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Metro Broadcasting, Inc. v. FCC: Are Racial Classifications No Longer Subject to Strict Scrutiny?

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I. INTRODUCTION

In *Metro Broadcasting, Inc. v. FCC*,[1] the Supreme Court addressed whether two minority preference programs of the Federal Communications Commission (the "Commission") were consistent with the fifth amendment principle of equal protection.[2] The majority, in an opinion written by Justice Brennan, held that the programs, one awarding an advantage to minority ownership in comparative hearings for new licenses and the other permitting a limited category of existing broadcast stations to be transferred solely to enterprises controlled by minorities, were constitutional.[3] The majority declined to apply a standard of strict scrutiny to the minority preference programs.[4]

This Casenote begins with a brief historical development of the Commission's regulatory authority and federal efforts to promote minority participation in the broadcast industry. Next, it examines the facts and procedural history of the case, the details and analysis of the Court's opinion, and concludes with a brief summary.

II. HISTORY OF FEDERAL EFFORTS TO PROMOTE MINORITY PARTICIPATION IN THE BROADCAST INDUSTRY

In the Communications Act of 1934,[5] Congress delegated to the Commission the authority to grant licenses to persons interested in constructing and operating radio and television broadcast stations in the United States under the "public convenience, interest, or necessity" standard.[6] In support of its power to regulate broadcasting, the Commission stated that "broadcasting is an important mass media form which, because it makes use of the airwaves belonging to the public, [a broadcaster] must obtain a

1. 110 S. Ct. 2997 (1990).
2. *Id.* at 3002.
3. *Id.*
4. *Id.* at 3008-09.
5. Pub. L. No. 73-416, 48 Stat. 1064 (1934).
6. 110 S. Ct. at 3003 (citing 47 U.S.C. §§ 151, 301, 303, 307, 309 (1988)).

Federal license under a public interest standard and must operate in the public interest in order to obtain periodic renewals of that license."[7]

To meet its mandate under the Communications Act to promote diversity of broadcasting, the Commission encouraged minority participation in the industry by adopting rules to prevent licensees from discriminating against minorities in the employment context.[8] The Commission defined the term "minority" to encompass "those of Black, Hispanic Surnamed, American Eskimo, Aleut, American Indian and Asiatic American extraction."[9]

The Commission has long recognized that the public interest is disserved when minorities are underrepresented in the broadcast industry because it is the licensee who is ultimately responsible for identifying and serving the needs of the viewing or listening audience.[10] In 1978 minorities owned less than one percent of the radio and television stations in the United States,[11] and in 1986, minorities owned only 2.1 percent of the more than 11,000 stations.[12]

III. Rationale Behind FCC's Minority Preference Policy

Originally, the Commission's policy was that no preference would be given to minority ownership in the absence of evidence that such ownership would result in superior service to the public.[13] The Court of Appeals for the District of Columbia Circuit rejected this policy and held that "[r]easonable expectation, not advance demonstration, is a basis for merit to be accorded relevant factors."[14]

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7. *Id.* (quoting *Nondiscrimination Employment Practices of Broadcast Licensees*, 13 F.C.C.2d 766, 769 (1968)).

8. *Id.* In support of this proposition, the court cited the following sources: *Nondiscrimination Employment Practices of Broadcast Licensees*, 18 F.C.C.2d 240 (1969); *Nondiscrimination Employment Practices of Broadcast Licensees*, 23 F.C.C.2d 430 (1970); *Nondiscrimination in Employment Policies and Practices of Broadcast Licensees*, 54 F.C.C.2d 354 (1975); *Nondiscrimination in Employment Policies and Practices of Broadcast Licensees*, 60 F.C.C.2d 226 (1976). The Commission's current equal employment opportunity policy is outlined at 47 CFR § 73.2080 (1989). 110 S. Ct. at 3003 n.3.

9. 110 S. Ct. at 3002 n.1 (quoting *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 F.C.C.2d 979, 980 n.8 (1978), and referring to *Commission Policy Regarding Advancement of Minority Ownership in Broadcasting*, 92 F.C.C.2d 849, 849 n.1 (1982) (citing 47 U.S.C. § 309(i)(3)(C) (1988))).

10. *Id.* at 3003 (quoting FCC Minority Ownership Task Force, Report on Minority Ownership in Broadcasting 1 (1978)).

11. *Id.*

12. *Id.*

13. *Id.* at 3004.

