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Comment

Metro Broadcasting, Inc. v. FCC: Requiem for a Heavyweight

Neal Devins*

The affirmative action wars continue.1 In Metro Broadcasting, Inc. v. FCC,2 the Supreme Court, by a 5-4 vote, upheld Federal Communications Commission (FCC) efforts to increase minority ownership and participation in broadcast management through race preferences in the granting of licenses.3 In the wake of the 1988 Term’s City of Richmond v. J.A. Croson Co.4 decision, the first case in which a majority of Justices formally endorsed strict scrutiny review in an affirmative action case,5 expectations had been high that Metro Broadcasting would invalidate the FCC program by extending Croson to federal race preference programs.6

Metro Broadcasting is surprising for other reasons. After the 1988

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1. This sentence plays off of Herman Schwartz’s suggestion that the “affirmative action wars are over.” Schwartz, The 1986 and 1987 Affirmative Action Cases: It’s All Over but the Shouting, 86 Mich. L. Rev. 524, 524 (1987). In an essay published in this review last year, I disputed Schwartz’s suggestion. See Devins, Affirmative Action After Reagan, 68 Texas L. Rev. 353, 378 (1989) (“[V]iewed as a mosaic, the cases leave unanswered many questions about the scope of permissible affirmative action.”).

3. Id. at 3009.
5. See id. at 721.
6. Analysis of the Court’s failure to extend Croson has focused on Justice White. White, who endorsed strict review in Croson, refused to extend Croson to federal action, thereby providing the critical fifth vote in Metro Broadcasting. Although White did not file an opinion in either case, and the explanations for his apparent flip-flop are somewhat conjectural, the best explanation is that White has a tendency to support federal action. As one former law clerk explained: “[W]ith White ‘one of the constants is respect for federal power or federal authority. You can usually fill him in on the side of the federal government.’” Stewart, White to the Right?, A.B.A. J., July 1990, at 40, 42. This sentiment was echoed by former Solicitor General Charles Fried, who noted that “Congress looms very large in White’s jurisprudence” and that “[h]e almost seems to yearn for a parliamentary democracy.” Lewis, Court Ruling Encourages Affirmative Action, N.Y. Times, July 4, 1990, at 12, col. 5. White’s pivotal role in recent cases led former Reagan official Charles Cooper to remark: “‘The story of the [1989] term was Justice White. He’s the Supreme Court.’” Marcus, Supreme Court Liberals Savor Wins Amid Conservative Majority, Wash. Post, July 2, 1990, at A5, col. 6 (quoting Cooper).
Term, there was reason to think that a firm, conservative majority dominated the Court. Rulings on privacy, employment discrimination, affirmative action, and the death penalty signalled the solidification of a Reagan-appointee-driven Court.\textsuperscript{7} Indeed, popular and scholarly commentary heralded “the end of an era of judicial activism that had lasted four decades and profoundly transformed the structure of American government and society.”\textsuperscript{8} \textit{Metro Broadcasting} demonstrates, however, that claims of the ascendency of a new Supreme Court era are premature. Along with other 5-4 rulings on privacy, political patronage, and school desegregation remedies,\textsuperscript{9} the decision reveals that the Rehnquist Court is one vote shy of a solidified majority.

The real surprise of \textit{Metro Broadcasting}, however, is not its outcome. Prior cases amply supported the federal government’s use of race to remedy societal discrimination.\textsuperscript{10} Accordingly, the FCC and the United States Senate, in briefs filed before the Court, characterized the preference as a congressionally mandated remedy.\textsuperscript{11} The Court did not

\begin{itemize}
  \item \textsuperscript{7} See, e.g., Stanford v. Kentucky, 109 S. Ct. 2969, 2980 (1989) (holding that capital punishment for crimes committed when the defendant was 16 or 17 years old is not cruel or unusual punishment under the Eighth Amendment); Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115, 2121-23 (1989) (holding that a statistical concentration of nonwhite workers in unskilled positions and of white workers in skilled positions did not establish a prima facie case of disparate impact under Title VII requiring the employer to justify its hiring practices); National Treasury Employees Union v. Von Raab, 109 S. Ct. 1384, 1391-96 (1989) (holding that because Customs Service employees applying for promotion to sensitive positions have a diminished expectation of privacy, suspicionless drug testing of these employees did not violate the Fourth Amendment); City of Richmond v. J.A. Croson Co., 109 S. Ct. 706, 730 (1989) (striking down a city plan requiring prime contractors who received city construction contracts to subcontract at least 30% of the contract to minority businesses).

  \item \textsuperscript{8} See, e.g., Rutan v. Republican Party of Ill., 110 S. Ct. 2729, 2737 (1990) (preventing promotion, transfer, recall, and hiring decisions involving low-level public employees from being based upon party affiliation and support); Minnesota v. Olson, 110 S. Ct. 1684, 1688-90 (1990) (3-2-2 decision) (guaranteeing overnight guests a fourth-amendment right to privacy in other people’s homes that protects them from warrantless searches); Missouri v. Jenkins, 110 S. Ct. 1651, 1665 (1990) (allowing, as a last resort, judges to order local or state officials to raise taxes to pay for a valid desegregation decree). For overviews of the 1989 Term, see Marcus, supra note 6; Greenhouse, supra note 7 (concluding that “[f]or the first time in a generation, a conservative majority was in a position to control the outcome on most important issues”).

  \item \textsuperscript{9} See Fullilove v. Klutznick, 448 U.S. 448, 476-78 (1980) (upholding a remedial set-aside enacted by Congress); Croson, 109 S. Ct. at 717-20 (discussing and distinguishing Fullilove from set-asides enacted by state and local government).

  \item \textsuperscript{10} Brief of the U.S. Senate as Amicus Curiae in Support of Respondents at 2, Metro Broadcasting, Inc. v. FCC, 110 S. Ct. 2997 (1990) (No. 89-453) (“The interest of the Senate in this case is
dispute this contention. It pointed to congressional findings of ""inequities stemming from racial and ethnic discrimination"" serving as a basis for the FCC preferences. A route was open to the Court to uphold the FCC program by simply reaffirming and slightly extending existing precedent.

The Court did not travel this paved road. Instead, it elected to make the focus of its inquiry the nonremedial objective of promoting program diversity through increasing minority ownership. In approving the FCC preference as a diversity measure, the Court chose the broadest grounds available for federal race preferences. Moreover, rather than make use of the compelling interest and least restrictive means test typically associated with racial line drawing (including, after Croson, affirmative action), the Court ruled that ""benign"" preferences mandated by Congress need only be ""substantially related"" to ""important governmental objectives within the power of Congress."" Finally, in finding congressional approval of the FCC preference, the Court relied on various sources of statutory construction—legislative inaction, appropriation riders, and action on related legislation—that had come under sharp attack by the conservative wing of the Court. Indeed, in the 1988 Term decisions limiting the sweep of civil rights protections, the Court had explicitly rejected some of these interpretive tools.

Metro Broadcasting is a significant expansion of affirmative action and is more than surprising at this point in the Court's evolution. At the

grounded in the conviction that the legislation [that] Congress has enacted to require the continuation of the FCC's policy is a measured and constitutional effort to overcome past inequities and to advance the legitimate public interest in diversity of programming."


(13) Id. at 3008.

(14) Id. at 3009.

(15) See id. at 3013-16.


beginning of the 1989 Term, it seemed impossible that a majority of Justices would subscribe to such a far-reaching decision. 18 Indeed, Metro Broadcasting’s monumental character may doom its prospects for lasting precedential influence. The replacement of William Brennan with David Souter portends either an extremely narrow reading of Metro Broadcasting or its outright reversal.19

In a strange way, this state of affairs makes the case especially significant. Metro Broadcasting may prove to be a sign post, the final landmark of a period when individuals like William Brennan helped lead the Court. The case is already being labeled as one of Brennan’s most significant opinions.20 Metro Broadcasting exemplifies Brennan’s ability to build coalitions that sacrifice doctrinal purity to achieve the desired outcome.21

This Comment, I hope, will resist the impulse to feign nostalgia.

18. The unexpectedness of the Court’s pronouncements was evident in conservatives’ reactions to the opinion: Judge Robert Bork called it “terrible,” One on One with John McLaughlin (Federal Information Systems Corp. broadcast, July 6, 1990) (NEXIS, Nexis library, current file); former Reagan civil rights head William Bradford Reynolds and conservative commentator Bruce Fein labeled the decision the Term’s “worst ruling.” Fein & Reynolds, High Court Closes Door on Mixed Session, Legal Times, July 9, 1990, at 18, col. 1; and Charles Fried, Reagan’s Solicitor General, called the decision a “horrible thing.” Lewis, supra note 6. By contrast, liberals were exhilarated.


20. See, e.g., Coyle, A Final Victory Marks the End of a Career, Nat’l L.J., Aug. 13, 1990, at S4, col. 2 (noting that Metro Broadcasting reflects Brennan’s “consummate skill and brilliance in fine-tuning decisions in such a way that the essential fifth voter either signed on to or wrote the majority opinion”); Marcus, Supreme Court Liberals Savor Win Amid Conservative Majority, Wash. Post, July 2, 1990, at A5, col. 1 (characterizing Metro Broadcasting as “the most unexpected win of all for Brennan” of the 1989 Term).


