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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. 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.

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. The Court has struggled, however, to delimit the particular circumstances under which racial preferences will survive scrutiny. 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.

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.
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. 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. 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. 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. 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. 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, the FCC created rules to encourage minority...
ownership of radio and television stations.\textsuperscript{13} Congress subsequently voiced its approval of those policies.\textsuperscript{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.\textsuperscript{15} Congress intervened in these proceedings by exercising its power to regulate federal spending.\textsuperscript{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.\textsuperscript{17} The result-

\begin{footnotesize}
\begin{enumerate}
\item[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.
\item[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.
\item[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
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ing confrontation involving the courts, Congress, and the federal agency ultimately reached the Supreme Court. Considering its recent precedent on race-based programs, 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.

In *Metro Broadcasting, Inc. v. FCC*, the Court held that the two challenged FCC minority preference policies, the "distress sale" and the award of a plus-factor to minority-owned companies when deciding among competing applicants for new licenses, did not violate equal protection principles. 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.

In *Metro*, the FCC awarded a television license to the Rainbow Broadcasting Corporation (Rainbow) over the competing Metro Broadcasting Corporation (Metro). 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. Metro appealed the award of the license to Rainbow.

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. In light of the inquiry, the D.C. Circuit remanded the appeal to the Commission for further consideration. 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.


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.


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.

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

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. The court delayed disposition of Shurberg’s appeal pending resolution of the same FCC inquiry that delayed the court’s review in Metro. The FCC, upon closing the inquiry, reaffirmed its order allowing the distress sale to Astroline. 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.

The United States Supreme Court consolidated the two cases for opinion in Metro, and ultimately upheld both FCC policies. 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.” 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. 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. 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.

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*.\(^4\) In that 1896 decision, which resulted in the infamous “separate but equal” doctrine, the Court gave its blessing to race conscious measures.\(^2\) 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.\(^4\)

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-

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41. *Id.* at 3044 (Kennedy, J., dissenting). Justice Scalia joined in the dissent.
43. 110 S. Ct. at 3047 (Kennedy, J., dissenting).
necessary to operate a station, and the potential dangers of a concentration of media control.\textsuperscript{44}

A. The Public Interest Standard

The Communications Act of 1934 (Communications Act)\textsuperscript{45} mandates that the FCC fulfill its regulatory duties as the “public convenience, interest, or necessity requires.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{48}

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{figure1.png}
\caption{A graph illustrating the relationship between public interest and broadcast regulation.}
\end{figure}

\section*{Footnotes}
\begin{itemize}
\item[44.] See generally Fowler & Brenner, \textit{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).
\item[46.] Id. § 303.
\item[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).
\end{itemize}
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.


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. Rcd 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, 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 Commission 58 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.
61. Id. at 935-36.
vice that the prevailing applicant could not provide. 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.

On appeal, the D.C. Circuit held that the FCC should favor applications that make entrepreneurs of local minority groups. 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. The court then remanded the case to the Commission with orders to grant the minority owners comparative merit.

In TV 9, the court did not require the FCC to offer proof that minority ownership and participation would result in programming diversity. Instead, the court held that comparative merit should be granted given a "reasonable expectation" of some public interest benefit. Two years later, in Garrett v. FCC, 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. Because Garrett failed to show how he would improve minority programming, the Commission refused to grant him comparative merit. On appeal, the D.C. Circuit held that the Commission erred in failing to grant Garrett's minority status any weight. The court directed the FCC to assume that minority ownership would result in minority programming. 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.
Shouldn't The Constitution Be Color Blind?

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.

2. The Distress Sale Policy

A second measure adopted by the FCC to foster minority ownership in broadcasting is the distress sale policy. 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. 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. 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. Ordinarily, the loss of a license under these circumstances is a total economic loss for the license holder.

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. The constitutionality of

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.
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. Rcd 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. Diversity, an underlying goal of the first amendment, is an integral part of the FCC's public interest standard. 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. The FCC consistently has emphasized viewpoint diversity as a primary public interest goal.

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. More importantly,
in promulgating its regulations, the Commission assumed that a nexus exists between minority employment and diversity in programming.\textsuperscript{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.\textsuperscript{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 \textit{Metro Broadcasting, Inc. v. FCC.}\textsuperscript{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.\textsuperscript{90}

\textsuperscript{87} 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.” \textsc{U.S. Comm’n on Civil Rights, Window Dressing on the Set: Women and Minorities on Television} (1977).


