸⁴ The FCC consistently has emphasized viewpoint diversity as a primary public interest goal.⁸⁵

The FCC based its authority to regulate minority employment by broadcasters on the belief that racial discrimination is incompatible with operating in the public interest under the Communications Act.⁸⁶ More importantly,

Broadcasting, 92 F.C.C.2d 849 (1982). While the Commission relies on a nexus between minority ownership and minority programming, research in this area is not conclusive. Findings indicate that "simply changing the race of the owner of a minority-oriented station will not necessarily improve that station's performance," but that the "relevance, quality, or positioning" of minority-oriented programming may be positively correlated with minority ownership. See Singleton, *FCC Minority Ownership Policy and Non-Entertainment Programming in Black Oriented Radio Stations*, 25 J. BROADCASTING 195, 199 (1981). But see Honig, *The FCC and its Fluctuating Commitment to Minority Ownership of Broadcast Facilities*, 27 HOW. L.J. 859 (1984) (opportunities for minority ownership have been substituted for and not combined with opportunities for minority participation in programming). See also *infra* note 274 (discussing a study by the Congressional Research Service of the nexus between minority ownership and minority programming).

82. *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

83. *Id.* (The first amendment calls for "the widest possible dissemination of information from diverse and antagonistic sources.")

84. *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964) (the "debate on public issues should be uninhibited, robust, and wide open"); see *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 795 (1978) ("[T]he 'public interest' standard necessarily invites reference to First Amendment principles . . ." (quoting *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 122 (1973))); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969) ("It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail . . .").

85. See, e.g., *Reexamination of the Commission's Comparative Licensing, Distress Sales and Tax Certificate Policies Premised on Racial, Ethnic or Gender Classifications*, 1 F.C.C. Rcd 1315 (1986).

86. *Nondiscrimination Employment Practices of Broadcast Licenses*, 18 F.C.C.2d 240 (1969). The Commission's minority policies are rooted in the social turbulence of the 1960's. In 1967, a presidential advisory commission was established to investigate civil disorders, and it issued a report which identified lack of presentation of minority issues in the media as a contributor to racial unrest. See O. KERNER, *REPORT OF THE NAT'L ADVISORY COMM'N ON CIVIL DISORDERS* (1968). The advisory commission suggested that a change in the structure of media control could result in a corresponding change in the content of the media's portrayal of minorities. See *id.* In 1968, the FCC responded to the advisory commission's report by creating a policy designed to eliminate discrimination in broadcast employment. *Nondiscrimination in Employment Practices of Broadcast Licensees*, 13 F.C.C.2d 766 (1968). A decade

in promulgating its regulations, the Commission assumed that a nexus exists between minority employment and diversity in programming.⁸⁷ The Commission argued that by fostering minority control of broadcast stations, it ensured that minority viewpoints would manifest themselves in station programming.

The FCC began implementing basic Equal Opportunity Employment (EEO) provisions in 1969 by adopting policies prohibiting discrimination against minorities in broadcast employment.⁸⁸ While the FCC's initial efforts focused on broadcasters' hiring practices, the FCC more recently created various regulatory measures to provide incentives for minorities to pursue ownership of broadcast facilities, including the distress sale and minority enhancement credit at issue in *Metro Broadcasting, Inc. v. FCC*.⁸⁹ Again, the Commission used the public interest standard to justify these measures, specifically, the public's interest in receiving a wide variety of programming.⁹⁰

later, the United States Commission on Civil Rights determined that "to the extent that the viewers' beliefs, attitudes, and behavior are affected by what they see on television, relations between the races and sexes may be affected by television's limited and often stereotyped portrayals of men and women, both white and non-white." U.S. COMM'N ON CIVIL RIGHTS, WINDOW DRESSING ON THE SET: WOMEN AND MINORITIES ON TELEVISION (1977).

87. Reexamination of the Commission's Comparative Licensing, Distress Sales and Tax Certificate Policies Premised on Racial, Ethnic or Gender Classifications, 1 F.C.C. Rcd 1315, 1315 (1986).

88. 18 F.C.C.2d at 240. The language of the FCC's EEO requirements is patterned after federal law set forth in Title VII of the Civil Rights Act of 1964. See 42 U.S.C. §§ 2000(e)-4(g)(i) (1970). One year later, the FCC began requiring annual employment reports from broadcasters and written descriptions of EEO programs with broadcast license renewal applications. Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination Employment Practices of Broadcast Licensees, 23 F.C.C.2d 430, 437 (1970); see also Nondiscrimination in the Employment Policies and Practices of Broadcast Licensees, 60 F.C.C.2d 226, 227 (1976) ("the overall ability of broadcast stations to serve the public interest [is] related to their employment policies and practices"); Nondiscrimination in the Employment Policies and Practices of Broadcast Licensees, 54 F.C.C.2d 354, 358 (1975) (the Commission requires broadcasters to "engage in a positive, continuing program of specific practices—to assure equal employment opportunity with regard to recruiting, hiring, training, promotion and other personnel actions."). In 1971, the FCC amended these rules to require broadcasters to include women in their EEO hiring and reporting obligations. Equal Employment Program, 32 F.C.C.2d 708 (1971).

89. See Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting, 92 F.C.C.2d 849, 853 (1982).

90. *Id.* In the past, the Supreme Court applauded the FCC's ownership and employment policies as consistent with the public interest standard and the first amendment goal of promoting diversity of viewpoint on the airwaves. See, e.g., *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 795 (1978) (it is not inconsistent with the Communications Act "for the Commission to conclude that the maximum benefit to the 'public interest' would follow from allocation of broadcast licenses so as to promote diversification of the mass media as a whole"); see also H.R. REP. NO. 765, 97th Cong., 2d Sess. 40, reprinted in 1982 U.S. CODE

II. THE CONSTITUTIONALITY OF RACE-BASED CLASSIFICATIONS

Given that the FCC's minority preference policies are race-based classifications, their constitutionality must be assessed in light of equal protection doctrine stemming from the fourteenth and fifth amendments and as pronounced by the United States Supreme Court. The equal protection clause of the fourteenth amendment commands that no state shall "deny to any person within its jurisdiction equal protection of the laws."⁹¹ Literally, the equal protection requirement of the fourteenth amendment applies only to state action. Judicial interpretation, however, has applied fourteenth amendment equal protection jurisprudence to the federal government as an aspect of due process guaranteed under the fifth amendment.⁹² Thus, governmental classifications, whether state or federal, are subject to identical standards of review for equal protection purposes.⁹³ As the cases discussed below illustrate,⁹⁴ equal protection analysis requires an examination of the purpose which the FCC's policies were designed to further and a determination of whether the policies will achieve their goal. Under the Supreme Court's equal protection analysis, race based classifications employed to achieve a goal that is less than "compelling" are unconstitutional.⁹⁵ Moreover, the racial classifications will not pass constitutional muster if the programs unduly burden nonminorities, if race based programs are used without an at-

CONG. & ADMIN. NEWS 2261, 2284 ("The nexus between diversity of media ownership and diversity of programming sources has been respectfully recognized by both the Commission and the courts."). In *NAACP v. Federal Power Comm'n*, 425 U.S. 662 (1976), the Court examined whether the Federal Power Commission (FPC) had the authority to prohibit discriminatory employment practices on the part of its regulatees. *Id.* While finding that the FPC lacked the authority, the Court distinguished the FCC's policies from the FPC's, proclaiming that the FCC's steps toward affirmative action were necessary to create programming that reflected minority viewpoints. *Id.* at 670 n.7. The Court sanctioned the FCC's unique ability to regulate in this area, noting that the FCC's policies "can be justified as necessary to enable the FCC to satisfy its obligation under the Communications Act of 1934 . . . to ensure that its licensees' programming fairly reflects the tastes and viewpoints of minority groups." *Id.*

91. U.S. CONST. amend. XIV, § 1.

92. See *United States v. Paradise*, 480 U.S. 149, 166 n.16 (1987) ("[T]he reach of the equal protection guarantee of the Fifth Amendment is coextensive with that of the Fourteenth . . ."). The fifth amendment's due process clause commands that "No person shall be . . . deprived of life, liberty or property, without due process of law . . ." U.S. CONST. amend. V.

93. See *Fullilove v. Klutznick*, 448 U.S. 448 (1980). Compare *City of Richmond v. J.A. Croson Co.*, 448 U.S. 469 (1989) (applying strict scrutiny to municipal racial classifications) with *Korematsu v. United States*, 323 U.S. 214 (1944) (applying strict scrutiny to racial classifications employed by the federal government).