14. *Id.* (quoting TV 9, Inc. v. FCC, 495 F.2d 929, 938 (1973)).

In May of 1978, the Commission adopted its *Statement of Policy on Minority Ownership of Broadcasting Facilities*.[15] The Commission found its past efforts to promote minority representation in broadcasting to be unsatisfactory:

> [W]e are compelled to observe that the views of racial minorities continue to be inadequately represented in the broadcast media. This situation is detrimental not only to the minority audience but to all of the viewing and listening public. 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. It enhances the diversified programming which is a key objective not only of the Communications Act of 1934 but also of the First Amendment.[16]

The Commission described two elements in what it termed "first steps"[17] towards the promotion of minority ownership to further the goal of diversity of programming. As the first element, the Commission would consider minority ownership as a factor in comparative hearings for new licenses.[18] The Commission primarily considers six factors in a comparative hearing: "[1] diversification of control of mass media communications, [2] . . . 'integration' of ownership and management, [3] proposed program service, [4] past broadcast record, [5] efficient use of frequency, and [6] the character of the applicants."[19] Under the new policy, the Commission would consider minority ownership as a "plus" in weighing the factors in a comparative hearing if the minority owner is actively involved in the daily operations and management of the station.[20]

Second, the Commission formulated a distress sale policy designed to increase minority opportunities to acquire existing licenses that are reassigned or transferred.[21] While, in general, a licenseholder whose qualifications are in doubt may not assign or transfer the license until the Commission conducts a hearing, the distress sale policy allows such a licensee to assign the license to an enterprise in which minority ownership is controlling,[22] and which meets the Commission's "basic" qualifications. The

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15. 68 F.C.C.2d 979 (1978).

16. 110 S. Ct. at 3004 (quoting 68 F.C.C.2d at 980-81 (footnotes omitted)).

17. *Id.* (quoting 68 F.C.C.2d at 984).

18. *Id.* In Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945), the Court held that a comparative hearing is required when the Commission has applications for licenses that are "mutually exclusive" or incompatible technologically. 110 S. Ct. at 3004 n.5 (referring to *Ashbacker*, 376 U.S. at 333).

19. 110 S. Ct. at 3004-05 (citations omitted).

20. *Id.* at 3005 (citations omitted).

21. *Id.*

22. *Id.*

minority buyer must purchase the license prior to the revocation or renewal hearing and must pay no more than seventy-five percent of the fair market value for the station.[23]

IV. THE CASE

For purposes of Supreme Court review, two cases, *Metro Broadcasting, Inc. v. FCC*,[24] and *Shurberg Broadcasting of Hartford, Inc. v. FCC*,[25] were consolidated.

A. Metro Broadcasting: A Challenge to the Minority "Plus" System

Metro Broadcasting, Inc. ("Metro") challenges the validity of the Commission's policy of awarding a "plus" to minority owners in comparative hearings.[26] Metro and Rainbow Broadcasting ("Rainbow") were among the applicants involved in a comparative hearing to select from three mutually exclusive proposals for a new UHF television station in the Orlando, Florida area. An administrative law judge disqualified Rainbow after an evidentiary hearing because of a finding that Rainbow had made misrepresentations in its application[27] and granted approval to Metro.[28] The Commission's Review Board disagreed with the administrative law judge's findings and further found Rainbow's application to be superior to Metro's. The Review Board gave Rainbow a big "plus" because it was ninety percent Hispanic-owned, while Metro had only one minority partner who owned less than twenty percent of the business.[29] The Review Board found that the "plus" awarded to Rainbow for minority ownership outweighed Metro's advantage for local residence and civic participation.[30] The Commission declined to review the Board's decision, stating that the Commission " 'agree[d] with the Board's resolution of this case.' "[31] Metro then sought review of the Commission's order in the United States Court of Appeals for the District of Columbia Circuit. The district court granted a remand of the record because of the Commission's ongoing evaluation of its minority ownership policies,[32] and because

23. *Id.*
24. 110 S. Ct. 2997 (1990).
25. 876 F.2d 902 (D.C. Cir. 1989).
26. 110 S. Ct. at 3005.
27. *Id.* (citing 96 F.C.C.2d 1073, 1087 (1983)).
28. *Id.*
29. *Id.*
30. *Id.* at 3005-06.
31. *Id.* at 3006 (citations omitted).
32. *Id.* (referring to *Notice of Inquiry on Racial, Ethnic or Gender Classifications*, 1 F.C.C. Rcd 1315 (1986)).