\textsuperscript{90} \textit{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. \textit{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-
tempt to use race-neutral means, or if it appears questionable that the programs will effect the desired change.\textsuperscript{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.\textsuperscript{97} Prior to its decision in \textit{Metro Broadcasting, Inc. v. FCC}, the Court subjected governmental classifications based on race to “strict” scrutiny.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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 \textit{Regents of the University of California v. Bakke},\textsuperscript{101} the Court examined the admissions programs of the University's medical school.\textsuperscript{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.\textsuperscript{103} Special candidates did not have to meet the grade point cutoff and were not ranked against candidates in the general admissions pro-

\textsuperscript{96} Id.
\textsuperscript{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 \textit{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).
\textsuperscript{101} 438 U.S. 265 (1978).
\textsuperscript{102} Id. at 272.
\textsuperscript{103} Id. at 273-74.
cess. \(^\text{104}\) Bakke, a white male, applied to the medical school in 1973 and in 1974. \(^\text{105}\) 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. \(^\text{106}\)

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. \(^\text{107}\) 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. \(^\text{108}\) 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. \(^\text{109}\) The Court concluded that an admissions policy that considered only one factor hindered rather than furthered attainment of genuine diversity. \(^\text{110}\) Nevertheless, the Court’s dicta in Bakke, \(^\text{111}\) 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 diversi- ty” 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 Amend- ment . . . . 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.’

Shouldn't The Constitution Be Color Blind?

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

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

In \textit{Fullilove v. Klutznick},\textsuperscript{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.\textsuperscript{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


\textsuperscript{113} \textit{Bakke}, 438 U.S. 265, 307 (opinion of Powell, J.); \textit{City of Richmond v. J.A. Croson Co.}, 488 U.S. 469, 493-97 (1989) (plurality opinion); \textit{id.} at 536-38 (Marshall, J., dissenting); \textit{Roberts v. United States Jaycees}, 468 U.S. 609, 624-25 (1984); see also \textit{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").

\textsuperscript{114} 488 U.S. 469 (1989).

\textsuperscript{115} Id. at 493.

\textsuperscript{116} Id. at 477-78.

\textsuperscript{117} Id.

\textsuperscript{118} Id. at 498.

\textsuperscript{119} Id. at 498-506.

\textsuperscript{120} Id. at 505.

\textsuperscript{121} 448 U.S. 448 (1980).

\textsuperscript{122} The Court sharply divided in \textit{Fullilove}, as it had in \textit{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. \textit{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. \textit{Id.} at 497-506 (Powell, J., concurring).
from minority-owned businesses.\textsuperscript{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.\textsuperscript{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.\textsuperscript{125} Traditionally, that power has been invoked only to prohibit the "perpetuation of prior purposeful discrimination."\textsuperscript{126} In other words, Congress has the constitutional power to redress the effects of discrimination forbidden by the fourteenth amendment. In \textit{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.\textsuperscript{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."\textsuperscript{128}

Finally, in \textit{Wygant v. Jackson Board of Education},\textsuperscript{129} the Court enunciated a three part test for evaluating governmental classifications based on race, which incorporated elements of the \textit{Bakke} and \textit{Fullilove} standards. In \textit{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.\textsuperscript{130} The Court

\textsuperscript{123} \textit{Id.} at 451.
\textsuperscript{124} \textit{Id.} at 482.
\textsuperscript{125} \textit{Id.} at 476.
\textsuperscript{126} \textit{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.").
\textsuperscript{127} \textit{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." \textit{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. \textit{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. \textit{Id.} at 460-63.
\textsuperscript{128} \textit{Id.} at 478.
\textsuperscript{129} 476 U.S. 267 (1986).
\textsuperscript{130} \textit{Id.} at 273. \textit{Wygant} involved a collective bargaining agreement between the Jackson, Mississippi Board of Education and a teacher's union. \textit{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. 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. 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. 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. The Court held that this goal could not be classified as a compelling state interest justifying race-based classifications.

2. Narrowly Tailored

The second part of strict scrutiny analysis requires that racial classifications be narrowly tailored to achieve a compelling state interest. In that, if layoffs became necessary, teachers with the least seniority would be laid off first. 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. 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.

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. Next, the Court questioned whether the racial preference is limited to those who have in fact suffered the disadvantage of discrimination. 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. 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. 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. Looking at a third factor under the narrowly tailored prong, the Fullilove Court noted that the burden imposed on nonminorities was slight, and concluded that the program was narrowly tailored to its remedial purposes.