In Metro Broadcasting, it appears that two critical features of the Court’s analysis are attributable to Justice Brennan’s efforts to have Justice White provide the critical fifth vote. First, Metro Broadcasting is limited to congressionally mandated race preferences. See infra note 88 and accompanying text. This reflects Justice White’s view of judicial deference to acts of Congress. See supra note 6. Second, the framing of the FCC program as a nonremedial diversity preference may be
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While the changing composition of the Court cannot be ignored, *Metro Broadcasting*—momentarily at least—governs the constitutionality of federal affirmative action efforts and hence demands serious scrutiny. This Comment will evaluate the three critical features of the case—namely, the utilization of middle tier rather than strict scrutiny review, the depiction of the FCC preference as a congressional program, and the focus on diversity rather than remedial justifications. I will take issue with each of these features. First, in all race cases, strict scrutiny is the appropriate standard of review.\(^{22}\) Granted, congressional authority to take race into account both expands the range of permissible federal action in this area and warrants deference to legislative determinations of a means-ends nexus. Yet without strict review, the principle disfavoring racial classifications is subverted. Second, the FCC preference cannot be fairly described as a congressional program.\(^{23}\) FCC preferences are rooted in judicial edict and presidential initiative. While congressional action furthers the FCC preference, Congress never authorized the FCC program. Third, first-amendment diversity is an inadequate justification for the FCC preference.\(^{24}\) Preferences rooted solely in diversity, while advancing first-amendment values, undermine the universalistic prohibition of line drawing on the basis of race. When this core equal protection value comes into conflict with discretionary governmental programs that serve the First Amendment, the First Amendment must give way.

Though the above synopsis reveals my strong disapproval of *Metro Broadcasting*, I do not suggest that either Congress or the FCC is without power in this area. In my view, either Congress’s fourteenth-amendment section 5 power\(^ {25}\) or the FCC’s broad congressionally delegated rule-making power\(^ {26}\) could furnish the formal foundation for the diversity rule as a remedy for discrimination that inhibits minority ownership of television and radio stations. A close look at the FCC preference reveals it to be as much a remedial measure as a diversity measure.\(^ {27}\) In

attributable to Justice White’s comments at oral argument, that Congress never endorsed the FCC preferences as a remedial device. See infra note 111 and accompanying text.

22. See infra notes 140-41 and accompanying text.

23. See infra notes 77-113 and accompanying text.

24. See infra notes 114-64 and accompanying text.

25. The Fourteenth Amendment grants Congress the “power to enforce, by appropriate legislation, the provisions of this article.” U.S. CONST. amend. XIV, § 5. For scholarly treatments of the reach of this power, see Choper, *Congressional Power to Expand Judicial Definitions of the Substantive Terms of the Civil War Amendments*, 67 MINN. L. REV. 299 (1982); and Cox, *Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91 (1966). See also infra notes 135-39 and accompanying text.

26. See 47 U.S.C. § 154(i) (1982) (giving the FCC the power to “make such rules and regulations . . . as may be necessary in the execution of its functions”).

27. See infra notes 165-90 and accompanying text.
fact, there is reason to suspect that the preference is primarily a remedial measure clothed in the garb of diversity.28

At the same time, a more forthright remedial justification for the program by Congress or the FCC is necessary. While either Congress or the FCC is empowered to remedy discrimination by way of race preferences, race-conscious remedies must be justified as remedies. Having the ball returned to Congress and the FCC is important both symbolically and practically. The government’s use of race is serious business and hence it is not mere formalism to demand that proper procedure be followed.

I. The Metro Broadcasting Opinion

Metro Broadcasting upheld two FCC programs designed to increase minority ownership29 of radio and television broadcasting licenses.30 Both programs were principally designed to further first-amendment diversity concerns. Neither program was formally codified by Congress. One program considers minority ownership a “plus” in comparing the merits of competing applications for a broadcasting license.31 Other factors in this comparative procedure include the past broadcast record, the proposed program service, and the owner participation in station operation.32 Minority status thus need not be dispositive, although it turned out to be the decisive factor in the licensing award under review in Metro Broadcasting.33 The second program is a “distress sale” policy that allows an FCC-approved minority enterprise to purchase at a “distress” price a license from a broadcaster whose qualifications have been called into question.34 Typically, a license holder whose qualifications are subject to challenge may not transfer that license until the challenge has been favorably resolved by the FCC. Because distress sales are limited to minority owners, race is dispositive in this FCC preference.

28. See infra note 134 and accompanying text.
30. Separate challenges, against each of the two programs, were launched by nonminorities who were denied a license awarded to a racial minority. See Metro Broadcasting, Inc. v. FCC, 110 S. Ct. 2997, 3005-08 (1990).
32. See Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393, 399-98 (1965).
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Differences between the comparative hearing preference and the distress sale set-aside loomed large in the lower courts. The comparative preference was upheld, in part because “it did not involve any quotas or fixed targets whatsoever, and minority ownership was simply one factor among several.”35 In contrast, the distress sale policy was invalidated, in part because “the policy singles out one aspect of diversity and elevates it to determinative status.”36 The Supreme Court, however, treated the two programs as part of a unified effort to increase minority ownership and found that neither program placed an undue burden on nonminority interests.37

In reaching this conclusion, the Court did not discuss the distinction it drew in Regents of the University of California v. Bakke38 between a comparative preference (the Harvard plan) and a set-aside (the Davis plan).39 Apparently, because the distress policy applies “only with respect to a small fraction of broadcast licenses”40 and because nonminority firms exercise some control over whether distress sales occur at all, the Court concluded that the program was not a set-aside.41 Furthermore, the Court noted that both FCC policies carry their own “natural limit” for minority preferences and will end “once sufficient diversity has been achieved.”42

The Court paid considerably more attention to two other Supreme Court affirmative action rulings, City of Richmond v. J.A. Croson Co.43 and Fullilove v. Klutznick.44 In Croson, the Court invalidated, under strict scrutiny review, efforts to set aside city-allocated contracting dollars for racial minorities.45 Although the Court acknowledged that Congress is “expressly charged by the Constitution with competence and authority to enforce equal protection guarantees”46 and thereby drew a sharp line between state and federal race preferences, Croson nonetheless raises the specter that strict scrutiny would be appropriate in reviewing federal race preferences. Indeed, Justice O’Connor’s Croson opinion expressly rejects the notion that section 5 justifies “some form of federal executive power to set aside contracts.”47

35. Winter Park, 873 F.2d at 354.
39. See id. at 311-19.
41. Id. at 3027.
42. Id. at 3025 (emphasis added).
44. 448 U.S. 448 (1980).
45. Croson, 109 S. Ct. at 721, 730.
46. Id. at 718 (quoting Fullilove, 448 U.S. at 483).
pre-emption in matters of race." 47

In Fullilove, the Court upheld a congressional plan setting aside federal construction grants for minority groups in response to a legislative finding of societal discrimination. 48 While broadly approving of Congress's power to remedy societal discrimination and recognizing the extraordinary deference owed to congressional fact finding, 49 Chief Justice Burger, in writing the Court's plurality opinion, as well as the Department of Justice in submitting a brief defending the program, took great pains to depict the set-aside as a "strictly remedial measure" 50 and hence within Congress's section 5 power. 51 Moreover, a majority of Justices in Fullilove, while neither endorsing nor rejecting strict review, nonetheless pointed to strict review as a possible measure of federal affirmative action. 52

Concerns raised by Croson and Fullilove clearly influenced those defending the program. The FCC and Senate briefs 53 presume strict review, 54 characterize the program as serving both diversity and remedial objections, 55 and suggest that the program is statutorily mandated. 56 The Metro Broadcasting Court, however, found the FCC preference on stronger precedential footing than either the FCC or Senate thought possible.