the result of the licensing proceeding between Metro and Rainbow could be affected by the Commission's conclusions regarding the validity of its minority ownership policies.[33] Before the Commission could complete its evaluation, however, Congress enacted and the President signed the Commission appropriations legislation for fiscal year 1988. This appropriations legislation disallowed the Commission's use of appropriated funds to evaluate or alter its minority ownership policies.[34] Thus, the Commission, in compliance with this Congressional mandate, ended its examination of minority ownership policies,[35] and reaffirmed its award of the license to Rainbow.[36] A divided panel of the Court of Appeals affirmed the Commission's order granting the license to Rainbow.[37]

B. Shurberg Broadcasting: A Challenge to the Minority Distress Sale Policy

The validity of the minority distress sale policy was challenged in *Shurberg Broadcasting of Hartford, Inc. v. FCC*.[38] Shurberg Broadcasting of Hartford, Inc. ("Shurberg") applied to the Commission for a permit for the construction of a television station in Hartford, Connecticut. Shurberg's application and another candidate's renewal application, Faith Center, were mutually exclusive. The Faith Center renewal application was pending a minority distress sale. Faith Center sought the Commission's permission to sell its television station to Astroline Communications Company ("Astroline"), a minority applicant. The Commission approved Faith Center's request to assign its broadcast license to Astroline in accordance with the minority distress sale policy.[39] Shurberg opposed the sale to Astroline on several grounds, including that the Commission's minority distress sale policy violated Shurberg's right to equal protection. The Commission rejected Shurberg's equal protection challenge to the policy.[40] Shurberg appealed the Commission's order to the United States Court of Appeals for the District of Columbia Circuit. Disposition was delayed, however, while the Commission completed its evaluation of minority ownership policies. When the appropriations legislation prohibiting the Commission from continuing its evaluation was enacted, the Commission reaffirmed its order approving the assignment to Astroline in accor-

33. *Id.*
34. *Id.*
35. *Id.* (referring to *Reexamination of Racial, Ethnic or Gender Classifications*, Order, 3 F.C.C. Rcd 766 (1988)).
36. *Id.* (referring to *Metro Broadcasting, Inc.*, 3 F.C.C. Rcd 866 (1988)).
37. *Id.*
38. 876 F.2d 902 (D.C. Cir. 1989).
39. 110 S. Ct. at 3007.
40. *Id.*

dance with the minority distress sale policy.[41] The court of appeals invalidated the Commission's minority distress sale policy which "unconstitutionally deprive[d] . . . Shurberg Broadcasting of [its] equal protection rights under the Fifth Amendment because the program [was] not narrowly tailored to remedy past discrimination or to promote programming diversity" and that "the program unduly burden[ed] Shurberg, an innocent nonminority, and [was] not reasonably related to the interests it [sought] to vindicate."[42]

V. THE SUPREME COURT'S OPINION

A. *The Majority Opinion*

Justice Brennan, writing for the majority,[43] phrased the issue in these two cases as being whether the Commission's minority preference programs violate the fifth amendment's "component" of equal protection.[44] The majority announced that benign race classifications used by Congress are subject to a different test than classifications employed by state and local governments.[45] The Court refused to apply a strict level of scrutiny and distinguished *Richmond v. Croson*[46] on its facts because it did not involve Congressional action. The Court found that

> benign race-conscious measures mandated by Congress—even if those measures are not "remedial" in the sense of being designed to compensate victims of past governmental or societal discrimination—are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives.[47]

The Court gave substantial deference to Congressional and Commission findings in its reasoning that "[i]t is of overriding significance in these cases that the FCC's minority ownership programs have been specifically approved—indeed, mandated—by Congress."[48] While minorities are underrepresented in the mass communications industry, Congress and the Commission rely on the objective of promoting programming diversity,

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41. *Id.*
42. *Id.* at 3007-08 (quoting *Shurberg*, 876 F.2d at 902-03).
43. Justices White, Marshall, Blackmun, and Stevens joined Justice Brennan in his majority opinion.
44. 110 S. Ct. at 3002.
45. *Id.* at 3009.
46. 488 U.S. 469 (1989).
47. 110 S. Ct. at 3008-09 (footnote omitted).
48. *Id.* at 3008.

rather than an attempt to remedy past discrimination, as the basis for the minority ownership policies.[49]