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. 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).
142. Id. at 487-89.
143. Id. at 492.
there were not enough minority contractors available to meet the thirty percent requirement. 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. Thus, because the plan was not narrowly tailored to achieve the compelling governmental interest ofremedying past discrimination, the Court held it unconstitutional.

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*. The D.C. Circuit relied primarily on *Bakke* and *Fullilove* in holding the Commission’s policy constitutional. 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.

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

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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.


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. First, the court assessed whether the comparative merit policy was implemented to remedy past discrimination. Relying on Congress' assertion that the underrepresentation of minorities in broadcasting was the result of past racial and ethnic discrimination, the court found the FCC's policy constitutional under this test.

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. 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. Using this reasoning, the *West Michigan* court upheld the constitutionality of the Commission's comparative merit policy.

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. 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.*
Shouldn't The Constitution Be Color Blind?

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

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

In \textit{Shurberg}, a license renewal proceeding for a television station in Hartford, Connecticut resulted in a constitutional challenge to the Commission's distress sale policy.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{166} The Commission granted Faith Center's request, but the proposed sale to a minority purchaser was never consummated.\textsuperscript{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.\textsuperscript{168} Again, the sale fell through.\textsuperscript{169}

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

\begin{footnotesize}
\begin{enumerate}
\item[163.] \textit{Shurberg}, 876 F.2d at 905.
\item[164.] \textit{Id.} at 904.
\item[165.] \textit{Id.} at 904.
\item[166.] \textit{Id.} at 905.
\item[167.] \textit{Id.}
\item[168.] \textit{Id.}
\item[169.] \textit{Id.}
\item[170.] \textit{Id.}
\item[171.] \textit{Id.} Applicants are treated as mutually exclusive when they file for the use of electronically interfering facilities.
\item[172.] \textit{Id.}
\end{enumerate}
\end{footnotesize}
tress sale on numerous grounds, including the contention that the distress sale policy violated Shurberg's constitutional right to equal protection.\textsuperscript{173}

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

Shurberg sought judicial review of the Commission's order in the D.C. Circuit.\textsuperscript{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.\textsuperscript{178} This inquiry was designed to explore the validity of the Commission's minority preference policies, including the distress sale.\textsuperscript{179} Prior to completion of the inquiry, however, Congress prohibited the FCC from expending any monies to investigate the Commission's minority preference policies.\textsuperscript{180} Consequently, the FCC closed the inquiry and reaffirmed its original order permitting the license assignment to Astroline.\textsuperscript{181}

\textsuperscript{173} Id. at 903.
\textsuperscript{174} Id. at 906.
\textsuperscript{175} Id.
\textsuperscript{176} Id.
\textsuperscript{177} Id.
\textsuperscript{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. \textit{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 \textit{Bakke} and \textit{Fullilove}, compelled a reevaluation of the minority preference schemes. \textit{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. \textit{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. \textit{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. Red 1315 (1986), modified, 2 F.C.C. Red 2377.

\textsuperscript{179} See Notice of Inquiry in MM Docket No. 86-484, 1 F.C.C. Red at 1315.
\textsuperscript{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).
\textsuperscript{181} \textit{Shurberg}, 876 F.2d at 907.
On appeal, a divided court held the distress sale policy unconstitutional. 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. The court emphasized that the distress sale policy unduly burdened nonminorities and was not reasonably related to achieving the interests it sought to vindicate.

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 on Winter Park Communications, Inc. v. FCC. In Winter Park, three applicants were competing for a new UHF television channel assigned to Orlando, Florida. The applications were designated for a comparative hearing to evaluate the relative qualifications of each applicant. 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.

The FCC's Review Board reversed the ALJ's decision and awarded the permit to Rainbow. The Board determined that Rainbow was a qualified applicant and then compared all three applicants. 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.

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. The majority held that West Michigan resolved the question of the policy's constitutionality. 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. Moreover, the court emphasized that Congress recognized that the underrepresentation of minorities in broadcasting

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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.\textsuperscript{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 \textit{Winter Park}, minority preference was but a plus factor in awarding a broadcast license, while in \textit{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 \textit{Metro Broadcasting, Inc. v. FCC}.