47. Id. at 720.
48. Fullilove, 448 U.S. at 492.
49. For an assessment and critique of the standards established by Congress for the formulation and judicial review of minority set-aside programs, see generally Days, Fullilove, 96 YALE L.J. 453 (1987).
50. Fullilove, 448 U.S. at 481.
52. Fullilove, 448 U.S. at 492; id. at 518-19 (Marshall, J., concurring). Of the six Justices joining in these opinions, only Justices Blackmun, Marshall, and White are still on the Court.
53. The Department of Justice, through the Solicitor General, typically defends the constitutionality of federal programs before the Supreme Court. In Metro Broadcasting, however, the Bush Department of Justice considered the FCC preference unconstitutional and filed a brief to that effect. See Brief for the United States, Metro Broadcasting, Inc. v. FCC, 110 S. Ct. 2997 (1990) (No. 89-453). Consequently, the Solicitor General allowed the FCC to defend its program before the Court. See Brief for Federal Communications Commission at 30 n.*, Metro Broadcasting, Inc. v. FCC, 110 S. Ct. 2997 (1990) (No. 89-453). The Senate brief was filed on the request of the Senate pursuant to Senate Resolution 251, introduced by Senator Mitchell and approved by the Senate. See 136 CONG. REC. S1775-76 (daily ed. Feb. 27, 1990). The Department of Justice decision to formally oppose the FCC preference was the impetus of the Senate resolution. See id. at S1776 (remarks of Sen. Mitchell).
54. See Brief for Federal Communications Commission at 27, Metro Broadcasting, Inc. v. FCC, 110 S. Ct. 2997 (1990) (No. 89-453) (asserting that "[t]he minority enhancement credit serves ... compelling government interests") (emphasis added); id. at 35 (arguing that "[t]he minority enhancement credit is narrowly tailored") (emphasis added). Neither parties' brief argues that middle tier review should be used in place of strict scrutiny.
55. See supra note 11.
56. See supra note 11.
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The Court rejected *Croson* out of hand as being irrelevant for assessing federal efforts. Noting that *Croson* itself drew a sharp line between federal and state use of race preferences, Justice Brennan concluded that *Croson*’s embrace of strict review was inapplicable "to a benign racial classification employed by Congress."57 Consequently, since *Fullilove* did not formally endorse a standard of review, he concluded that precedent did not constrain the *Metro Broadcasting* Court’s choice of a standard of review.58

The question remained, however, whether the FCC preference would have to be characterized as remedial. Although *Fullilove* had addressed congressional enforcement of the Fourteenth Amendment through a remedial set-aside, the *Metro Broadcasting* Court interpreted the case as suggesting more generally that the courts should defer to Congress’s employment of race preferences because of Congress’s “institutional competence as the national legislature.”59 The Court therefore found it unnecessary to employ a remedial constraint and instead held that “benign race-conscious measures mandated by Congress—even if those measures are not ‘remedial’ . . . —are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to [the] achievement of those objectives.”60

Under this relaxed standard of review, the Court had little difficulty upholding the FCC plan. First, by referring to appropriations bills that temporarily prohibit the FCC from modifying its preference program, the Court characterized the FCC preference as congressionally mandated.61 In a similar vein, the Court concluded that “Congress has made clear its view that the minority ownership policies advance the goal of diverse programming.”62 The Court derived legislative intent from proposed legislation,63 hearings,64 failed efforts to undermine the diversity

58. See id. at 3007-08 & n.13 (acknowledging that there is no clearly established standard of review that can be derived from the Court’s earlier *Fullilove* case).
59. Id. at 3008.
60. Id. at 3008-09 (footnote omitted).
61. See id. at 3006 & n.9, 3012.
62. Id. at 3012.
preferences, and Congress’s enactment of related legislation that accorded racial minorities a preference in obtaining broadcast licenses. Second, by referring to a slew of cases upholding FCC regulations of broadcasters to ensure the “wildest possible dissemination of information from diverse and antagonistic sources,” the Court found broadcast diversity “at the very least” an important governmental objective. Third, although the FCC never sought to establish a nexus between minority ownership and diversity broadcasting, the Court easily found the FCC’s means and ends to be substantially related.

As a starting point, the Court noted “[w]ith respect to this ‘complex’ empirical question, we are required to give ‘great weight to the decisions of Congress and the experience of the Commission.’” Specifically, the Court viewed the diversity preference as an appropriate response to the rock and the hard place between which the FCC found itself between in 1978. In that year, the FCC concluded that its race-neutral efforts to ensure adequate representation of minority views were unsuccessful. However, the FCC felt constrained by both first-amendment principles and problems of implementation from more directly interfering with broadcast programming. Consequently, it attacked the problem indirectly, by focusing on minority ownership and presuming a link to program diversity. The Court deemed this FCC action an appropriate response to the situation the agency faced. Furthermore, although...
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the FCC did not rely upon it, the Court pointed to "a host of empirical evidence" corroborating this presumed nexus.

In the end, Metro Broadcasting—rather than "press[ing] the outer limits of Congressional authority" as did the Fullilove set-aside—was characterized as an easy case. For the Court, the diversity objective is "at least" important and the presumed ownership-diversity nexus appears the only mechanism available to accomplish that objective without trammeling on first-amendment rights. Furthermore, there is no undue burden on nonminority interests. In fact, the Court's analysis suggests that the FCC preference would be upheld even under a strict scrutiny review.

II. The Road Taken: An Assessment of Metro Broadcasting

Every substantive feature of Metro Broadcasting is unsatisfactory—namely, the failure to distinguish between the distress sale and comparative hearing preferences, the utilization of middle tier rather than strict review, the depiction of the preference program as congressionally mandated, and, most important, the conclusion that the FCC preference easily passes scrutiny under middle tier review and might well be upheld under strict review. This Part, in demonstrating the failings of Metro Broadcasting, will be organized under two major headings. First, an examination of the history of the preference programs reveals that the program is not congressionally mandated. Second, a consideration of the values that underlie the equality guarantee point to the impropriety of both the utilization of middle tier review and the majority's embrace of the diversity rationale.

73. See Brief for Federal Communications Commission at 41-44, Metro Broadcasting, Inc. v. FCC, 110 S. Ct. 2997 (1990) (No. 89-453) (noting that the courts, congressional reports, and other sources have concluded that such a nexus exists).
74. Metro Broadcasting, 110 S. Ct. at 3017.
76. This Part will not discuss two of the failings, namely, the failure to distinguish between the two programs and the characterization of the programs as temporary. These matters are sufficiently obvious to be dispensed with in a footnote.

It is preposterous to suggest that the distress sale preference is indistinguishable in kind from the comparative hearing preference because it applies "only with respect to a small fraction of broadcast licenses." Metro Broadcasting, 110 S. Ct. at 3026-27. Justice Powell's distinction of the Davis and Harvard plan in Bakke had nothing to do with the size of the Davis quota. It had everything to do with the nature of the quota, that is, the reservation of slots only for minority students. As the distress sale preference is available only to minority entrepreneurs, the distinction drawn in Bakke seems quite relevant. Admittedly, Justice Powell spoke only for himself when he characterized the distinction between a comparative preference and an exclusive opportunity as dispositive. Nonetheless, to reject Justice Powell is to reject the legal significance of the distinction, not its existence. Metro Broadcasting seemingly rejects the existence of the distinction.

Metro Broadcasting is also incorrect in characterizing the diversity preference as temporary because "once sufficient diversity has been achieved" the preferences will end. Id. at 3025. First, as
A. Congress and the FCC Preference

Court action and presidential initiative are the sources of the comparative hearing and distress sale preferences.\(^77\) The comparative hearing preference is rooted in *TV 9, Inc. v. FCC*,\(^78\) a 1973 D.C. Court of Appeals decision. *TV 9* was an appeal of the FCC's refusal to value minority status in accordance with a broadcast license. The FCC's position was that "'the Communications Act, like the Constitution, is color blind. What the Communications Act demands is service to the public ... and that factor alone must control the licensing processes, not the race, color or creed of an applicant.'"\(^79\) In other words, the FCC in 1972 rejected the nexus between minority ownership and diversity programming.\(^80\) The D.C. Circuit overturned this FCC practice, emphasizing that it is "consistent with the primary objective of maximum diversification of ownership" to award comparative preferences on the basis of race "when minority ownership is likely to increase diversity of content."\(^81\) In accordance with *TV 9*, the FCC instructed its Administrative Law Judges to afford comparative merit to applicants when minority owners were to

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77. The FCC's commitment to diversity dates back to a 1965 policy statement concluding that "[d]iversification of control is a public good in a free society." Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393, 394 (1965). The Supreme Court upheld the FCC's ownership diversification policies in FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775 (1978). In that case, the Court stated that the public interest licensing standard of § 303(r) of the Communications Act of 1934, 47 U.S.C. § 303(r) (1982), extends to "‘the First Amendment goal of achieving ‘the widest possible dissemination of information from diverse and antagonistic sources.’" National Citizens Comm., 436 U.S. at 795 (quoting Associated Press v. United States, 326 U.S. 1, 20 (1945)).


80. The FCC stated: "‘There is nothing in the degree or type of participation proposed by [the black owners] which gives assurance that the benefits of their racial background would inure in any material degree to the operation of the station.’" Id. (quoting Mid-Florida Television Corp., 33 F.C.C.2d 34, 268 (1970) (Hearing Examiner's Initial Decision)).