94. See *infra* notes 101-47 and accompanying text.

95. See, e.g., *Wygant v. Jackson Board of Educ.*, 476 U.S. 267 (1986).

tempt to use race-neutral means, or if it appears questionable that the programs will effect the desired change.⁹⁶

A. *Strict Scrutiny Analysis*

The Supreme Court has interpreted the equal protection clause to require a "heightened" standard of review for classifications based on race, ethnicity, or gender.⁹⁷ Prior to its decision in *Metro Broadcasting, Inc. v. FCC*, the Court subjected governmental classifications based on race to "strict" scrutiny.⁹⁸

Strict scrutiny requires that the classification serve a "compelling" governmental interest, and that the means used to achieve that compelling interest be "necessary" or "narrowly tailored."⁹⁹ In comparison, "intermediate" scrutiny, the standard used to evaluate classifications based on gender, requires only that the means be "substantially related" to the achievement of an "important" governmental interest.¹⁰⁰

1. *Compelling Governmental Interest*

While the Court requires a compelling governmental interest to justify race-based classifications, the Court has never enunciated a test to determine what type of interest is compelling. In *Regents of the University of California v. Bakke*,¹⁰¹ the Court examined the admissions programs of the University's medical school.¹⁰² The medical school used two admissions procedures, one for "regular" candidates, the other for "special" candidates, including "economically and/or educationally disadvantaged" applicants and minorities.¹⁰³ Special candidates did not have to meet the grade point cutoff and were not ranked against candidates in the general admissions pro-

96. *Id.*

97. *See, e.g.,* *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

98. *Croson*, 488 U.S. at 469; *Fullilove v. Klutznick*, 448 U.S. 448, 496 (1980) (Powell, J., concurring); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 290-91 (1978); *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

99. *See* *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982); *Craig v. Boren*, 429 U.S. 190 (1976).

100. *Hogan*, 458 U.S. at 724; *Craig*, 429 U.S. at 197. The Supreme Court struggled with the constitutionality of government sponsored minority preferences in four cases before its decision in *Metro*. *See Croson*, 488 U.S. at 469; *Wygant v. Jackson Board of Educ.*, 476 U.S. 267 (1986); *Fullilove*, 448 U.S. at 448; *Bakke*, 438 U.S. at 265. The Court's cases produced twenty-three opinions and made it difficult for lower federal courts to extract a majority holding and arrive at the governing principles and limitations. *Shurberg Broadcasting of Hartford, Inc. v. FCC*, 876 F.2d 902, 934 (D.C. Cir. 1989) (Wald, J., dissenting).

101. 438 U.S. 265 (1978).

102. *Id.* at 272.

103. *Id.* at 273-74.

cess.¹⁰⁴ Bakke, a white male, applied to the medical school in 1973 and in 1974.¹⁰⁵ Upon being denied admission for the second time, he challenged the admissions process on the grounds that it violated both the equal protection clause of the fourteenth amendment and Title VII of the Civil Rights Act of 1964.¹⁰⁶

Holding that racial and ethnic classifications of any kind are inherently suspect and call for the most exacting judicial scrutiny, Justice Powell, in a plurality opinion, invalidated the special admissions program and ordered Bakke admitted to the medical school.¹⁰⁷ Yet, the Court did not go so far as to say that race could never be considered in admissions decisions. In fact, the Court suggested that the goal of achieving a diverse student body was sufficiently compelling to justify consideration of race in admissions decisions under some circumstances.¹⁰⁸ The Court rejected the special admissions program involved in *Bakke*, however, because the program focused *solely* on ethnic diversity and failed to consider a variety of factors which, the Court implied, a university should weigh in attempting to create a heterogeneous class.¹⁰⁹ The Court concluded that an admissions policy that considered only one factor hindered rather than furthered attainment of genuine diversity.¹¹⁰ Nevertheless, the Court's dicta in *Bakke*,¹¹¹ implying that the government has a compelling interest in achieving a diverse student body,

104. *Id.* at 275.

105. *Id.* at 276.

106. *Id.* at 277-78.

107. *Id.* at 265, 320.

108. *Id.* at 311-15. Justices Brennan, White, Marshall, and Blackmun joined Justice Powell in holding that race could be a valid factor in the admissions process. *Id.* at 320, 356-69 (Brennan, White, Marshall, and Blackmun, JJ., concurring in part and dissenting in part). Individual members of the Court have suggested or found that the promotion of "racial diversity" may be a sufficiently compelling justification for the government to impose race-based measures, at least in the context of promoting a diverse student body or a diverse faculty in higher education. *See id.*; *Wygant v. Jackson Board of Educ.*, 476 U.S. 267, 306 (1986) (Marshall, J., dissenting); *id.* at 315-17 (Stevens, J., dissenting); *see also id.* at 286 (O'Connor, J., concurring in part and concurring in the judgment).

109. *Bakke*, 438 U.S. at 313-14. Chief Justice Burger and Justices Stevens, Stewart, and Rehnquist joined Justice Powell in this portion of the judgment. *Id.* at 411-21.

110. *Id.* at 315.

111. *Id.* at 322-24. Justice Powell asserted that:

[A]cademic freedom . . . is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any authoritative selection.'

Id. at 312 (quoting *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) (quoting in part *United States v. Associated Press*, 52 F. Supp. 302, 372 (W.D.N.Y. 1943))).

left room for later analogies concerning the government's interest in creating broadcast programming diversity.¹¹²

The only interest that the Supreme Court clearly has identified as compelling is the interest in remedying the effects of past discrimination.¹¹³ In *City of Richmond v. J.A. Croson Co.*,¹¹⁴ Justice O'Connor, writing for the majority, stated that racial classifications should be "strictly reserved for remedial settings."¹¹⁵ In *Croson*, the Court examined a minority preference plan implemented by the Richmond City Council.¹¹⁶ The plan required the city to award minority-owned businesses a specified percentage of the dollar amount of all city contracts.¹¹⁷ The Court struck down Richmond's plan because, in explaining its reasons for enacting the plan, the city made only a "generalized assertion" of past discrimination.¹¹⁸ The Court held that without a specific factual predicate on which to base the plan, the plan was not remedial.¹¹⁹ Thus, the plan did not serve any compelling governmental interest and did not withstand the Court's strict scrutiny test.¹²⁰

In *Fullilove v. Klutznick*,¹²¹ the Court sustained the constitutionality of a set-aside provision in the Public Works Employment Act (Employment Act) by focusing on Congress' authority under the fourteenth amendment to enact measures to remedy past discrimination.¹²² The Employment Act required state and local grantees to use at least ten percent of federal funds designated for local public works projects to procure services or supplies

112. See, e.g., *West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601 (D.C. Cir. 1984), cert. denied, 470 U.S. 1027 (1985).

113. *Bakke*, 438 U.S. 265, 307 (opinion of Powell, J.); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-97 (1989) (plurality opinion); *id.* at 536-38 (Marshall, J., dissenting); *Roberts v. United States Jaycees*, 468 U.S. 609, 624-25 (1984); see also *Wygant*, 476 U.S. 267, 274 (1986) (plurality opinion) ("the Court has insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination").

114. 488 U.S. 469 (1989).

115. *Id.* at 493.

116. *Id.* at 477-78.

117. *Id.*

118. *Id.* at 498.

119. *Id.* at 498-506.

120. *Id.* at 505.

121. 448 U.S. 448 (1980).

122. The Court sharply divided in *Fullilove*, as it had in *Bakke*. The Chief Justice, joined by Justices Powell and White, concluded that Congress, because of its spending power, had a compelling interest in ensuring that grantees of the program would not engage in spending patterns that would perpetuate the effects of past discrimination. *Fullilove*, 448 U.S. at 473-80 (Burger, C.J., plurality opinion). Justice Powell, writing separately, also determined that, in enacting the statute, Congress sought to further the compelling interest of eradicating the continuing effects of past discrimination. *Id.* at 497-506 (Powell, J., concurring).

from minority-owned businesses.¹²³ Because the Employment Act provided an administrative oversight process that could be invoked to waive the ten percent requirement in specific cases, Chief Justice Burger determined that Congress designed the program to ensure that the preference would be awarded only to disadvantaged minority enterprises.¹²⁴

In upholding the constitutionality of the Employment Act, the plurality opinion specifically recognized Congress' power under section 5 of the fourteenth amendment "to enforce, by appropriate legislation," equal protection guarantees.¹²⁵ Traditionally, that power has been invoked only to prohibit the "perpetuation of prior purposeful discrimination."¹²⁶ In other words, Congress has the constitutional power to redress the effects of discrimination forbidden by the fourteenth amendment. In *Fullilove*, the Court found that Congress had ample evidence to support its conclusion that minority-owned businesses suffered discrimination in access to public contracting opportunities.¹²⁷ Therefore, the Court upheld the constitutionality of the program, reasoning that Congress could legislate "to ensure that those businesses were not denied equal opportunity to participate in federal grants to state and local governments."¹²⁸

Finally, in *Wygant v. Jackson Board of Education*,¹²⁹ the Court enunciated a three part test for evaluating governmental classifications based on race, which incorporated elements of the *Bakke* and *Fullilove* standards. In *Wygant*, several nonminority teachers who were laid off by the Jackson Board of Education challenged the race-based layoff, arguing that it violated the equal protection clause of the fourteenth amendment.¹³⁰ The Court

123. *Id.* at 451.

124. *Id.* at 482.

125. *Id.* at 476.

126. *Id.* at 476-77; see also *Katzenbach v. Morgan*, 348 U.S. 641, 651 ("Correctly viewed, section 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment.").