The Court accepted programming diversity, a long-term Commission goal, as an important governmental objective. The Court examined the Commission's efforts to increase programming diversity prior to its adoption of the minority preference policies, and found that the Commission initially attempted to further this goal through means without consideration of ownership.[50] As early as the 1960s, the Commission determined that these efforts had failed to produce any meaningful diversification.[51] The Commission undertook a complete evaluation of its policies in 1960, and again in 1971 and 1978, before adopting the minority preference policies.[52] Congress recognized, in agreement with the Commission's assessment, that past efforts which did not employ race-conscious measures were unsuccessful in achieving diversity.[53] The Court next found that the Commission's programs were substantially related to the achievement of the governmental objective of programming diversity.[54] The Court reasoned that "we must pay close attention to the expertise of the Commission and the factfinding of Congress when analyzing the nexus between minority ownership and programming diversity," and concluded "we are required to give 'great weight to the decisions of Congress and the experience of the Commission.' "[55] The Court found that the Commission's judgment concerning the nexus is a "product of its expertise" and entitled to deference.[56]

The Court then found the judgment of Congress and the Commission that there is a nexus between increased minority ownership and diversity of programming "[did] not rest on impermissible stereotyping."[57] The programs were the result of analysis, and

> [w]hile we are under no illusion that members of a particular minority group share some cohesive, collective viewpoint, we believe it a legitimate inference for Congress and the Commission to draw that as more minorities gain ownership and policymaking roles in the media, varying perspectives will be more fairly represented on the airwaves.[58]

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49. *Id.* at 3010.
50. *Id.* at 3020-22.
51. *Id.* at 3020. *See supra* text accompanying notes 10-16.
52. 110 S. Ct. at 3022.
53. *Id.* at 3022-23.
54. *Id.* at 3011.
55. *Id.* (citations omitted).
56. *Id.*
57. *Id.* at 3016.
58. *Id.* at 3018.

Justice Brennan cites other factors in support of the Court's determination that the Commission's policies are substantially related to the goal of programming diversity. The Court notes that the Commission has rejected other types of preferences which reflected "the considered nature of the Commission's judgment in selecting the particular minority ownership policies at issue."[59]

Also, the minority ownership policies were directed to limit the barriers to entry that minorities face.[60] The Commission "identified as key factors hampering the growth of minority ownership a lack of adequate financing, paucity of information regarding license availability, and broadcast inexperience."[61] The Court found that both the policy of giving a plus for minority ownership in comparative hearings and the minority distress sale program addressed these factors in an attempt to foster greater minority participation in the broadcast industry.[62] Minorities had been effectively locked out of the market; their opportunities were often limited to the smaller range and less profitable UHF stations.[63]

The Court again looked to the fact that Congress had shown its support for the minority ownership policies through appropriations acts limited in duration and thus ensured future re-evaluation of the policies.[64] Congress continued to monitor closely the minority preference policies and continued to hold hearings concerning minority ownership.[65] Congress also instructed the Commission to report annually on the effects of the minority preference programs and whether they were producing the intended results.[66] Also, administrative and judicial review was available for all Commission decisions.[67] Finally, the Court contemplated that "[s]uch a goal carries its own natural limit, for there will be no need for further minority preferences once sufficient diversity has been achieved."[68]

The majority asserted that "a congressionally mandated benign race-conscious program that is substantially related to the achievement of an important governmental interest is consistent with equal protection principles so long as it does not impose *undue* burdens on nonminorities."[69] The Court characterized the burden on nonminorities as minimal because

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59. *Id.* at 3023.
60. *Id.* at 3024.
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.* at 3025.
67. *Id.*
68. *Id.*
69. *Id.* at 3026 (citations omitted) (emphasis in original).

"no one has a First Amendment right to a license."[70] Applicants have no legitimate expectations that their applications for license will be granted without the Commission's consideration of public interest of which minority ownership is a factor.[71] The Court further reasoned that the minority distress sale policy did not unduly burden nonminorities because it applied only to a "small fraction of broadcast licenses."[72] Minority distress sales represented less than four tenths of one percent of all broadcast sales since 1979.[73] Since 1978, when the program was implemented, an average of only .20 percent of renewal applications each year have ended in distress sales.[74] The Court concluded that the burden on nonminorities is not undue because nonminorities are able to compete for the vast majority of license opportunities.[75]