81. *TV 9*, 495 F.2d at 937. As the D.C. Circuit observed in a subsequent opinion: "The entire thrust of *TV 9* is that Black ownership and participation together are themselves likely to bring about programming that is responsive to the needs of the black citizenry, and that 'reasonable expectation,' without 'advance demonstration,' gives them relevance." Garrett v. FCC, 513 F.2d 1056, 1063 (D.C. Cir. 1975) (footnotes omitted).
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participate in the operation of the station.82

The distress sale exception is an outgrowth of a White House policy. In January 1978, the Carter Administration announced that "[b]ecause of telecommunications' vital role in social, economic, and political progress, full minority participation [in ownership] is a critical component of President Carter's economic and social policy goals."83 Specifically, the White House proposed, among other things, tax breaks for broadcasters who sell their stations to minority owners and the distress sale exception.84 The FCC endorsed these features of the White House proposal in May 1978.85 Pointing to FCC task force findings (issued one week earlier) of "[a]cute underrepresentation of minorities among the owners of broadcast properties,"86 the FCC claimed race preferences as necessary to serve the goal of "a more diverse selection of programming" through "[f]ull minority participation in the ownership and management of broadcast facilities."87

Metro Broadcasting does not dispute the above account. Moreover, Metro Broadcasting does not suggest that Congress has codified the FCC preference. However, the FCC preference is characterized as being "specifically approved—indeed, mandated—by Congress," a fact of "overriding significance" in the Court's analysis.88

The Court points to four categories of congressional action to support its proposition. First, Congress in 1969, 1973, and 1974 failed to enact legislation that would likely have had the effect of limiting minority ownership opportunities in the broadcasting industry.89 Yet failure to enact legislation prior to the establishment of FCC policy could not

82. See 1978 Statement, supra note 34, at 982. The FCC also ordered the expedited processing of minority applications. See id.
84. Id. at 253. For an analysis of the tax certificate program, see Note, supra note 29 (concluding that the tax certificate program, while worthwhile, is probably unconstitutional absent appropriate findings of past discrimination and reauthorization by Congress).
85. See 1978 Statement, supra note 34, at 983. In addition to the tax certificate and distress sale programs, cable broadcasters are also required to comply with the FCC's Equal Employment Opportunity requirements. 47 C.F.R. § 76.71 (1989); see also Comment, Constitutionality of Affirmative Action Requirements Imposed Under the Cable Communications Policy Act of 1984, 35 CATH. U.L. REV. 807 (1986) (arguing that the FCC's regulation of the employment practices of cable operators violates the equal protection clause of the Fourteenth Amendment).
86. 1978 Statement, supra note 34, at 981 (quoting MINORITY OWNERSHIP TASKFORCE, FEDERAL COMMUNICATIONS COMM'N, MINORITY OWNERSHIP REPORT (1978)). Minority ownership of media property, as compared to the percentage of minorities in the population, is minute. In October 1986, less than 250 of over 11,000 radio and television stations were owned by minorities. Note, supra note 29, at 981 (citing NATIONAL ASSN OF BROADCASTERS, MINORITY BROADCASTING FACTS 6, 8 (1986)).
87. 1978 Statement, supra note 34, at 981.
89. Id. at 3013.
speak to Congress’s approval or mandate of the diversity preferences. Congressional acquiescence simply cannot occur until the policy to which Congress might acquiesce is in place.90 Second, in response to Reagan FCC efforts to reexamine the diversity preference,91 Congress considered proposals to codify the FCC’s minority ownership policies.92 These proposals were not enacted, however, and consequently lend no support to the proposition that Congress strongly favored the diversity preference.93

Third, in 1981 and 1982, Congress authorized a lottery procedure for the granting of broadcast licenses that included a minority preference.94 Specifically, with “the [congressional] objective of increasing the number of media outlets owned by [minorities],”95 minority applicants were accorded a “significant preference”96 in the lottery. Undoubtedly, the lottery statute is suggestive of congressional support for the diversity rule. Neither the language nor legislative history of the lottery statute, however, demands that the FCC pursue either its comparative hearing or distress sale preference. As Justice White exclaimed in his questioning of FCC counsel Daniel Armstrong, Court reliance on the lottery statute is inappropriate because “that isn’t what the FCC has done.”97

Fourth (and most significant), Congress in 1987 enacted, and in each subsequent year reenacted, limitation riders prohibiting the FCC from reexamining its comparative hearing and diversity preferences.98


91. See Reexamination, supra note 69.

92. Metro Broadcasting, 110 S. Ct. at 3015-16.

93. If anything, Congress’s failure to codify the diversity preference suggests weak congressional support for the preference.


98. Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appro-
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These riders prohibit the FCC from expending appropriated funds to "repeal" or "reexamine" FCC preferences designed to "expand minority and [female] ownership of broadcasting licenses."99 Because appropriation bills are enacted annually, limitation riders lapse at the end of each fiscal year. Consequently, Congress must reenact these riders each year or the limitation no longer constrains the agency.100

The FCC rider was first passed as a preemptive strike against FCC efforts to reexamine its race and gender preferences. This reexamination was spurred by Steele v. FCC,101 a case that called the FCC's gender preference into doubt because "the Commission has been unable to offer any evidence other than statistical underrepresentation to support its bold assertion that more women station owners would increase programming diversity."102 Specifically, during the Steele litigation, the FCC asked that the case be returned so that it could conduct a proceeding to determine "whether there is a nexus between [FCC] preference schemes and enhanced diversity."103 The FCC asserted that such a proceeding was necessary because the presumed nexus "fail[ed] to pass constitutional muster" under its reading of Supreme Court decisions.104

Congress was outraged by this reexamination. Already antagonized by FCC efforts to repeal the Fairness Doctrine,105 as well as the FCC's weak enforcement of its prohibition of dual television and newspaper

100. See generally Devins, Regulation of Government Agencies Through Limitation Riders, 1987 DUKE L.J. 456 (analyzing institutional characteristics that prevent full consideration and articulation of policy in appropriations bills).
101. 770 F.2d 1192 (D.C. Cir. 1985). Two months after the initial decision in Steele by the D.C. Circuit, the court held an on banc rehearing and vacated the judgement.
102. Id. at 1199. For an analysis of Steele and the FCC reaction to it, see Comment, The Female Merit Policy in Steele v. FCC: "A Whim Leading to a Better World?" 37 AM. U.L. REV. 379 (1988).
103. Reexamination, supra note 69, at 13.
105. Broadcasting magazine, commenting on the FCC's repeal of the Fairness Doctrine in the wake of Congress's effort to codify it, observed that "[t]he move so poisoned relations between the two entities that it stimulated congressional oversight of a magnitude Washington insiders say is unprecedented." Micromanagement of the FCC: Here to Stay?, BROADCASTING, Dec. 26, 1988, at 56.
ownership in a single market, members of the House Committee overseeing the FCC castigated all five Commissioners for their refusal to honor congressional preferences. The outgrowth of this hearing was the first of the limitation riders. The Senate Report accompanying this rider noted that the FCC reexamination was "unwarranted" and that the Congress "has found that promoting diversity of ownership of broadcast properties satisfies important public policy goals." 

The Metro Broadcasting Court, in looking at the report language and related hearings, was correct in concluding that Congress approves of and has "kept the FCC's minority ownership policies in place." The Court was wrong, however, in labeling the diversity programs congressionally "mandated," implying that enactment of a limitation rider is functionally equivalent to legislative authorization. In complete contrast to the normal state of affairs, limitation riders are necessarily temporary measures; if Congress ever declines to reenact the rider, the FCC would be free to rescind its diversity preference. The FCC riders then cannot be viewed as Congress's mandate that the FCC pursue its diversity preferences. Because the riders merely prevent the FCC from reexamining its preference programs, this limitation is uninstructive in understanding congressional purpose.

Practical problems associated with treating appropriation riders as substantive legislation also support this limited reading of the FCC riders. In a 1987 study I concluded:

[Appropriation riders are single-year measures—necessarily susceptible to changing circumstances. Although the [lower federal] courts have tended to provide substantive interpretations of appropriations by looking to legislative history and by recognizing that Congress often legislates in the appropriations process, such interpretations are suspect and should not be undertaken. Otherwise, courts, in the name of legislative intent, will create binding precedents that may ultimately frustrate Congress's ability to express its]

107. Congressman John Bryant characterized it as "almost pointless" to work with the Commission, Steele Hearings, supra note 104, at 31; Congressman Mickey Leland referred to the need to draft "FCC proof" legislation as well as the need to "fight this Commission tooth and nail" on civil rights matters, id. at 20; and Congressman Edward Markey labeled the reexamination "a cloudburst in a storm of suspicion and distrust which seems to hover over this commission," id. at 22.
110. Id. at 3008.
111. This point was made in oral argument. In response to the FCC counsel's assertion that "this is Congress now that's acted," Justice White remarked: "[B]ut all Congress said... [is] that it didn't want you to change." Transcript of Oral Arguments at 39, Metro Broadcasting, Inc. v. FCC, 110 S. Ct. 2997 (1990) (No. 89-453).
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desires.  

This conclusion is consistent with Supreme Court precedents that draw a sharp line between authorizations and appropriations.  

Congressional support for the FCC preferences, while clear, falls short of a legislative mandate. To the extent that Metro Broadcasting’s choice of middle tier review or its conclusion that minority ownership is substantially related to program diversity hinges on the congressional “mandate” for the FCC preference, the Court’s reasoning is subject to question.