127. *Fullilove*, 448 U.S. at 476-77. Congress cited evidence that a nationwide history of past discrimination had reduced minority participation in federal construction grants. Specifically, Congress asserted that "in fiscal year 1976 less than 1% of all federal procurement was concluded with minority business enterprises, although minorities comprised 15-18% of the population." *Id.* at 459. Congress drew on its experience under § 8(a) of the Small Business Act of 1953, which had extended aid to minority businesses, emphasizing that it had ten years of experience with discrimination in the contracting business. *Id.* at 460. Moreover, Congress asserted that the intricacies of the bidding process, longstanding barriers impairing access by minority enterprises to public contracting opportunities, and direct discrimination were causing the disparity. *Id.* at 460-63.

128. *Id.* at 478.

129. 476 U.S. 267 (1986).

130. *Id.* at 273. *Wygant* involved a collective bargaining agreement between the Jackson, Mississippi Board of Education and a teacher's union. *Id.* at 270. The agreement provided

agreed with the nonminority teachers. First, the Court held that racial classifications must be justified by a compelling state purpose, and that the means chosen by the state to effectuate that purpose must be narrowly tailored.¹³¹ Next, the Court announced that generalized societal discrimination alone is insufficient to justify a racial classification; there must be convincing evidence of prior discrimination by the governmental unit involved before the use of race-based measures to remedy such discrimination is permissible.¹³² As the final part of the test, if a program is effected to remedy prior discrimination, the trial court must make a factual determination that there is sufficient evidence to justify the conclusion that remedial action is necessary.¹³³ Moreover, the Court rejected the lower court's reasoning that the racial preferences were permissible as an attempt to provide role models for minority students.¹³⁴ The Court held that this goal could not be classified as a compelling state interest justifying race-based classifications.¹³⁵

2. *Narrowly Tailored*

The second part of strict scrutiny analysis requires that racial classifications be narrowly tailored to achieve a compelling state interest.¹³⁶ In

that, if layoffs became necessary, teachers with the least seniority would be laid off first. *Id.* at 270-71. The agreement contained an important exception, however. The agreement provided that the Board would lay off a percentage of minority personnel no greater than the percentage of minorities employed by the school district at the time of the layoff. *Id.* at 270. In certain years, the bargain resulted in layoffs of nonminority teachers, while minority teachers with less seniority were retained. *Id.* at 272.

131. *Id.* at 274.

132. *Id.* at 274-76.

133. *Id.* at 277 ("Evidentiary support for the conclusion that remedial action is warranted becomes crucial when the remedial program is challenged in court by nonminority employees.").

134. *Id.* at 274-76.

135. *Id.* The court of appeals held that the role model theory was "sufficiently important" to justify the layoff provision. The court reasoned that because the percentage of minority teachers in the Jackson school system was less than the percentage of minority students, there was a need for more faculty role models. *Id.* at 274.

In rejecting the lower court's theory, Justice Powell noted that:

because the role model theory does not necessarily bear a relationship to the harm caused by prior discriminatory hiring practices, it actually could be used to escape the obligation to remedy such practices by justifying the small percentage of black teachers by reference to the small percentage of black students.

Id. at 276.

136. A number of Justices have described the required relationship between a classification and the government's underlying purposes differently at different times. *See, e.g.,* *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984) (classifications must be "necessary . . . to the accomplishment of their legitimate purpose") (quoting *McLaughlin v. Florida*, 379 U.S. 184, 196 (1964)); *Fullilove v. Klutznick*, 448 U.S. 448, 480 (1979) (opinion of Burger, C.J.) (classification must be

Croson, the Court identified two factors that are particularly significant in reviewing race-based classifications under the narrowly tailored prong. The first seeks to determine whether the governmental authority attempted to use alternative race-neutral remedies before resorting to race conscious measures.¹³⁷ Next, the Court questioned whether the racial preference is limited to those who have in fact suffered the disadvantage of discrimination.¹³⁸ The Court has identified other factors relevant to the narrowly tailored inquiry, such as the flexibility and planned duration of the remedy, and the effect of the classification on innocent third parties.¹³⁹ The Court considers these factors to ensure that the means chosen to remedy the discrimination, the racial classification, fits the compelling goal so closely that there is little or no possibility that the motive for the classification is illegitimate racial prejudice or stereotype.

Under the narrowly tailored prong, the Court traditionally has rejected the use of quotas and policies that rely on race alone. For example, in *Bakke*, the Court held unconstitutional an admissions policy that used race as the sole criterion in its admissions decisions.¹⁴⁰ By contrast, in *Fullilove*, even though the ten percent set aside constituted a quota, the Court upheld the program, emphasizing that the waiver provision made the program sufficiently flexible to ensure that race would only be taken into account where it furthered the government's compelling purpose.¹⁴¹ Looking at a third factor under the narrowly tailored prong, the *Fullilove* Court noted that the burden imposed on nonminorities was slight,¹⁴² and concluded that the program was narrowly tailored to its remedial purposes.¹⁴³

Croson further illustrates the Court's application of the narrowly tailored prong. Like the program in *Fullilove*, in *Croson*, Richmond's plan contained a waiver provision.¹⁴⁴ The *Croson* waiver, however, was granted only when

narrowly tailored to the achievement of the purposes); *id.* at 537 (Stevens, J., dissenting) ("Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification.").

137. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507-09 (1989); *see also Wygant*, 476 U.S. at 283 (plurality opinion); *Fullilove*, 448 U.S. at 463-67 (opinion of Burger, C.J.); *id.* at 511 (Powell, J., concurring).

138. *Croson*, 488 U.S. at 507-08; *id.* at 517 (Stevens, J., concurring); *Wygant*, 476 U.S. at 276 (plurality opinion); *Fullilove*, 448 U.S. at 480-82, 486-88 (opinion of Burger, C.J.); *id.* at 510 (Powell, J., concurring).

139. *Wygant*, 476 U.S. at 282-83 (plurality opinion); *id.* at 287 (O'Connor, J., concurring in part and concurring in the judgment); *Fullilove*, 448 U.S. at 514-15 (Powell, J., concurring).

140. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 315 (1977).

141. *Fullilove*, 448 U.S. at 487-88.

142. *Id.* at 487-89.

143. *Id.* at 492.

144. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 478 (1989). The waiver provision provided that

there were not enough minority contractors available to meet the thirty percent requirement.¹⁴⁵ Because the waiver provision in *Croson* focused solely on the availability of minority subcontractors, and not on whether the favored minorities were the victims of past discrimination, the Court found that the plan contained no nexus to its remedial purpose.¹⁴⁶ Thus, because the plan was not narrowly tailored to achieve the compelling governmental interest of remedying past discrimination, the Court held it unconstitutional.¹⁴⁷

B. West Michigan Broadcasting v. FCC: The Comparative Hearing Preference Survives its First Test

Interpreting the Supreme Court's pronouncements on equal protection, the United States Court of Appeals for the District of Columbia Circuit upheld the constitutionality of the FCC's minority preference in comparative hearings in *West Michigan Broadcasting Co. v. FCC*.¹⁴⁸ The D.C. Circuit relied primarily on *Bakke* and *Fullilove* in holding the Commission's policy constitutional.¹⁴⁹ The appellate court decided *West Michigan* in 1984, before the Supreme Court's decisions in *Wygant* and *Croson*; therefore, subsequent challenges to the FCC's policies questioned *West Michigan* in light of the Supreme Court's later opinions.¹⁵⁰

West Michigan arose when the Commission granted a construction permit to Waters Broadcasting Company in a comparative hearing proceeding.¹⁵¹ Waters was fully owned by a minority who pledged to assume responsibility for day to day management of the station.¹⁵² The West Michigan Broadcasting Company appealed, challenging the Commission's grant of merit to Waters based on his minority status.¹⁵³

No partial or complete waiver of the foregoing [30% set-aside] requirement shall be granted by the city other than in exceptional circumstances. To justify a waiver, it must be shown that every feasible attempt has been made to comply, and it must be demonstrated that sufficient, relevant, qualified Minority Business Enterprises . . . are unavailable or unwilling to participate in the contract to enable meeting the 30% MBE goal.

Id. at 478-79.

145. *Id.*

146. *Id.* at 508-09.

147. *Id.* at 509-11.

148. 735 F.2d 601 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1027 (1985).

149. *Id.* at 613-16.

150. See *infra* notes 160-62 and accompanying text.

151. *West Michigan*, 735 F.2d at 602.

152. *Id.* at 603.