IV. \textit{Metro Broadcasting, Inc. v. FCC: SETTLING THE CONTROVERSY OVER THE CONSTITUTIONALITY OF RACIAL PREFERENCES EMPLOYED BY THE FEDERAL GOVERNMENT}

In \textit{Metro Broadcasting, Inc. v. FCC},\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{196} Id.

\textsuperscript{197} 110 S. Ct. 2997 (1990).

\textsuperscript{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. \textit{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 \textit{Bakke}. In 1980, he strongly dissented from the decision in \textit{Fullilove} upholding the constitutionality of congressionally mandated set-asides on federally funded construction projects. \textit{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 \textit{Wygant}, arguing that the educational benefits of an integrated faculty could justify racial preference to speed the integration. \textit{Wygant v. Jackson Board of Educ.}, 476 U.S. 267, 313-15 (1986) (Stevens, J., dissenting). Although he reiterated that reasoning in \textit{Croson}, he sided with the majority because of his belief that minority set-asides are not socially useful. \textit{City of Richmond v. J.A. Croson Co.}, 448 U.S. 469, 511-17 (1989) (Stevens, J., concurring in part and concurring in judgment).

\textsuperscript{199} \textit{Metro}, 110 S. Ct. at 3008.
objectives and that are "substantially" related to the achievement of those objectives.\textsuperscript{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.\textsuperscript{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.\textsuperscript{202} The Court’s reasoning appears to contradict its holding in \textit{City of Richmond v. J.A. Croson Co.}\textsuperscript{203} In \textit{Croson}, a majority of the Court agreed that strict scrutiny applies to all racial classifications, even "remedial" or "benign" ones.\textsuperscript{204} In adopting this lower level of scrutiny, the \textit{Metro} Court distinguished \textit{Croson}, reasoning that \textit{Croson} did not prescribe the level of scrutiny to be applied to racial classifications employed by Congress.\textsuperscript{205}

Justice Brennan based this conclusion on the Court’s holding in \textit{Fullilove v. Klutznick}.\textsuperscript{206} Specifically, Justice Brennan pointed to Chief Justice Burger’s language in \textit{Fullilove} acknowledging that Congress has the power to enforce the fourteenth amendment’s equal protection guarantees.\textsuperscript{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.\textsuperscript{208}

Justice Brennan also used \textit{Fullilove} to support the majority’s adoption of a lower level of scrutiny, reasoning that three members of the \textit{Fullilove} Court

\begin{itemize}
  \item \textsuperscript{200} Id.
  \item \textsuperscript{201} See, e.g., \textit{Croson}, 448 U.S. at 495.
  \item \textsuperscript{202} \textit{Metro}, 110 S. Ct. at 3008-09.
  \item \textsuperscript{203} 488 U.S. 469 (1989).
  \item \textsuperscript{204} Id. at 493.
  \item \textsuperscript{205} \textit{Metro}, 110 S. Ct. at 3008-09.
  \item \textsuperscript{206} Id. at 3008 (citing \textit{Fullilove v. Klutznick}, 448 U.S. 448 (1980)).
  \item \textsuperscript{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 \textit{Fullilove}, 448 U.S. at 472 (quoting U.S. CONST. art. I, § 8, cl.1))).
  \item \textsuperscript{208} Id. at 3008-09.
\end{itemize}
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.\textsuperscript{209} Justice Brennan interpreted this precedent to mean that a congressionally approved preference need not be subject to strict scrutiny.\textsuperscript{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.\textsuperscript{211} Moreover, Justice Brennan suggested that Congress need not make more than a generalized assertion of societal discrimination to support its racial classifications.\textsuperscript{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.\textsuperscript{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.\textsuperscript{214} Based on this analogy, the Court concluded that the interest in enhancing broadcast diversity was, at the very least, an important governmental objective.\textsuperscript{215}

\textsuperscript{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 the 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)).

\textsuperscript{210} Id. at 3008-09.

\textsuperscript{211} Id.

\textsuperscript{212} Id. at 3009.

\textsuperscript{213} Id. at 3010. (“[I]t is axiomatic that broadcasting may be regulated in light of the rights of the viewing and listening audience ... .”).

\textsuperscript{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)).

\textsuperscript{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. 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.

The Court found the policies substantially related to achieving programming diversity in other relevant aspects as well. Specifically, Justice Brennan concluded that the policies placed no impermissible burdens on nonminorities. 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. 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.