B. Diversity and the Equality Principle

The major surprise of Metro Broadcasting was that the Court crossed the abyss separating remedial and nonremedial justifications for affirmative action without hesitation. Although Justice Powell (in Bakke), Justice O’Connor (in Wygant v. Jackson Board of Education), and Justice Stevens (in Johnson v. Transportation Agency) had all indicated that affirmative action could be justified on nonremedial grounds, the Court had never seriously considered nonremedial justifications for race preferences. Instead, in cases involving both federal and state programs, the debate revolved around classic remedial questions of

112. Devins, supra note 100, at 498 (footnotes omitted).
113. See, e.g., Andrus v. Sierra Club, 442 U.S. 347, 361 (1978) (“The distinction [between appropriations and authorizations] is maintained ‘to assure that program and financial matters are considered independently of one another, [thereby preventing the Appropriations Committee] from trespassing on substantive legislation’”) (quoting HOUSE BUDGET COMM., 95TH CONG., 1ST SESS., CONGRESSIONAL CONTROL OF EXPENDITURES 19 (Comm. Print 1977)); Tennessee Valley Auth. v. Hill, 437 U.S. 153, 190 (1978) (“We recognize that both substantive enactments and appropriations measures are ‘Acts of Congress,’ but the latter have the limited and specific purpose of providing funds for authorized programs. . . . [Otherwise], every appropriations measure would be pregnant with prospects of altering substantive legislation . . . .”).
114. Justice Powell noted that the first-amendment value of selecting a group of students to foster the “robust exchange of ideas” independently supports the use of race as a plus factor in university admissions. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 313 (1978); see generally Blasi, Bakke as Precedent: Does Mr. Justice Powell Have a Theory?, 61 CALIF. L. REV. 21 (1979) (dissecting the theoretical bases of Justice Powell’s reasoning in Bakke).
115. 476 U.S. 261 (1986). Justice O’Connor suggested that Bakke might be extended to nonremedial settings. See id. at 286-87 (O’Connor, J., concurring). Justice O’Connor, however, has never upheld an affirmative action plan on nonremedial grounds. Moreover, Justice O’Connor’s dissent in Metro Broadcasting suggests that she no longer endorses nonremedial justifications for affirmative action. See Metro Broadcasting, Inc. v. FCC, 110 S. Ct. 2997, 3034 (1990) (O’Connor, J., dissenting) (asserting that modern equal protection doctrine has recognized that “remedying the effects of racial discrimination” is the only compelling interest that will support the government’s use of racial classifications).
116. 480 U.S. 616 (1987). Justice Stevens perceives backward-looking remedial affirmative action as too limiting. For Stevens, “in many cases the employer will find it more appropriate to consider other legitimate reasons to give preferences to members of underrepresented groups.” Id. at 646 (Stevens, J., concurring).
defining the wrongdoer and the scope of the violation.\textsuperscript{117} As Professor Kathleen Sullivan observed, the Court “approve[s] affirmative action only as precise penance for the specific sins of racism . . . committed in the past.”\textsuperscript{118}

This remedial emphasis is hardly surprising. The values that underlie the Court’s equality jurisprudence—separation of functions and antidiscrimination—effectively limit government to the use of race for remedial measures.\textsuperscript{119}

Separation of functions lies at the heart of the Court’s two-tiered classification approach. Government, for the most part, is presumed trustworthy and hence may draw distinctions among people without intrusive judicial scrutiny. The important exception to this rule is that “[c]lassifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns.”\textsuperscript{120} In other words, because “[t]hese factors are so seldom relevant to the achievement of any legitimate state interest,”\textsuperscript{121} “judicial deference is no longer justified.”\textsuperscript{122}

The antidiscrimination principle is the principle disfavoring all race-dependent decision making.\textsuperscript{123} In the words of Justice Stevens: “Persons of different races, like persons of different religious faiths and different political beliefs, are equal in the eyes of the law.”\textsuperscript{124} As such, the antidiscrimination principle furthers liberal individualism and discourages, as Professor Michael Perry puts it, “racialism, the mental habit of thinking about and dealing with persons of races, other than one’s own, not as individuals, but as ‘blacks,’ ‘whites,’ and so forth.”\textsuperscript{125}

\textsuperscript{117.} See, e.g.,\textsuperscript{118} Wygant, 476 U.S. at 274-76 (rejecting as a justification for an affirmative action teacher layoff provision the argument that minority students need role models as a remedy for general societal discrimination, and requiring instead that the remedy bear some relation to prior discriminatory practices by the particular school board); United States v. Lawrence County School Dist., 579 F.2d 1031, 1043 (5th Cir. 1986) (suggesting that changing school district zones did not exceed the scope of the violation when the school board continually violated an original court desegregation order prohibiting “zone jumping”); Seattle School Dist. v. Washington, 633 F.2d 1338, 1345 (9th Cir. 1980) (declaring invalid a state statute prohibiting school boards from busing students across district lines on the grounds that “judicial desegregation remedies could not exceed the geographical scope of the constitutional violation”), aff’d, 458 U.S. 457 (1982).

\textsuperscript{118.} Sullivan, The Supreme Court, 1985 Term—Comment, Sins of Discrimination: Last Term’s Affirmative Action Cases, 100 Harv. L. Rev. 75, 80 (1986).


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In the case of "benign" discrimination, separation of functions and antidiscrimination values diverge. Separation of functions does not bar the affirmative use of race. In the words of Professor John Hart Ely, "When the group that controls the decision making process classifies so as to advantage a minority and disadvantage itself, the reasons for being unusually suspicious, and, consequently, employing a stringent brand of review, are lacking." Antidiscrimination's emphasis on individual self-worth is more limiting, however. If minorities and nonminorities are similarly situated vis-à-vis race, distinctions between the benign and pernicious use of race are senseless. Alexander Bickel, in a passage often quoted by the Reagan Justice Department, put it this way: "[D]iscrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society. Now this is to be unlearned and we are told that this is not a matter of fundamental principle but only a matter of whose ox is gored."

This is not to say either that antidiscrimination absolutely forbids race-dependent decision making or that separation of functions always endorses race-conscious action that benefits minorities. With respect to antidiscrimination, in order to discourage racist conduct, wrongdoers must be forced to remedy their racist conduct—even if it is impossible to locate the "actual victim" of discrimination. With respect to separation of functions, affirmative action programs must truly serve minority interests at the expense of nonminority interests. Otherwise, the group-disadvantaging principle that permits endorsement of race preferences under separation-of-functions principles would evaporate. For example,

126. Metro Broadcasting, Inc. v. FCC, 110 S. Ct. 2997, 3008 (1990). Justices Brennan and O'Connor are at odds on whether the Court can successfully distinguish benign from pernicious classifications. Whereas Justice Brennan is "confident" of the Court's ability to do so, id. at 3008 n.12, Justice O'Connor labels benign racial classifications a "contradiction in terms" because "'benign' carries with it no independent meaning," id. at 3033 (O'Connor, J., dissenting). The disagreement within the Court itself shows that Justice O'Connor has the upper hand here; the line separating benign from pernicious discrimination is not obvious. Justice Brennan and supporters of the program saw the nexus between minority ownership and program diversity as an appropriate recognition of cultural diversity, id. at 3016-17, while opponents such as Justice O'Connor characterized the presumptive nexus as racist stereotyping, see id. at 3037 (O'Connor, J., dissenting). In gender cases, feminists sharply disagree in their characterization of gender preferences. Some feminists, for example, see maternity leave and other pregnancy-related "benefits" as a mechanism to perpetuate gender roles. See, e.g., Williams, Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate, 13 N.Y.U. REV. L. & SOC. CHANGE 325, 329 (1984-85). Other feminists see this endorsement of strict equality as "part of the way male dominance is expressed in the law." C. MACKINNON, FEMINISM UNMODIFIED 44 (1987). This difficulty of sorting out benign and pernicious suggests that Justice Brennan is a bit cavalier in his confidence in the judiciary's ability here.


a quota designed to ensure that minorities continue to be overrepresented in "second class" job categories would not be entitled to deference on separation-of-functions grounds.

The diversity rationale endorsed in Metro Broadcasting raises concerns under both antidiscrimination and separation-of-functions analyses. Diversity values a cross-representation of viewpoints and assumes that group status—at least "in the aggregate"—is a proxy for the representation of certain views. With respect to the FCC preference, the diversity rationale presumes that racial status will influence the programming decisions of black and white license holders. In focusing on groups, diversity directly contradicts the ethos of individualism that underlies antidiscrimination. Moreover, while the FCC assumes that black and white broadcasters will make different programming decisions, it does not assume that black and white viewers will be racially stratified in their viewing decisions. However, that both minorities and non-minorities are intended beneficiaries of the presumed ownership-programming nexus exposes the FCC practice to criticism under the separation-of-functions rationale. The FCC preference can be characterized as racist stereotyping designed to serve the predominantly nonminority broadcasting audience. On the other hand, the legislative and administrative record also supports interpretation of the FCC preference as a measure designed principally to serve the minority audience and only incidentally the nonminority audience. This construction, although debatable, at least answers the separation-of-functions concern.