153. *Id.*

In *West Michigan*, the court applied two distinct tests to determine whether the minority preference policy served a compelling government interest.¹⁵⁴ First, the court assessed whether the comparative merit policy was implemented to remedy past discrimination.¹⁵⁵ Relying on Congress' assertion that the underrepresentation of minorities in broadcasting was the result of past racial and ethnic discrimination,¹⁵⁶ the court found the FCC's policy constitutional under this test.¹⁵⁷

Under the second test, the *West Michigan* court, extrapolating from *Bakke*, concluded that broadcast diversity is a compelling interest in the same way that creating a diverse student body is a compelling governmental interest.¹⁵⁸ The court likened the FCC's comparative hearing preference to the type of admissions decision sanctioned by the Supreme Court in *Bakke*, a policy recognizing race as only one of several factors in selecting from among competing applicants.¹⁵⁹ Using this reasoning, the *West Michigan* court upheld the constitutionality of the Commission's comparative merit policy.¹⁶⁰

III. THE D.C. CIRCUIT'S INTERPRETATION OF EQUAL PROTECTION DOCTRINE AS APPLIED TO THE FCC'S MINORITY PREFERENCE POLICIES

Subsequent challenges to the FCC's minority preference policies in the United States Court of Appeals for the District of Columbia Circuit alleged that the United States Supreme Court's decisions in *Wygant v. Jackson Board of Education* and *City of Richmond v. J.A. Croson Co.* undermined the court of appeals' holding in *West Michigan Broadcasting Co. v. FCC*. The challenges centered around two FCC minority preference policies: the distress sale and the comparative hearing preference. In *Shurberg Broadcasting of Hartford, Inc. v. FCC*, a divided panel of the D.C. Circuit struck down the Commission's minority distress sale policy.¹⁶¹ In *Winter Park Communications, Inc. v. FCC*, however, a different three judge panel of the D.C. Circuit

154. *Id.* at 612-15.

155. *Id.* at 614.

156. *Id.* at 616; see also H.R. REP. NO. 765, 97th Cong., 2d Sess. 43, reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS 2237, 2281 (past inequities stemming from racial and ethnic discrimination lead to an underrepresentation of minorities in broadcasting).

157. 735 F.2d at 613-14.

158. *Id.* at 614-15.

159. *Id.* at 615.

160. *Id.*

161. *Shurberg Broadcasting of Hartford, Inc. v. FCC*, 876 F.2d 902 (D.C. Cir. 1989), *rev'd sub nom. Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997 (1990).

upheld the Commission's comparative hearing preference.¹⁶² The Supreme Court granted certiorari to each of these cases, and, in *Metro Broadcasting, Inc. v. FCC*, resolved the conflicting premises underlying the court of appeals' decisions.

A. *Shurberg Broadcasting of Hartford, Inc. v. FCC: The D.C. Circuit Assesses the Constitutionality of the FCC's Distress Sale Policy*

In *Shurberg*, a license renewal proceeding for a television station in Hartford, Connecticut resulted in a constitutional challenge to the Commission's distress sale policy.¹⁶³ The licensee of the television station, Faith Center, Inc., faced the possible loss of its license when Faith Center's renewal application was designated for hearing.¹⁶⁴ The Commission decided to investigate allegations that Faith Center had solicited funds over the air that were used for purposes other than those described in its broadcast.¹⁶⁵

Several months after receiving its hearing designation order, Faith Center petitioned the FCC for permission to assign its license under the distress sale policy.¹⁶⁶ The Commission granted Faith Center's request, but the proposed sale to a minority purchaser was never consummated.¹⁶⁷ Two years after its first request to invoke the distress sale policy, Faith Center made a second request to the Commission for permission to pursue a distress sale.¹⁶⁸ Again, the sale fell through.¹⁶⁹

Meanwhile, Shurberg Broadcasting of Hartford, Inc. tendered an application to the FCC for permission to build a television station in Hartford.¹⁷⁰ The Shurberg application was mutually exclusive with Faith Center's still-pending renewal application, however, meaning that the stations could not coexist.¹⁷¹ Faith Center reacted by again seeking Commission approval for a distress sale, this time to the Astroline Communications Company.¹⁷² Commission approval precluded Shurberg from receiving a construction permit to operate its proposed station. Therefore, Shurberg opposed the dis-

162. *Winter Park Communications, Inc. v. FCC*, 873 F.2d 347 (D.C. Cir. 1989), *aff'd sub nom. Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997 (1990).

163. *Shurberg*, 876 F.2d at 905.

164. *Id.* at 904.

165. *Id.* at 904.

166. *Id.* at 905.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.* Applicants are treated as mutually exclusive when they file for the use of electronically interfering facilities.

172. *Id.*

tress sale on numerous grounds, including the contention that the distress sale policy violated Shurberg's constitutional right to equal protection.¹⁷³

Rejecting Shurberg's constitutional challenge as "without merit," the FCC approved the distress sale of the station to Astroline.¹⁷⁴ In support of its distress sale policy, the Commission relied on the diversity rationale.¹⁷⁵ The Commission also noted that Congress expressly required incorporation of significant preferences for minority applicants into the FCC's licensing scheme.¹⁷⁶

Shurberg sought judicial review of the Commission's order in the D.C. Circuit.¹⁷⁷ The court delayed disposition of the appeal, however, by granting a Commission request to remand the record for further consideration in light of a separate, non-adjudicatory inquiry at the FCC.¹⁷⁸ This inquiry was designed to explore the validity of the Commission's minority preference policies, including the distress sale.¹⁷⁹ Prior to completion of the inquiry, however, Congress prohibited the FCC from expending any monies to investigate the Commission's minority preference policies.¹⁸⁰ Consequently, the FCC closed the inquiry and reaffirmed its original order permitting the license assignment to Astroline.¹⁸¹

173. *Id.* at 903.

174. *Id.* at 906.

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.* at 906-07. That inquiry was a result of the D.C. Circuit's decision in *Steele v. FCC*, 770 F.2d 1192 (D.C. Cir. 1985). The court in *Steele* held that the FCC lacks statutory authority to grant enhancement credits in comparative license proceedings to female owners. In a per curiam opinion, a majority of the *Steele* panel likened the comparative preferences to a social engineering experiment. *Id.* at 1198.

Following the *Steele* decision, the FCC petitioned for rehearing en banc. In its brief, however, the Commission admitted that its existing racial and gender preferences violated equal protection standards. Supplemental Brief for the FCC at 13-15, *Steele v. FCC*, 770 F.2d 1192 (D.C. Cir. 1985) (No. 84-1176). Moreover, the Commission noted that recent Supreme Court decisions, namely *Bakke* and *Fullilove*, compelled a reevaluation of the minority preference schemes. *Id.* The Commission asserted that, under the Supreme Court's new guidelines, racial classifications could not be based on the mere assumption that integrated minority owners would result in increased minority-oriented programming. *Id.* Therefore, the Commission requested that the court of appeals allow the agency to conduct a comprehensive study to determine whether a nexus truly does exist between minority ownership and program diversity. *Id.* The D.C. Circuit approved the request, and the FCC began an inquiry to gather the empirical data necessary to support its racial and gender preference schemes. Notice of Inquiry in MM Docket No. 86-484, 1 F.C.C. Rcd 1315 (1986), *modified*, 2 F.C.C. Rcd 2377.

179. See Notice of Inquiry in MM Docket No. 86-484, 1 F.C.C. Rcd at 1315.

180. *Shurberg Broadcasting of Hartford, Inc. v. FCC*, 876 F.2d 902, 907 (D.C. Cir. 1989), *rev'd sub nom. Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997 (1990); see also *supra* notes 16-17 and accompanying text (discussing Congress' appropriations riders).

181. *Shurberg*, 876 F.2d at 907.

On appeal, a divided court held the distress sale policy unconstitutional.¹⁸² In a per curiam opinion, the panel majority stated that the policy deprived Shurberg of its fifth amendment equal protection rights because the program was neither narrowly tailored to remedy past discrimination nor to promote programming diversity.¹⁸³ The court emphasized that the distress sale policy unduly burdened nonminorities and was not reasonably related to achieving the interests it sought to vindicate.¹⁸⁴

182. *Id.* at 934.

183. *Id.* The court first evaluated the distress sale policy as a means to remedy past discrimination. Applying *Croson*, the District of Columbia Circuit stated that the Supreme Court's decision permitted Congress to impose affirmative action programs on an industry only when Congress could prove actual damage resulting from discrimination in that particular industry. *Id.* at 915 (demanding a "quantum of particularized evidence of the effects of societal discrimination in the relevant industry"). The *Shurberg* court cited statements by Congress which note that the underrepresentation of minorities in broadcasting "is merely part of the larger phenomenon of minority underrepresentation in certain professions and occupations." *Id.* at 914. Moreover, the court noted that while minority entry into broadcasting may be "hindered by difficulties in obtaining financing, . . . minorities' lack of money is not linked to specific discriminatory practices." *Id.* at 914 n.15. Judge Silberman, writing for the panel majority, hypothesized that the underrepresentation of minorities in the media might be explained by the notion that minorities are disproportionately attracted to other industries. *Id.* at 915.

The court of appeals also examined whether the FCC's diversity rationale could be classified as a compelling government interest. *Id.* at 919. While acknowledging that the Supreme Court categorized racial diversity as a compelling government interest in *Bakke*, Judge Silberman noted that only one Supreme Court Justice had actually proffered this opinion. *Id.* The *Shurberg* court also indicated that in *Croson*, a plurality of the Supreme Court stated that based on classifications race should be used strictly as remedial measures. *Id.* at 919 (quoting *Croson*, 488 U.S. 469, 493 (1989)). Judge Silberman questioned whether there is a compelling interest in increasing the diversity of programming, deeming it an "Orwellian notion" to suggest that the government has a role in educating the general public through regulation of program content in the media. *Id.* at 920 n.27.