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. 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.
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.\textsuperscript{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."\textsuperscript{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.\textsuperscript{225} Moreover, the dissent rejected the majority's reliance on \textit{Fullilove} to support its application of intermediate scrutiny.\textsuperscript{226} The dissent distinguished \textit{Fullilove} as applicable only to Congressional measures designed to remedy identified past discrimination.\textsuperscript{227}

The dissent concluded that, under the strict scrutiny standard, the FCC's minority preference policies would not pass constitutional muster.\textsuperscript{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.\textsuperscript{229} Justice O'Connor noted that modern equal protection doctrine has recognized only one such interest: remedying the effects of past discrimination.\textsuperscript{230} Because the FCC's policies were not designed as remedial measures, the dissent concluded, they serve no compelling governmental purpose.\textsuperscript{231}

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

\textsuperscript{223} \textit{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." \textit{Id}. at 3032 (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 448, 493 (1989)).

\textsuperscript{224} \textit{Id}. at 3030.

\textsuperscript{225} \textit{Id}.

\textsuperscript{226} \textit{Id}. Justice O'Connor stated that the Court applied a different form of review in \textit{Fullilove} only because Congress was exercising its powers under section 5 of the fourteenth amendment. \textit{Id}.

\textsuperscript{227} \textit{Id}. at 3031. In \textit{Fullilove}, Congress identified discriminatory practices within the construction industry. In \textit{Metro}, Justice O'Connor emphasized that the FCC had no such remedial purpose for its race-based classifications. \textit{Id}.

\textsuperscript{228} \textit{Id}. at 3044.

\textsuperscript{229} \textit{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.

\textit{Id}.

\textsuperscript{230} \textit{Id} at 3034.

\textsuperscript{231} \textit{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. Moreover, the dissent questioned how the FCC could identify a black viewpoint, an Arab viewpoint, or any other viewpoint. The dissent sharply criticized the majority's reasoning that an applicant's race would likely indicate his particular perspective. 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. The dissent also pointed out that market forces, rather than the owner's race, largely shape what goes on the air. 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.

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. 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. Therefore, the dissent concluded, the policies failed to satisfy the narrowly tailored prong.

In a separate dissent joined by Justice Scalia, Justice Kennedy likened the Metro decision to the Court's decision in <i>Plessy v. Ferguson</i>. 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. Justice Kennedy asserted that strict scrutiny is the only test the Court can apply to satisfy the constitutional guarantee of equal protection. Justice Kennedy sharply criticized the majority for concluding that "increas[ing] the listening pleasure of media audiences" justified discriminating on the basis of race.

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.
250. 448 U.S. 448 (1980).
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. Typically, when the Court is asked to pass on the constitutionality of legislation, it does so delicately. 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. 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.

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. The Court did note, however, that the program in Fullilove would survive strict scrutiny, and reiterated that racial classifications call for strict scrutiny. 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.”).


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. 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.

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. 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. The FCC has never asserted that it sought to remedy past discrimination through its minority preference policies. 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. 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.

In addition to Fullilove, Justice Brennan cited Croson as support for adopting an intermediate level of scrutiny for affirmative action programs sanctioned by Congress. 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, 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.
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.
269. Croson, 488 U.S. at 489-91.
amendment forbids. 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.

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.” The Metro dissent correctly asserts that enhancing the listening pleasure of our nation’s audiences is hardly just cause for sanctioning discrimination.

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. Inherent

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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)).
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{277} The FCC itself has recognized that there is an adequate diversity of programming in the United States, if not an overabundance.\textsuperscript{278} Because there is likely no real need in the market to enhance


\textsuperscript{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. \emph{See 1 Network Inquiry, Special Staff, FCC, New Television Networks: Entry, Jurisdiction, Ownership and Regulation} 298 (1980).

\textsuperscript{277} There are presently 12,118 radio stations and 4,150 television stations licensed in the United States. \emph{Broadcasting}, October 1, 1990, at 75. Moreover, within the TV household universe of 92.1 million, 58.6% subscribe to cable. \emph{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.

\textsuperscript{278} \emph{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" ille-
gitimate uses of race. By eliminating the requirement that race-based classi-
fications serve only to remedy past discrimination, Justice Brennan grants
the judiciary ample room to cloud the distinction between "benign" classifi-
cations 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 mi-
nority 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. In addition, Metro leaves room for
any racial group with political strength to influence the development of pro-
grams that unnecessarily favor them, while placing a burden on nonminories.

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.
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 continu-
ing 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."

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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