The question remains whether separation-of-functions values should trump antidiscrimination concerns when government adopts an affirmative action plan. Supreme Court affirmative action cases preceding

130. Metro Broadcasting, 110 S. Ct. at 3016.
131. As Justice O'Connor commented in her Metro Broadcasting dissent, the FCC preference "embod[ies] stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by history and the Constitution." Id. at 3029 (O'Connor, J., dissenting).
132. The FCC has argued that the underrepresentation of minority broadcasters "is detrimental not only to the minority audience but to all of the viewing and listening public." 1978 Statement, supra note 34, at 980-81. The FCC reasoned: "Adequate representation of minority viewpoints in programming serves not only the needs and interests of the minority community but also enriches and educates the non-minority audience." Id. at 981.
133. This concern is distinguishable from Justice O'Connor's concern that "[t]he policies impermissibly value individuals because they presume that persons think in a manner associated with their race." Metro Broadcasting, 110 S. Ct. at 3037 (O'Connor, J., dissenting). For Justice O'Connor, racial stereotyping is an inevitably pernicious categorization of an individual as a member of a racial group. Separation of functions asks a different question: is government acting in a well-intentioned manner?
134. See 1978 Statement, supra note 34, at 979-80.
135. Academic debate on this question is legion. Compare, e.g., Ely, supra note 127, at 724-25, 738-39 (arguing that separation of functions predominates) with Van Alstyne, Rites of Passage:
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Metro Broadcasting, rather than making one or the other value absolute, are a hybrid of sorts. In accord with antidiscrimination, the Court held there must be "convincing evidence that remedial action is warranted." Otherwise, "a core purpose of the Fourteenth Amendment which is to 'do away with all governmental distinctions based on race'" will be undermined. At the same time, in accord with separation of functions, the Court has indicated that an affirmative action plan "need not be limited to the remedying of specific instances of identified discrimination." The Court has also indicated that a governmental actor—rather than being forced to make a contemporaneous finding of discrimination—may "remedy" discrepancies in "the relevant labor market" between qualified minority hires and qualified nonminority hires. Between these two values, antidiscrimination appears predominant. Separation-of-functions concerns merely temper the antidiscrimination value: while separation of functions liberalizes government's ability to say there is a wrong in need of redress, the central value of disfavoring nonremedial uses of race remains intact.

Metro Broadcasting ducked this remedial demand issue as well as the antidiscrimination principle by distinguishing Congress's "benign" use of race from other race-conscious decision making. In doing so, the Court also rejected strict review in favor of middle tier review of Congress's affirmative action efforts. The endorsement of middle tier review is pure sophistry. The core of the Court's argument is that case law supports judicial deference to congressional action. Consequently, because no Court precedent formally applies strict review to federal affirmative action, judicial deference supports a lowering of the strict scrutiny standard of review applicable to state and local affirmative action efforts. The Court ignored its long-standing rule that "[t]his Court's approach to... equal protection claims has always been precisely the same [for state and federal action]." In this case, the same means strict scrutiny re-

Race, the Supreme Court, and the Constitution, 46 U. CHI. L. Rev. 775, 810 (1979) (arguing that antidiscrimination predominates for "in all we do in life... to treat any person less well than another or to favor one any more than another for being black or white or brown or red, is wrong").

138. Id. at 287 (O'Connor, J., concurring).
139. See id. at 277. For further discussion of the remedial use of race classifications, see id. at 284-85 (O'Connor, J., concurring).
view, the standard applied in *Croson*.\textsuperscript{141}

My argument for strict review should not be interpreted as suggesting that federal power to make use of racial classification reaches no further than state power in this area. The respect owed a coequal branch, Congress’s power to enforce the Fourteenth Amendment, and the checks against ill-considered action inherent in the structure of government all speak to judicial deference to congressional decision making in the equal protection realm.\textsuperscript{142} Consequently, in *Fullilove*, the furthering of equal protection values by redressing systemic societal discrimination warranted judicial deference to the assessment of both legislative means and ends.\textsuperscript{143} For this reason, Chief Justice Burger’s plurality opinion concludes that the set-aside upheld in *Fullilove* would pass muster under strict review.\textsuperscript{144}

*Metro Broadcasting* is on a different footing, however. Rather than enforcing or furthering equal protection values, the FCC policy advances first-amendment diversity values at the expense of equal protection race neutrality values. At this level, the FCC preference seems subject to the Supreme Court’s admonition that judicial deference should not be shown to congressional action that dilutes equal protection decisions.\textsuperscript{145}

These concerns, given *Metro Broadcasting*’s suggestion that the FCC preferences may very well satisfy strict review, may seem merely symbolic. Symbols matter quite a lot, however. The operational phrases in equality decision making have no fixed meaning.\textsuperscript{146} A compelling in-

\textsuperscript{141} The embrace of strict scrutiny in *Croson* had seemingly established the uniform state-federal standard to be applied in affirmative action cases. See *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706, 721 (1989). Indeed, in a case decided shortly after *Croson*, *H.K. Porter Co. v. Metropolitan Dade County*, the Supreme Court vacated “for further consideration in light of *Croson*” a federal appeals court decision upholding a Department of Transportation affirmative action plan. 109 S. Ct. 1333 (1989) (mem.), vacating 825 F.2d 324 (11th Cir. 1987).

\textsuperscript{142} See generally Nathanson, *Congressional Power to Contradict the Supreme Court’s Constitutional Decisions: Accommodation of Rights In Conflict*, 27 WM. & MARY L. REV. 331 (1986).

\textsuperscript{143} The *Fullilove* Court was extraordinarily deferential. With respect to legislative ends, the Court noted that Congress’s failure to engage in specific fact finding was not problematic because “Congress had abundant historical basis from which it could conclude that traditional procurement practices ... perpetuate the effects of prior discrimination.” *Fullilove* v. Klutznick, 448 U.S. 448, 478 (1980) (emphasis added). With respect to legislative means, the Court referred to “the well-established concept that a legislature may take one step at a time to remedy only part of a broader problem.” Id. at 485 (emphasis added). See generally Days, supra note 49, at 463-76.

\textsuperscript{144} *Fullilove*, 448 U.S. at 492.

\textsuperscript{145} Katzenbach v. Morgan, 384 U.S. 641, 651 n.10 (1966). This feature of *Katzenbach*—the so-called “ratchet” theory—is quite controversial. Many commentators perceive that Congress’s power to expand rights protection necessarily leads to a correlative power to reduce. For an excellent introduction to this topic, see Carter, *The Morgan “Power” and the Forced Reconsideration of Constitutional Decisions*, 53 U. CHI. L. REV. 819, 830-34 (1986). See also Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603, 614 (1975) (proposing a theory that distinguishes between congressional competence to make “liberty” and “federalism” judgments as a possible resolution to the ratchet theory controversy).

\textsuperscript{146} In a similar vein, Sanford Levinson argues that it is the interpreter of the Constitution,
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terest in one case may not be deemed a substantial interest in another; substantially related may demand a tighter means-ends fit than a least restrictive means requirement. Indeed, the few rational review cases that strike down governmental action apply a more rigorous standard than many middle tier and strict review decisions. As a result, the battle over the applicable standard of review is a battle over the characterization of the case. Given the malleability of equality standards, that characterization may well prove outcome determinative. As Justice O'Connor observed in dissent: "A lower standard [of review] signals that the Government may resort to racial distinctions more readily [thereby evidencing a] . . . renewed toleration of racial classifications."

Metro Broadcasting fully evidences this tolerance. The notion that first-amendment diversity concerns, in general, outweigh core equal protection concerns is dumbfounding. There is little doubt that the achievement of the widest "possible dissemination of information from diverse and antagonistic sources" further first-amendment values. Moreover, there is no reason to doubt the FCC's argument that program diversity objectives cannot be accomplished through race-neutral means "without on-going government surveillance of the content of speech." Nevertheless, this first-amendment defense of the diversity rule fails at two levels. First, Supreme Court precedent recognizes that public interest objectives may warrant limitations on broadcasters' first-amendment rights. Second, even if the First Amendment bars race-neutral alterna-

rather than the document's text, that defines the Constitution's meaning. See Levinson, Law as Literature, 60 Texas L. Rev. 373, 384-86 (1982). In other words, the meaning of standards—whether they be constitutional provisions or standards of review—lies in the hands of the interpreter.


148. See generally Gunther, The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1 (1972) (criticizing the Court's two-tiered classification approach, under which the characterization of a case may define the outcome).


150. Id. at 46. Justice Brennan also suggests that "insurmountable practical problems" of monitoring "the needs of every community" speak in favor of the presumed nexus. Metro Broadcasting, 110 S. Ct. at 3019. This suggestion, however, is fundamentally at odds with the Supreme Court's clear rejection of "administrative convenience" justification for line drawing on the basis of race or gender. See, e.g., Frontiero v. Richardson, 411 U.S. 677, 690 (1973) (arguing that "[a]lthough efficacious administration of governmental programs is not without some significance, 'the Constitution recognizes higher values than speed and efficiency' ") (quoting Stanley v. Illinois, 405 U.S. 645, 656 (1972)).
tives, equal protection antidiscrimination concerns trump the first-amendment diversity value.

When it comes to the broadcast medium, the Supreme Court has held that "[i]t is the right of the viewers and listeners, not the right of the broadcasters which is paramount."152 Relatedly, the Court has also ruled that "in evaluating the first-amendment claims of [broadcasters,] we must afford great weight to the decisions of Congress and the experience of the commission."153 Indeed, the factors Metro Broadcasting cites to support judicial deference to Congress's use of race—Congress's fact-finding expertise, status as a coequal branch, and institutional competence as the national legislature—apply with equal force to the first-amendment arena. Consequently, it hardly seems surprising that the first-amendment interest in broadcast diversity (recognized as at least substantial and quite possibly compelling in Metro Broadcasting) should outweigh the first-amendment rights of broadcasters (recognized by the Court as secondary to the public's interest in media access).