Chief Judge Wald, dissenting, accepted the conclusion that bringing different perspectives to listening audiences was of sufficient import to justify regulations favoring minority applicants. *Id.* at 935 (Wald, J., dissenting). Moreover, Chief Judge Wald distinguished *Croson*, indicating that the restrictions placed on state and local affirmative action programs could not be easily transferred to programs supported by Congress. *Id.*

184. *Id.* at 934. Judge Silberman noted that in carrying out the distress sale policy, the FCC did not adjust the degree of preference to the buyer's actual past disadvantage or discrimination. *Id.* at 916. Judge Silberman also emphasized that the distress sale policy overly burdened nonminority groups. The court recognized that Mr. Shurberg was deprived of "a unique opportunity to own a broadcasting station, solely because of his race." *Id.* at 917.

The court denied a rehearing en banc. *Id.* at 958. In the opinion denying a rehearing, Judge MacKinnon relied on *Croson* to conclude that a racial preference can only be upheld if it is but one of several factors considered in awarding a broadcast license. *Id.* at 954. Judge MacKinnon wrote that "any racial or group preference is inherently suspect," and "must be subject to close and careful scrutiny and can only be upheld to justify an award to promote programming diversity if it is one of several factors that entered into the decision." *Id.*

B. Winter Park Communications, Inc. v. FCC: *The D.C. Circuit Looks at the FCC's Comparative Hearing Preference*

Three weeks after the *Shurberg* decision, the D.C. Circuit issued its opinion in *Winter Park Communications, Inc. v. FCC*.¹⁸⁵ In *Winter Park*, three applicants were competing for a new UHF television channel assigned to Orlando, Florida.¹⁸⁶ The applications were designated for a comparative hearing to evaluate the relative qualifications of each applicant.¹⁸⁷ The administrative law judge (ALJ) disqualified one of the applicants, Rainbow Broadcasting, for misrepresentations in its proposal, and awarded the license to Metro Broadcasting, Inc.¹⁸⁸

The FCC's Review Board¹⁸⁹ reversed the ALJ's decision and awarded the permit to Rainbow.¹⁹⁰ The Board determined that Rainbow was a qualified applicant and then compared all three applicants.¹⁹¹ The Board concluded that Rainbow was entitled to a substantial preference because it was ninety percent owned by minorities who pledged to work at the station full time.¹⁹²

Metro Broadcasting and Winter Park Communications appealed, alleging that the comparative hearing preference policy violated the fifth amendment. A divided court of appeals affirmed the Commission's decision upholding the policy.¹⁹³ The majority held that *West Michigan* resolved the question of the policy's constitutionality.¹⁹⁴ The court noted that the enhancement credit for minority participation easily passed constitutional muster because the Commission considered race as but one factor in a competitive multi-factor selection system.¹⁹⁵ Moreover, the court emphasized that Congress recognized that the underrepresentation of minorities in broadcasting

185. 873 F.2d 347 (D.C. Cir. 1989), *aff'd sub nom.* Metro Broadcasting, Inc. v. FCC, 110 S. Ct. 2997 (1990).

186. *Id.* at 349.

187. *Id.* at 350.

188. *Id.*

189. For a discussion of the FCC's procedures for review, see *supra* note 58.

190. 873 F.2d at 350.

191. *Id.*

192. *Id.*

193. *Id.* at 353.

194. *Id.* Because *West Michigan* was decided before *Croson*, the *Winter Park* court was forced to determine the effect of the Supreme Court's decision in *Croson*. The court of appeals concluded that *Croson* did not tamper with the constitutional framework underlying the *West Michigan* decision. *Id.* Distinguishing the FCC's policy from the minority set-aside policy involved in *Croson*, the court of appeals noted that the enhancement credits given to minorities in the comparative hearing process were not inflexible racial quotas. *Id.* at 354.

195. *Id.* at 353.

stemmed from racial discrimination; therefore, the court deemed the enhancement a valid remedial measure.¹⁹⁶

Thus, the D.C. Circuit invalidated the minority distress sale policy and upheld the comparative preference policy. The court apparently distinguished the two policies on the grounds that, in *Winter Park*, minority preference was but a plus factor in awarding a broadcast license, while in *Shurberg*, minority preference was the absolute determinative factor. To resolve the underlying constitutional questions, the United States Supreme Court granted certiorari and consolidated the cases for decision in *Metro Broadcasting, Inc. v. FCC*.

IV. *METRO BROADCASTING, INC. v. FCC*: SETTling THE CONTROVERSY OVER THE CONSTITUTIONALITY OF RACIAL PREFERENCES EMPLOYED BY THE FEDERAL GOVERNMENT

In *Metro Broadcasting, Inc. v. FCC*,¹⁹⁷ the United States Supreme Court, in a decision written by Justice Brennan, upheld the constitutionality of both the distress sale policy and the comparative hearing preference.¹⁹⁸ The majority refused to apply strict scrutiny to the race-based classifications at issue. Instead, the Court applied an intermediate test to race conscious measures mandated by Congress.¹⁹⁹ Rather than analyzing whether the FCC's racial classifications were "narrowly tailored" to achieve a "compelling" government interest, Justice Brennan concluded that the Court would uphold "benign racial classifications" that serve "important" governmental

196. *Id.*

197. 110 S. Ct. 2997 (1990).

198. *Id.* at 3002. Justices White, Marshall, Blackmun, and Stevens joined in the majority opinion. Justice Stevens also filed a separate concurrence, voicing his approval of the adoption of a forward looking level of scrutiny for racial classifications. *Id.* at 3028 (Stevens, J., concurring). The history of Justice Stevens' approach to affirmative action is an interesting one. In 1978, he voted against the preferential admissions policy at issue in *Bakke*. In 1980, he strongly dissented from the decision in *Fullilove* upholding the constitutionality of congressionally mandated set-asides on federally funded construction projects. *Fullilove v. Klutznick*, 448 U.S. 448, 553-54 (1980) (Stevens, J., dissenting). As of that date, Justice Stevens had opposed racial preferences of any sort. More recently, however, Justice Stevens has emerged as one of the strongest supporters of employment quotas. In redefining his position, Justice Stevens has emphasized what he has termed forward looking justifications. For example, he dissented from the 1986 decision in *Wygant*, arguing that the educational benefits of an integrated faculty could justify racial preference to speed the integration. *Wygant v. Jackson Board of Educ.*, 476 U.S. 267, 313-15 (1986) (Stevens, J., dissenting). Although he reiterated that reasoning in *Croson*, he sided with the majority because of his belief that minority set-asides are not socially useful. *City of Richmond v. J.A. Croson Co.*, 448 U.S. 469, 511-17 (1989) (Stevens, J., concurring in part and concurring in judgment).

199. *Metro*, 110 S. Ct. at 3008.

objectives and that are "substantially" related to the achievement of those objectives.²⁰⁰ While Justice Brennan's opinion does not explain why the majority classified the minority preference policies as "benign," Supreme Court precedent indicates that benign measures "essentially involve a choice made by dominant racial groups to disadvantage themselves," and are employed for the asserted purpose of aiding a minority.²⁰¹

A. The Majority Rejects the Strict Scrutiny Test for Congressionally Established Racial Classifications

The majority adopted a two part test for analyzing racial classifications employed by Congress: (1) the measure must serve an important governmental objective and (2) the measure must be substantially related to the achievement of that objective.²⁰² The Court's reasoning appears to contradict its holding in *City of Richmond v. J.A. Croson Co.*²⁰³ In *Croson*, a majority of the Court agreed that strict scrutiny applies to all racial classifications, even "remedial" or "benign" ones.²⁰⁴ In adopting this lower level of scrutiny, the *Metro* Court distinguished *Croson*, reasoning that *Croson* did not prescribe the level of scrutiny to be applied to racial classifications employed by Congress.²⁰⁵

Justice Brennan based this conclusion on the Court's holding in *Fullilove v. Klutznick*.²⁰⁶ Specifically, Justice Brennan pointed to Chief Justice Burger's language in *Fullilove* acknowledging that Congress has the power to enforce the fourteenth amendment's equal protection guarantees.²⁰⁷ Implying that the FCC adopted the minority preference programs at Congress' direction, Justice Brennan concluded that the Court should defer to the competence of the legislature and uphold the constitutionality of the programs.²⁰⁸

Justice Brennan also used *Fullilove* to support the majority's adoption of a lower level of scrutiny, reasoning that three members of the *Fullilove* Court

200. *Id.*

201. *See, e.g., Croson*, 448 U.S. at 495.

202. *Metro*, 110 S. Ct. at 3008-09.

203. 488 U.S. 469 (1989).

204. *Id.* at 493.

205. *Metro*, 110 S. Ct. at 3008-09.

206. *Id.* at 3008 (citing *Fullilove v. Klutznick*, 448 U.S. 448 (1980)).

207. *Id.* ("[W]e are 'bound to approach our task with appropriate deference to the Congress, a co-equal branch charged by the Constitution with the power to 'provide for the . . . general Welfare of the United States' and 'to enforce, by appropriate legislation,' the equal protection guarantees of the Fourteenth Amendment.'" (quoting *Fullilove*, 448 U.S. at 472 (quoting U.S. CONST. art. I, § 8, cl.1))).

208. *Id.* at 3008-09.

would have applied an intermediate level of scrutiny to the congressional measure at issue, while three other members of the *Fullilove* Court focused on whether the legislation's objectives were within Congress' power.²⁰⁹ Justice Brennan interpreted this precedent to mean that a congressionally approved preference need not be subject to strict scrutiny.²¹⁰

Deferring completely to Congress, Justice Brennan announced that benign race-based measures mandated by Congress are constitutional if they serve an important governmental objective, and need not be aimed at remedying past discrimination.²¹¹ Moreover, Justice Brennan suggested that Congress need not make more than a generalized assertion of societal discrimination to support its racial classifications.²¹²

1. Programming Diversity as an "Important" Governmental Objective

Applying the first prong of the test to the FCC's minority preference policies, the Court found that programming diversity is an important governmental objective and, therefore, a valid constitutional basis for the policies. The majority reasoned that by virtue of the limited number of broadcast licenses available, the government was justified in putting restraints on licensees.²¹³ The majority compared the government's interest in creating a diversity of views and information on the airwaves to the interest in creating a diverse student body identified in *Regents of the University of California v. Bakke*, and found the objectives to be similar.²¹⁴ Based on this analogy, the Court concluded that the interest in enhancing broadcast diversity was, at the very least, an important governmental objective.²¹⁵

209. *Id.* at 3008. Justice Brennan asserted that three members of the *Fullilove* Court "would have upheld benign racial classifications that 'serve important governmental objectives and are substantially related to achievement of those objectives.'" *Id.* (quoting *Fullilove*, 448 U.S. at 519 (Marshall, J., concurring in judgment)). Justice Brennan also noted that three members of the *Fullilove* Court "inquired 'whether the objectives of th[e] legislation are within the power of Congress' and 'whether the limited use of racial and ethnic criteria . . . is a constitutionally permissible means for achieving the congressional objectives.'" *Id.* (quoting *Fullilove*, 448 U.S. at 473 (opinion of Burger, C.J.)(emphasis omitted)).

210. *Id.* at 3008-09.

211. *Id.*

212. *Id.* at 3009.

213. *Id.* at 3010. ("[I]t is axiomatic that broadcasting may be regulated in light of the rights of the viewing and listening audience . . .").

214. *Id.* at 3010-11 "Just as a 'diverse student body' contributing to 'a robust exchange of ideas' is a 'constitutionally permissible goal' on which a race-conscious university admissions program may be predicated, the diversity of views and information on the airwaves serves important First Amendment values." *Id.* at 3010 (quoting *Regents of the Univ. of Cal.*, 438 U.S. 265, 311-13 (1978)).

215. *Id.* at 3010-11.

2. *The Majority Finds the FCC's Policies "Substantially Related" to Achieving Programming Diversity*

Under the second prong of its intermediate test, the Court analyzed the relationship between expanded minority ownership and greater broadcast diversity to determine whether the FCC's policies were substantially related to the important governmental objective of achieving programming diversity.²¹⁶ Deferring to the expertise of Congress and the Commission, the majority found no fault with the assumption that increased minority ownership of broadcast stations would result in increased minority programming.²¹⁷

The Court found the policies substantially related to achieving programming diversity in other relevant aspects as well.²¹⁸ Specifically, Justice Brennan concluded that the policies placed no impermissible burdens on nonminorities.²¹⁹ The majority emphasized that third parties could be called upon to bear some of the burden of eradicating racial discrimination, provided that the burden was not undue.²²⁰ Because the applicants in *Metro* had no settled expectation that the FCC would grant their applications without considering public interest factors such as minority ownership, the majority found that the programs placed no undue burden on nonminorities.²²¹

B. *The Dissent Rejects the Application of an Intermediate Level of Scrutiny*

The dissent sharply criticized the majority's use of a lesser equal protection standard. Justice O'Connor, writing for the dissent, asserted that the Court had no constitutional basis for applying an intermediate level of scrutiny to race-based measures employed by Congress.²²² Therefore, Justice O'Connor argued that the FCC's policies should be analyzed under strict

216. *Id.* at 3011.

217. *Id.* ("[W]e are required to give 'great weight to the decisions of Congress and the experience of the Commission.'") (quoting *Columbia Broadcasting Sys. v. Democratic Nat'l Comm.*, 412 U.S. 94, 102 (1973)).

218. *Id.* at 3019.

219. *Id.* at 3025.

220. *Id.* at 3025-26.

221. *Id.* at 3026-27. While distress sales have been categorized as a 100 percent set-aside program, Justice Brennan reasoned that the policy is not unduly burdensome because Nonminority firms are free to compete for the vast remainder of license opportunities available in a market that contains over 11,000 broadcast properties. Nonminorities can apply for a new station, buy an existing station, file a competing application against a renewal application of an existing station, or seek financial participation in enterprises that qualify for distress sale treatment.

Id. at 3027.

222. *Id.* at 3028-29 (O'Connor, J., dissenting). The Chief Justice, Justice Scalia, and Justice Kennedy joined in the dissent.

scrutiny to determine whether they are narrowly tailored to achieve a compelling government interest.²²³

The dissent emphasized that no lower level of scrutiny should apply to the federal government because “[t]he Constitution’s guarantee of equal protection binds the Federal Government as it does the states.”²²⁴ Justice O’Connor indicated that the Court has repeatedly held the reach of the equal protection guarantee of the fifth amendment to be coextensive with that of the fourteenth.²²⁵ Moreover, the dissent rejected the majority’s reliance on *Fullilove* to support its application of intermediate scrutiny.²²⁶ The dissent distinguished *Fullilove* as applicable only to Congressional measures designed to remedy identified past discrimination.²²⁷

The dissent concluded that, under the strict scrutiny standard, the FCC’s minority preference policies would not pass constitutional muster.²²⁸ According to Justice O’Connor, broadcast diversity is not a compelling governmental interest, and therefore does not satisfy the first prong of the strict scrutiny test.²²⁹ Justice O’Connor noted that modern equal protection doctrine has recognized only one such interest: remedying the effects of past discrimination.²³⁰ Because the FCC’s policies were not designed as remedial measures, the dissent concluded, they serve no compelling governmental purpose.²³¹

Further, under the second prong of the strict scrutiny test, the dissent concluded that the policies challenged were not narrowly tailored. Justice

223. *Id.* at 3029, 3032. Justice O’Connor expressed the concern that “[a]bsent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are ‘benign’ or ‘remedial’ and what classifications are in fact motivated by racial inferiority or simple racial politics.” *Id.* at 3032 (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 448, 493 (1989)).

224. *Id.* at 3030.

225. *Id.*

226. *Id.* Justice O’Connor stated that the Court applied a different form of review in *Fullilove* only because Congress was exercising its powers under section 5 of the fourteenth amendment. *Id.*

227. *Id.* at 3031. In *Fullilove*, Congress identified discriminatory practices within the construction industry. In *Metro*, Justice O’Connor emphasized that the FCC had no such remedial purpose for its race based classifications. *Id.*

228. *Id.* at 3044.

229. *Id.* at 3036.

The FCC’s extension of the asserted interest in diversity of views . . . presents . . . an unsettled First Amendment issue. . . . Although we have approved limited measures designed to increase information and views generally, the Court has never upheld a broadcasting measure designed to amplify a distinct set of views or the views of a particular class of speakers.

Id.

230. *Id.* at 3034.

231. *Id.* at 3034-35.

O'Connor emphasized that the interest in increasing the diversity of broadcast viewpoints would justify discrimination against the members of any group whose viewpoint was deemed sufficiently covered in the broadcast spectrum.²³² Moreover, the dissent questioned how the FCC could identify a black viewpoint, an Arab viewpoint, or any other viewpoint.²³³ The dissent sharply criticized the majority's reasoning that an applicant's race would likely indicate his particular perspective.²³⁴ Justice O'Connor noted that the evidence provided no support for the proposition that a broadcast owner's race is related to his station's programming.²³⁵ The dissent also pointed out that market forces, rather than the owner's race, largely shape what goes on the air.²³⁶ Therefore, Justice O'Connor concluded that the Commission should look to proposed programming rather than racial background when assessing which applicants promise to best serve the public interest.²³⁷

Justice O'Connor also maintained that the FCC programs were unduly burdensome because they denied nonminorities the right to an exceptionally valuable property on the basis of race.²³⁸ The dissent characterized the distress sale as a one hundred percent set aside program, and asserted that race was the dispositive factor in a substantial percentage of comparative proceedings.²³⁹ Therefore, the dissent concluded, the policies failed to satisfy the narrowly tailored prong.²⁴⁰

In a separate dissent joined by Justice Scalia, Justice Kennedy likened the *Metro* decision to the Court's decision in *Plessy v. Ferguson*. Justice Kennedy reasoned that the Court's characterization of the FCC's policies as "benign racial conscious measures" was reminiscent of *Plessy's* "separate but equal" doctrine.²⁴¹ Justice Kennedy asserted that strict scrutiny is the only test the Court can apply to satisfy the constitutional guarantee of equal protection.²⁴² Justice Kennedy sharply criticized the majority for concluding that "increas[ing] the listening pleasure of media audiences" justified discriminating on the basis of race.²⁴³

232. *Id.* at 3036-38.