Yet, even if the First Amendment bars race-neutral diversity regulations so that the presumptive ownership-broadcasting nexus is the only mechanism that promises to further important diversity objectives, the FCC preference is nonetheless impermissible. Irrespective of one's views as to whether the Constitution prefers equal protection to free speech or vice versa,155 the FCC policy implicates these constitutional rights in such different ways that equality must predominate in this case. The elimination of the diversity preference merely limits FCC efforts to expand first-amendment values. Unlike prior restraints or direct regulation of the press and broadcast media, the elimination of the diversity preference does not limit the speech of any speaker presently in the market-


153. Columbia Broadcasting, 412 U.S. at 102. The Court, moreover, has recognized that the FCC has broad authority to interpret its public interest mandate. See National Broadcasting Co. v. United States, 319 U.S. 190, 215-16 (1943).


155. The Constitution does not create a hierarchy of rights. Moreover, Professor Douglas Laycock's observation in a slightly different context—the clash between freedom of religion and equality—seems equally relevant here: "Even conceding that some constitutional rights may be more important than others, both of these rights have been counted among our preferred freedoms." Laycock, Tax Exemptions for Racially Discriminatory Religious Schools, 60 TEXAS L. REV. 259, 262 (1982).
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place. In sharp contrast, the maintenance of the diversity preference strikes at the heart of the Constitution’s mandate for equal treatment on the basis of race.

This conclusion is buttressed by Supreme Court holdings that equal treatment values outweigh other constitutional protections. In *Bob Jones University v. United States*, the Court upheld the government’s denial of tax breaks to schools that, as a matter of religious belief, discriminate on the basis of race. For the Court, the government’s “fundamental, overriding interest in eradicating racial discrimination . . . substantially outweighs whatever burden” is placed on religious freedom. In *Roberts v. United States Jaycees*, the Court ruled that an all-male club’s freedom of association interest waned in comparison to state antidiscrimination efforts. The Court observed that “acts of invidious discrimination in the distribution of publicly available goods, services, and other advantages cause unique evils that government has a compelling interest to prevent.” These cases make clear the primacy of the equal treatment value.

The *Metro Broadcasting* Court, however, sidesteps the problems of competing constitutional values by characterizing the diversity preference as benign. But if first-amendment diversity alone grounds the preference—that is, if equal protection remedial objectives are irrelevant—then the diversity preference is necessarily at odds with *Brown v. Board of Education*. universalistic command that racial line drawing is impermissible. Diversity, by itself, demands that government act in a

157. Id. at 605.
158. Id. at 604; see also Bugai, Discrimination in the Name of the Lord: A Critical Examination of Discrimination by Religious Organizations, 79 Colum. L. Rev. 1514, 1549 (1979) (arguing that only activities outside of a “spiritual epicenter” must yield to antidiscrimination policies). See generally Laycock, supra note 155, at 277 (arguing that there is no basis for rank ordering freedoms in the Constitution). For further discussion of the balancing of religious liberty and antidiscrimination values, see Marshall & Brant, Employment Discrimination in Religious Schools: A Constitutional Analysis, in PUBLIC VALUES, PRIVATE SCHOOLS 91 (N. Devins ed. 1989).
160. See id. at 621.
161. Id. at 628. For further analysis, see Marshall, Discrimination and the Right of Association, 81 Nw. U.L. Rev. 68, 68-70 (1986) (arguing that the constitutionality of applying antidiscrimination legislation to private organizations is not settled by *Roberts*). The *Roberts* ruling was extended in two subsequent cases pertaining to all-male clubs. See New York State Club Ass’n v. City of New York, 487 U.S. 1, 12 (1988) (stating that under *Roberts* New York’s Human Rights Law “could be constitutionally applied at least to some of the large clubs”); Board of Directors v. Rotary Club, 481 U.S. 337, 346 (1987) (declaring that “the relationship among Rotary Club members is not the kind of intimate or private relation that warrants constitutional protection” from a state civil rights statute).
163. For an excellent introduction to *Brown*’s universalistic vision, see D. Kirp, JUST SCHOOLS 3-71 (1982).
race-conscious manner and hence cannot be reconciled with the equality guarantee.\textsuperscript{164} Metro Broadcasting's failure to recognize competing equality concerns is the most disappointing feature of the case.

III. The Road Not Taken: The Remedial Justification for the FCC Preference

The failings of Metro Broadcasting do not condemn FCC efforts to increase minority ownership through racial preferences. The FCC program is capable of characterization as the permissible efforts of a federal administrative agency to remedy societal discrimination. Although dutifully noting that "Congress found that 'the effects of past inequities stemming from racial and ethnic discrimination have resulted in a severe underrepresentation of minorities in the media of mass communication,'"\textsuperscript{165} the Metro Broadcasting Court never pursued this line of inquiry. Perhaps, as shall shortly be discussed,\textsuperscript{166} the FCC's handling of the case forced the Court's hand on this point. Given the problematic nature of Metro Broadcasting, however, the Court would have been better off upholding the diversity preference by pursuing this remedial tack.

The FCC preference is not merely an attempt to increase broadcast diversity caused by the underrepresentation of minority license holders. Two remedial justifications also underlie the FCC preferences. First, the preference is an outgrowth of FCC efforts to further national equal employment opportunity objectives. Second, the preference is a remedial link to FCC diversity objectives; since the underrepresentation of minority owners stems from societal discrimination, the FCC must remedy that discrimination as a means to the end of program diversity.

The story begins in 1968 with the Kerner Commission Report concluding that America is a racially polarized society in need of pervasive reform.\textsuperscript{167} The Kerner Commission chided the broadcast media for failing to communicate "the difficulties and frustration of being a Negro in the United States."\textsuperscript{168} In response, the FCC adopted equal opportunity regulations forbidding the grant of licenses to broadcasters who do not comply with Title VII equal employment requirements as well as regulations requiring licensees to develop a comprehensive equal opportunity

\textsuperscript{164} For an analysis that reaches the opposite conclusion, see Comment, The Constitutionality of the FCC's Use of Race and Sex in the Granting of Broadcast Licenses, 83 NW. U.L. REV. 665 (1989).
\textsuperscript{166} See infra notes 187-90 and accompanying text.
\textsuperscript{167} REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 1 (1968).
\textsuperscript{168} Id. at 210.
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program.169 The Commission claimed that its "duty" to serve the "public interest" included an obligation to further national civil rights policy through its licensing decisions.170

At this time, however, the principle focus of FCC civil rights enforcement was the elimination of pernicious discrimination by its license holders. Yet, within ten years the FCC would base the affirmative use of race upon remedial concerns.171

Similarly, in 1978, an FCC Task Force Report, Minority Ownership in Broadcasting,172 concluded that remedial assistance was an appropriate basis for increasing minority ownership. The Report observed:

Generations of discrimination have created a form of racial caste. . . . [A] direct result of the general societal discrimination has been the underrepresentation of these minorities in the ownership of broadcast stations . . . . [I]f the inequities of the past are to be corrected they must be treated by measures which go beyond mere "neutrality."173

The Carter Administration echoed these concerns. In explaining Administration recommendations that the FCC grant minority preferences, the President stated that the lack of minority ownership was attributable to:

Such obstacles as not having adequate financing, the lack of technical training because of discrimination and exclusion in the past, and a shortage of available stations to buy or to manage, because so many were assigned long ago when racial discrimination was both a de facto and a de jure part of the American societal life.174

The FCC responded to the Carter initiative and their own task force recommendations with its May 1978 adoption of distress sale and tax certificate preferences for racial minorities.175

Congressional and related FCC action in the early 1980's further

170. Petition for Rulemaking (Memorandum Opinion), 13 F.C.C.2d at 768, 769.
171. Remedial concerns were raised in the TV 9 litigation. See Mid-Florida Television Corp., 37 F.C.C.2d 559, 560 (1972) (Hooks, Comm'r, concurring) (denial of rehearing) ("Blacks have been, for so many years, oppressed by racist and artificial devices that it may take other 'artificial' measures to offset the prevailing conditions.").
172. MINORITY OWNERSHIP TASKFORCE, FEDERAL COMMUNICATIONS COMM'N, MINORITY OWNERSHIP IN BROADCASTING (1978); see also Note, Achieving Diversity in Media Ownership: Bakke and the FCC, 67 CALIF. L. REV. 230, 233-36 (1979) (discussing racial discrimination against minority broadcasters).
173. Id. at 7-8.
175. See supra notes 83-87 and accompanying text.
strengthens the remedial justification for the FCC preferences. Congress, in 1981, enacted a lottery statute containing a diversity preference. After the FCC refused to implement the statute, in part, because Congress—unlike the Commission—did not specify that preference beneficiaries had suffered from discrimination, Congress enacted a second lottery statute in 1982. In this statute, which contained a racially specific diversity preference, was responsive to the conferees' finding that "the effects of past inequities stemming from racial and ethnic discrimination have resulted in a severe underrepresentation of minorities in the media of mass communications." 177

In 1986, however, the FCC flip-flopped, claiming that its diversity preferences were constitutionally suspect because they were grounded solely in diversity objectives. This decision triggered congressional hearings and, ultimately, limitation riders prohibiting FCC reexamination of its diversity preference. The legislative history surrounding this action suggests that Congress saw the FCC preferences as serving remedial as well as diversity objectives.