233. *Id.* at 3035.

234. *Id.* at 3035-37.

235. *Id.* at 3037-38.

236. *Id.* at 3037-39.

237. *Id.* at 3039-40.

238. *Id.* at 3043.

239. *Id.*

240. *Id.* at 3044.

241. *Id.* (Kennedy and Scalia, JJ., dissenting).

242. *Id.* at 3045.

243. *Id.* at 3044.

V. THE SUPREME COURT'S REJECTION OF STRICT SCRUTINY
ANALYSIS: AN IMPROPER INTERPRETATION OF
FUNDAMENTAL EQUAL PROTECTION PRINCIPLES

A. *A Critical Assessment of the Court's Opinions*

The Court's decision in *Metro Broadcasting, Inc. v. FCC* has set a dangerous precedent for justifying the use of race-based classifications. Whereas in previous cases the Court subjected any program that discriminated on the basis of race to strict scrutiny,²⁴⁴ in *Metro*, the Court declined to apply such scrutiny, declaring that discrimination is constitutional, as long as it serves some "important" governmental interest.²⁴⁵ In *Metro*, "increas[ing] the listening pleasure of media audiences" was held a sufficient governmental interest to justify discrimination.²⁴⁶ Moreover, the majority abandoned the need for tying racial classifications to the effects of past discrimination.²⁴⁷

1. *The Majority's Lack of a Constitutional Basis for Applying an Intermediate Level of Scrutiny*

Prior to deciding *Metro*, the Court, in *City of Richmond v. J.A. Croson Co.*,²⁴⁸ extensively discussed the level of scrutiny to be applied to race conscious measures, following the precedents set forth in *Regents of the University of California v. Bakke*,²⁴⁹ *Fullilove v. Klutznick*,²⁵⁰ and *Wygant v. Jackson Board of Education*.²⁵¹ In those opinions, the Court explained that strict scrutiny is the only test to be applied to classifications based on race.²⁵² The Court's opinions recognized that race based classifications must be strictly reviewed because at the same time a racial classification helps one group of citizens, it denies constitutional protection to another. Therefore, the Court held that race-conscious measures should be used only when they are necessary to remedy the effects of specific past discrimination.²⁵³ The Court's logic was sound; when race-based classifications are used to correct identified discrimination, the classifications implicitly balance the equal protection of one group against another. While race based measures may result in one class receiving favored treatment, that favored treatment is designed

244. See *supra* notes 97-102 and accompanying text.

245. *Metro*, 110 S. Ct. at 3009.

246. *Id.* at 3044 (Kennedy, J., dissenting).

247. *Id.* at 3008-09.

248. 488 U.S. 469 (1989).

249. 438 U.S. 265 (1978).

250. 448 U.S. 448 (1980).

251. 476 U.S. 267 (1986).

252. See, e.g., *Croson*, 488 U.S. at 493-95.

253. *Id.*

to equalize discriminatory treatment. Justice Brennan's relaxed scrutiny in *Metro* means that for one group, the balance will be tilted.

Surprisingly, Justice Brennan's opinion discarded strict scrutiny for an intermediate test solely because the FCC's policies had congressional approval.²⁵⁴ Typically, when the Court is asked to pass on the constitutionality of legislation, it does so delicately.²⁵⁵ Although Congress is a co-equal branch of the federal government, its actions are not immune from judicial scrutiny. In fact, the Court has never hesitated to invoke its authority under the Constitution when it has determined that Congress has overstepped the bounds of its constitutional power.²⁵⁶ In *Metro*, Justice Brennan deferred to the judgment of Congress on a constitutional question. While the majority was willing to defer to Congress regarding a racial classification that adversely affects nonminorities, it is doubtful whether the same deference would be readily forthcoming should Congress decide to employ a program that the Court suspected would adversely affect minorities.²⁵⁷

Justice Brennan's application of an intermediate level of scrutiny is closer to a politically influenced deference to Congress than a proper interpretation of precedent. An analysis of the relevant Supreme Court precedent bolsters this conclusion. The *Metro* majority's reliance on *Fullilove* to support the adoption of an intermediate level of scrutiny is misplaced. In *Fullilove*, Chief Justice Burger used neither strict scrutiny nor intermediate scrutiny in evaluating the program at issue. Instead, the Court looked at whether the objectives of the legislation were within the power of Congress, and whether the limited use of racial criteria was permissible within the constraints of the due process clause.²⁵⁸ The Court did note, however, that the program in *Fullilove* would survive strict scrutiny,²⁵⁹ and reiterated that racial classifications call for strict scrutiny.²⁶⁰ Moreover, at the time the Court decided

254. *Metro*, 110 S. Ct. at 3008 ("It is of overriding significance in these cases that the FCC's minority ownership programs have been specifically approved—indeed, mandated—by Congress.").

255. See *Fullilove*, 448 U.S. at 472; *Blodgett v. Holden*, 475 U.S. 142, 148 (1972) (opinion of Holmes, J.).

256. See, e.g., *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 103 (1973) (holding that broadcasters were not obligated to accept paid advertisements from "responsible" individuals and groups because regulation of program content is intolerable under the first amendment).

257. Also surprising is the majority's deference to a Congressional "mandate" that has not been codified. Congress' only expression of approval came in the form of a rider attached to the FCC appropriations for 1988 and 1989. See *supra* notes 16-17. The FCC's minority preference policies are just that, FCC policies, and not legislation.

258. *Fullilove*, 448 U.S. at 473.

259. *Id.* at 472-73.

260. *Id.*

Fullilove, a majority of the Justices had not yet decided which level of scrutiny to apply to "reverse" or "majority" discrimination cases.²⁶¹ That question was clearly resolved in *Croson*, when a majority of the Court finally agreed that strict scrutiny applies to all racial classifications, even "remedial" or "benign" ones.²⁶²

Thus, the *Metro* Court's decision was a radical departure from modern equal protection doctrine. First, Justice Brennan reasoned that *Fullilove* required the Court to defer to Congress.²⁶³ Justice Brennan's opinion, however, ignores the fact that the *Fullilove* decision turned on Congress' finding that the set aside program employed was necessary to remedy the effects of past discrimination.²⁶⁴ The FCC has never asserted that it sought to remedy past discrimination through its minority preference policies.²⁶⁵ In fact, Congress has not specifically mandated that the Commission maintain a policy of granting preferences to minority applicants in comparative license proceedings in order to remedy prior discrimination. The only relevant Congressional action is the enactment of appropriations riders directing that the status quo be maintained with respect to the Commission's policies.²⁶⁶ Thus, it cannot be said that Congress has, through appropriate statutory language, made an authoritative determination finding a compelling need to rectify the effects of discrimination in the broadcasting industry.²⁶⁷

In addition to *Fullilove*, Justice Brennan cited *Croson* as support for adopting an intermediate level of scrutiny for affirmative action programs sanctioned by Congress.²⁶⁸ In *Croson*, the Court focused on racial classifications implemented not by Congress, but by a municipality. Moreover, while *Croson* implied that section 5 of the fourteenth amendment permits Congress more latitude than the states to use racial classifications,²⁶⁹ the *Croson* Court referred only to programs designed to remedy the effects of past discrimination. Because section 5 gives Congress the power to enforce the antidiscriminatory provisions of the fourteenth amendment, it logically follows that Congress also has the power to redress the effects of discrimination that the

261. See *supra* notes 121-28 and accompanying text.

262. *Croson*, 488 U.S. at 493.

263. *Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997, 3008-09 (1990).

264. See *supra* notes 121-28 and accompanying text.

265. The FCC has asserted only the diversity principle as justification for its policies instituting minority preferences. See *supra* notes 81-90 and accompanying text.

266. See *supra* note 16.

267. In fact, Congress can point to no identified discrimination in the broadcasting arena. See *supra* note 156 and accompanying text.

268. *Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997, 3009-10 (1990).

269. *Croson*, 488 U.S. at 489-91.

amendment forbids.²⁷⁰ While Congress is explicitly authorized under section 5 to enforce the fourteenth amendment's antidiscrimination norms, nowhere does the Constitution explicitly empower Congress to promote broadcasting diversity. Thus, Congressional approval adds little to the constitutional analysis of a racial classification designed to increase the variety of programs available to radio and television audiences.²⁷¹

2. *Broadcast Diversity is Not an "Important" Governmental Objective*

The majority's argument that promoting broadcasting diversity justifies the use of racial classifications also holds little weight. As Justice Scalia pointed out in his concurrence in *Croson*, "discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of a democratic society."²⁷² The *Metro* dissent correctly asserts that enhancing the listening pleasure of our nation's audiences is hardly just cause for sanctioning discrimination.²⁷³ Even the argument that these policies are necessary to create programming diversity rings hollow for several reasons. First, neither Congress nor the Commission has offered empirical proof of a nexus between minority ownership and minority programming.²⁷⁴ Inherent

270. See *supra* notes 125-28 and accompanying text.

271. Moreover, neither the structural guarantees of the Constitution nor the express grant of "unique remedial powers" under section 5 of the fourteenth amendment can eliminate the need for careful judicial scrutiny of any program adopted by the federal government that classifies individuals according to their race.

272. *Croson*, 488 U.S. at 521 (Scalia, J., concurring in the judgment) (quoting A. BICKEL, *THE MORALITY OF CONSENT* 133 (1975)).

273. *Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997, 3044 (1990).

274. See *supra* note 81 and accompanying text. The majority cites a study by the Congressional Research Service as empirical evidence of the nexus. *Metro*, 110 S. Ct. at 3017 n.31. This study was based on data from approximately 9000 responses to an FCC survey of about 11,000 American radio and television stations. CONGRESSIONAL RESEARCH SERVICE, *MINORITY BROADCAST STATION OWNERSHIP AND BROADCAST PROGRAMMING: IS THERE A NEXUS?* (June 29, 1988) [hereinafter CRS Report]. The survey first asked station owners what percentage of the ownership interest in their station was held by women or members of specific minority groups. It then posed questions concerning programming conduct; specifically, it asked whether programming was directed to or provided special services for any of nine listed groups, including specific minorities, women, children, and senior citizens. Respondents were asked to state whether the targeting or format was for 1-19 hours per week or for more than 20 hours per week.

The CRS found some correlation between minority ownership and "audience-targeted programming." Whereas only 20 percent of stations without any black ownership responded that they engage in "black programming," 65 percent of stations with black ownership said that they did so. *Id.* at 13. For Hispanic ownership and Hispanic programming, the corresponding figures were 10 percent and 59 percent.

Judge Stephen Williams provided an insightful analysis of the CRS survey in his *Winter Park* opinion. Judge Williams noted that there was a methodological flaw in the survey. *Winter Park Communications, Inc. v. FCC*, 873 F.2d 347, 359 (D.C. Cir. 1989) (Williams, J.,

in the Court's assumption that there exists a causal link between ownership and programming is a stereotype that does minorities a great disservice. As Justice Powell aptly noted in *Bakke*, racial classifications carry a danger of stigmatic harm.²⁷⁵ The FCC's minority preference policies reinforce the stereotype that a person's race dictates the type of music he listens to or the programs he watches on television. In any event, the majority's opinion is flawed because it fails to recognize the simple fact that it is the market that dictates media programming, not the station's owner.²⁷⁶

Second, even if it can be shown that minority ownership leads to minority programming, it is questionable whether the United States is so lacking in diverse programming as to render using racial classifications to achieve this goal constitutional.²⁷⁷ The FCC itself has recognized that there is an adequate diversity of programming in the United States, if not an overabundance.²⁷⁸ Because there is likely no real need in the market to enhance

concurring in part and dissenting in part). Specifically, the designers made no effort to adjust for possible differences in the racial composition of the various station owners' potential audiences. *Id.* Judge Williams asserted that this flaw made it "impossible to examine the role of market demand as a force behind programming decisions." *Id.* For instance, "Hispanic-targeting" is likely to be more profitable in Miami than in Minneapolis. Thus, Judge Williams concluded, "if specific minorities are more likely to own stations in areas where minorities are more numerous (as seems likely), the difference in targeting, which the Report hesitantly attributes to the owners' racial characteristics, may be due simply to their rational responses to demand." *Id.* Judge Williams went on to cite the CRS Report itself, which acknowledged that it "would be difficult to determine to what degree station programming strategies are market driven rather than the results of minority ownership interests." *Id.* (quoting CRS Report at 3).

Judge Williams also asserted that the survey's failure to define "minority targeted programming was far more critical than this methodological flaw, stating, "[A]s the survey omitted that vital step, it and the Report prove only that black owners are more likely to say that they target black audiences, Hispanic owners that they target Hispanic audiences, and so on." *Id.* Had Congress identified minority-targeted programming, the entire exercise would "almost necessarily have constituted the crudest type of racial stereotyping." *Id.*

275. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 269 (1978).

276. Any argument that a television station's owner dictates programming is further diluted by the fact that most television stations affiliate with one of the major commercial networks and delegate many programming decisions to the networks. See 1 NETWORK INQUIRY, SPECIAL STAFF, FCC, NEW TELEVISION NETWORKS: ENTRY, JURISDICTION, OWNERSHIP AND REGULATION 298 (1980).

277. There are presently 12,118 radio stations and 4,150 television stations licensed in the United States. BROADCASTING, October 1, 1990, at 75. Moreover, within the TV household universe of 92.1 million, 58.6% subscribe to cable. *Id.* Therefore, cable television has nearly 54 million subscribers, each of whom more than likely receives upwards of thirty channels. Given the variety of programming that is provided by this abundance of media outlets, diversity hardly seems a problem, nonetheless a compelling interest.

278. See *Syracuse Peace Council v. Television Station WTVH*, 2 F.C.C. Rcd 5043 (1988). In *Syracuse*, the FCC eliminated the fairness doctrine, under which licensees were required to affirmatively seek to cover controversial issues in their communities and then provide a reasonable opportunity for the discussion of contrasting viewpoints. The Commission held that the policy was no longer necessary because of an adequate diversity of viewpoints in the media.

diverse programming, it is unnecessary for the Court to adopt increasing diversity as an important state interest.

B. The Dangerous Ramifications of an Intermediate Level of Scrutiny

Metro leaves doubt as to whether courts will be able to “smoke out” illegitimate uses of race. By eliminating the requirement that race-based classifications serve only to remedy past discrimination, Justice Brennan grants the judiciary ample room to cloud the distinction between “benign” classifications and those motivated by illegitimate notions of racial inferiority. While the Court’s reasoning apparently reflects the belief that Congress, as the government branch closest to the electorate, will act only when it has adequate support to do so, analysis of Congress’ support for the FCC’s minority preference policies shows that Congress is fallible. Congress can neither point to an identified discrimination within the broadcasting industry as support for the policy, nor can it provide empirical support for the nexus it offers as justification for the policies.²⁷⁹ In addition, *Metro* leaves room for any racial group with political strength to influence the development of programs that unnecessarily favor them, while placing a burden on nonminorities.²⁸⁰

The *Metro* decision sets a dangerous precedent by removing the check that strict scrutiny placed on Congressional action. Moreover, while the *Metro* Court presumably thought its decision would help to elevate the position of minorities in this country, the decision will, in fact, have the opposite effect. The FCC’s minority preferences serve only to reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relation to individual worth. The

Id.; see also *Shurberg Broadcasting of Hartford, Inc. v. FCC*, 876 F.2d 902, 921 (D.C. Cir. 1989), *rev’d sub nom. Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997 (1990). The D.C. Circuit offered the following rationale in *Shurberg*:

If other media are substitutes for broadcasting for purposes of presenting diverse viewpoints on controversial issues of public importance, thereby rendering the fairness doctrine violative of the First Amendment in the view of the FCC, it seems implausible that the FCC at the same time can have a compelling interest in continuing to promote diverse programming through the distress sale policy.

Shurberg, 876 F.2d at 921.

279. See *supra* note 183.

280. Justice Stevens recognized this danger in *Fullilove*, stating:

[i]f there is no duty to attempt either to measure the recovery by the wrong or to distribute that recovery within the injured class in an evenhanded way, our history will adequately support a legislative preference for almost any ethnic, religious, or racial group with the political strength to negotiate a ‘piece of the action’ for its members.

Fullilove v. Klutznick, 448 U.S. 448, 539 (1980) (Stevens, J., dissenting).

preferences also reinforce the stereotype that a person's race will determine his likes and dislikes.

VI. CONCLUSION

The FCC enacted its minority preference policies in order to increase the diversity of programs that our nation's audience receives via radio and television. Those policies, however, discriminate against nonminorities by depriving them of the substantial benefit of acquiring a radio or television license based on their race, not on how well they will serve the public interest. The Commission's policies generated substantial controversy over whether the government's interest in creating programming diversity would outweigh the pernicious effects of racial classifications.

In *Metro Broadcasting, Inc. v. FCC*, the United States Supreme Court held that racial classifications sanctioned by Congress do not violate equal protection principles. In arriving at its conclusion, the Court applied an intermediate level of scrutiny to the FCC's minority preference policies. The Court's decision, therefore, leaves the federal government considerable latitude to employ race-conscious measures that Congress considers "benign."

Yet, "benign race conscious measures" is a contradiction in terms. Any classifications based on race are suspect, and should be subjected to strict scrutiny. The majority's interpretation of the level of scrutiny that should be applied to race-based measures employed by Congress sets a dangerous precedent that could result in such measures being used for illegitimate reasons. The majority distorted the balance between the use of race based measures and the government interest those measures are designed to achieve. In *Metro*, the Court thwarted the values behind equal protection principles by reducing the nature of the government's purpose in using racial classifications to one that is "important." The Court further insulted years of precedent by holding up as a measuring stick for an "important" governmental interest something as trivial and insupportable as the need to increase the diversity of programs on radio and television. The result is, indeed, a return to *Plessy v. Ferguson*.

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