However, prior to its filings before the Supreme Court, the FCC maintained in Metro Broadcasting that its "goal in implementing the preference policy has not been to remedy prior discrimination against minorities or to provide remedial benefits." With President Bush's appointment of three new commissioners in the summer of 1989 (all of whom expressly supported the diversity preferences in their confirmation

176. See supra notes 94-97 and accompanying text.
178. See Brief for Federal Communications Commission, Steele v. FCC, 770 F.2d 1192 (D.C. Cir. 1985) (No. 84-1176), reprinted in Steele Hearings, supra note 104, at 78; supra notes 101-04 and accompanying text. In saying the FCC "flip-flopped," I do not mean that the FCC's reexamination of its diversity preferences was inappropriate. First, if the FCC viewed these preferences as purely a diversity measure, there was reason to question their constitutionality. See supra notes 119-39 and accompanying text. Second, even as a remedial link to diversity objectives, the FCC might well have been troubled by its failure to examine whether there was in fact a correlation between minority ownership and diverse programming. If no correlation was found to exist, the FCC might have found itself without authority in this matter. Third, irrespective of the question of constitutionality, the FCC may perceive race line drawing to be so odious as to be inconsistent with its public interest mandate.
179. For example, in questioning FCC Chairman Mark Fowler, Congressman Mickey Leland asked: "Why are you always putting up obstacles when we have some convenient means by which we can overcome this incredible discrimination?" Steele Hearings, supra note 104, at 36. Another example is Senate majority leader George Mitchell's statement that one need served by the FCC's diversity preference "is to overcome the effects of . . . discrimination." 136 Cong. Rec. S7773 (daily ed. Feb. 27, 1990); see supra notes 105-08 and accompanying text; see also S. Rep. No. 182, 100th Cong., 1st Sess. 76, 77 (1988) (referring to Congress's remedial objectives).
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hearings\textsuperscript{181}), the FCC again changed course. Before the Supreme Court, the FCC argued that the diversity preferences served "the compelling governmental interests of promoting diversity in broadcast programming and remedying discrimination."\textsuperscript{182}

It seems entirely appropriate that the FCC frame its Supreme Court argument this way. The demand that an agency "explain the rationale and factual basis for its decision"\textsuperscript{183} and the prohibition of post hoc rationalizations of agency policy before a reviewing court\textsuperscript{184} does not foreclose FCC advancement of this remedial justification. The remedial justification falls well within Supreme Court precedent "upholding a decision of less than ideal clarity if the agency's path may reasonably be discerned."\textsuperscript{185} First, the establishment and evolution of FCC diversity preferences suggests that remedial concerns played a large role. Second, FCC fact finding explicitly supports the remedial connection. Third, since the FCC preference is responsive to the adverse consequences of minority underrepresentation on broadcast diversity, the causes of minority underrepresentation (various aspects of societal discrimination) are inexorably linked to program diversity concerns. Fourth, a contrary holding demands that government agencies undertake the seemingly redundant task of re-authorizing existing regulations. Such a requirement seems clearly impractical, as well as a violation of the rights of government agencies to define their own policy agenda.\textsuperscript{186}


It also seems a little too late in the day to argue—as the Bush Department of Justice did in Metro Broadcasting—that the deference accorded Congress's efforts to combat discrimination do not extend to "Federal administrative agencies acting under a general grant of authority to regulate a particular industry in the public interest." Brief for the United States at 14, Metro Broadcasting, Inc. v. FCC, 110 S. Ct. 2997 (1990) (No. 89-453). Congress, for better or worse, is empowered to broadly delegate its rule-making authority to executive and independent agencies. See generally L.
The Court in *Metro Broadcasting*, of course, declined to assess the remedial justification for the diversity preference. That refusal, in large measure, can be attributed to the FCC's handling of the case. Rather than argue that the FCC itself intends for its diversity preferences to serve remedial objectives, the FCC brief argues that congressional action—presumably the limitation riders—has superimposed remedial objectives onto the FCC preference. While the limitation riders temporarily freeze the preferences, it is quite a stretch to argue that they alter the substantive objectives served by the preferences.

The Court's refusal to treat the FCC preference as a remedial measure is appropriate. Unlike social and economic legislation for which the Court is free to provide legitimating ends, racial line drawing at least demands that the government clearly state the purposes behind its action. The FCC's effort to tie its remedial theory to congressional action simply does not wash. To hold otherwise—that is, to empower courts to provide legitimating rationales when government's use of race is well intentioned—is to tear at the heart of equality. Separation of functions and antidiscrimination set line drawing on the basis of race apart from other governmental conduct for a reason.

All of this leads to a somewhat strange conclusion. The FCC preference is capable of characterization as a remedy for societal discrimination. Moreover, since this remedy is integrally related to the FCC's interest in program diversity, the preference lies within the bounds of FCC authority. Consequently, there is good reason to uphold the preference. However, as it is incumbent upon the FCC to state the basis for its use of race, its failure to endorse the remedial justification as its own forecloses remedial analysis. Moreover, the diversity justification by itself is inadequate support for governmental line drawing on the basis of race. The FCC plan therefore must be declared invalid.

This conclusion may appear to be the victory of form over substance. After all, the FCC need only point to its and Congress's findings about the causes of minority underrepresentation and the impact of such

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188. See supra notes 109-13 and accompanying text.
189. See, e.g., *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955) ("Evils in the same field may be of different dimensions . . . [or so the legislature may think."] (emphasis added); *Railway Express Agency v. New York*, 336 U.S. 106, 110 (1949) ("The local authorities may well have concluded [that the regulation advanced a useful purpose].") (emphasis added).
190. Congress's lottery statute meets this mandate and hence is clearly constitutional under the analysis advanced in this Comment.
underrepresentation on program diversity objectives to justify the diversity preference. In my view, however, the costs of racial line drawing demand this formality. Government’s use of race either to define an individual’s worth or as a behavioral predictor is one of the principal evils to be checked by the counter-majoritarian judiciary. The mandate that government forthrightly defend its use of race therefore seems an absolutely minimalistic demand.

IV. Conclusion

Metro Broadcasting is at once far reaching and vulnerable: far reaching because the utilization of middle tier review and the approval of nonremedial affirmative action is suggestive of expansive congressional authority to utilize race-specific preferences; vulnerable because the demands of middle tier review may prove as scrutinizing as strict review, and because the line drawn between Congress and other governmental entities may ultimately limit the case to instances where race preferences are formally endorsed in authorizing legislation. In the hands of a Court without Justice William Brennan, there is reason to think that the case will receive a narrowing construction. Nonetheless, although a narrowing construction may effectively nullify the case’s most controversial features, Metro Broadcasting at the least reinforces Fullilove and thereby provides a significant victory for proponents of race preferences.

But this victory may not prove sweet. As this Comment demonstrates, Metro Broadcasting reflects suspect reasoning and is an affront to core equality values. For the powerful critics of Justice Brennan, this case may well prove a model of judicial impropriety. At this level, Metro Broadcasting diverts attention away from the very real problems minorities face as a consequence of past discrimination. This result is tragic.

There is another tragedy here. Metro Broadcasting, by emphasizing the deference owed Congress as well as the Court’s “confidence” in the judiciary’s ability to distinguish well-intentioned from pernicious classifications, seems almost flip in its approval of race preferences. This “What, me worry?” approach invites Congress to treat race—like farm supports, trade tariffs, defense systems, and so on—as simply another bargaining chip in the legislative process. Race is different, however, and

191. See, e.g., Craig v. Boren, 429 U.S. 190, 204 (1976) (rejecting—as inconsistent with “the normative philosophy that underlies the Equal Protection Clause”—state proof that gender classification concerning the sale of alcohol is warranted because men are eleven times more likely than women to be arrested for driving under the influence of alcohol).

192. Metro Broadcasting, Inc. v. FCC, 110 S. Ct. 2997, 3008 n.12 (1990). For further discussion, see supra note 126.
the unthinking use of race is simply unacceptable. As Professor Drew Days, who represented the United States in Fullilove, observed in a related context: “This is an indefensible state of affairs that threatens to undermine the principle of affirmative action and the appropriate use of race-conscious remedies for racial discrimination. It ought to stop.”

Metro Broadcasting’s significance as a precedent and a symbol is a story that has yet to unfold. By choosing the broadest grounds available for their decision, however, the Supreme Court may have ultimately limited the constructive use of race preferences. In any event, by suggesting that the trouble with racial classifications is merely a problem of ends and not means, Metro Broadcasting sends the wrong message.