B. Justice Stevens' Concurrence

In a brief concurring opinion, Justice Stevens emphasized that he supported the Court's "focus on the future benefit, rather than the remedial justification" when reviewing governmental use of racial classifications.[76] Justice Stevens maintained that it was " 'especially important that the reasons for any such classification be clearly identified and unquestionably legitimate.' "[77] Justice Stevens was satisfied that the Court's opinion illustrated how both aspects of this standard were met.[78]

C. The Dissents

Justice O'Connor's Dissent. Justice O'Connor, with whom the Chief Justice, Justice Scalia, and Justice Kennedy joined, opened her opinion by noting the Court's departure from the fundamental principles of equal protection which required that the Government treat people as "*individuals*" rather than " 'as simply components of a racial, religious, sexual or national class.' "[79] Justice O'Connor criticized the majority's refusal to apply a strict standard of scrutiny to the racial classifications which would require that the classifications be "necessary and narrowly

70. *Id.* (citing Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 389 (1969)).
71. *Id.*
72. *Id.* at 3026-27.
73. *Id.* at 3027.
74. *Id.*
75. *Id.*
76. *Id.* at 3028 (Stevens, J., concurring).
77. *Id.* (quoting Fullilove v. Klutznick, 448 U.S. 448, 534-35 (1980) (dissenting opinion)).
78. *Id.*
79. *Id.* (O'Connor, J., dissenting) (quoting Arizona Governing Comm. v. Norris, 463 U.S. 1073, 1083 (1983) (emphasis in original)).

tailored to achieve a compelling state interest."[80] It is a denial of equal protection, "[e]xcept in the narrowest of circumstances," to grant benefits to some and deny benefits to others because of race.[81] Justice O'Connor argued that these racial classifications view individuals as the "product of their race"[82] and even benign classifications which purport to benefit certain racial groups may "stigmatize" them in a society that values the individual and judges him according to his individual merit.[83] Justice O'Connor asserted that the majority misapplied *Fullilove v. Klutznick*,[84] in citing it as authority to support their application of a lesser level of scrutiny to " 'benign' " racial classifications employed by Congress.[85]

First, *Fullilove* involved Congress' remedial powers under section 5 of the fourteenth amendment, and this was the key factor in the Court's application of a different standard of review.[86] Section 5 gives Congress the power to act with respect to the states, and does not apply to *Metro*, which involves the administration of federal programs.[87]

Second, in *Fullilove*, Congress had identified past discrimination and acted to remedy that discrimination.[88] The Commission and Congress did not purport to act for any remedial purpose.

Third, Justice O'Connor asserted that even if *Fullilove* applied outside the context of Congress' section 5 remedial powers, it would not lend support to the majority's application of a lesser standard of review.[89] Justice O'Connor maintained that "[t]he Constitution's guarantee of equal protection binds the Federal Government as it does the States, and no lower level of scrutiny applies to the Federal Government's use of race classifications."[90] In fundamental disagreement with the majority, Justice O'Connor asserted that " 'it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government.' "[91]

According to Justice O'Connor "[u]nder the appropriate standard, strict scrutiny, only a compelling interest may support the government's

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80. *Id.* at 3029.
81. *Id.*
82. *Id.*
83. *Id.* (citations omitted).
84. 448 U.S. 448 (1980).
85. 110 S. Ct. at 3031 (referring to 110 S. Ct. at 3008) (majority opinion).
86. *Id.* (citing *Fullilove*, 448 U.S. at 483, and Richmond v. J.A. Croson Co., 488 U.S. 469, 488 (opinion of O'Connor, J.)).
87. *Id.* at 3030.
88. *Id.* at 3031 (citing *Fullilove*, 448 U.S. at 456-67, 480-89 (opinion of Burger, C.J.), 448 U.S. at 498-99 (opinion of Powell, J.)).
89. *Id.* at 3032.
90. *Id.* at 3030.
91. *Id.* (quoting Bolling v. Sharpe, 347 U.S. 497, 500 (1953), companion case to Brown v. Board of Educ., 347 U.S. 483 (1954)).

use of racial classifications."[92] The only interest that had been recognized as compelling is the interest of remedying the effects of previous discrimination. The acknowledged goal of the Commission and Congress in the minority preference programs was not to remedy past discrimination, but to increase program diversity, a goal that was "simply too amorphous, too insubstantial, and too unrelated to any legitimate basis for employing racial classifications."[93] The majority asserted that the interest must be "important."[94] The majority's allowance of the use of racial classifications by the Government based on the "insubstantial interest" of programming diversity "trivializes the constitutional command to guard against such discrimination and has loosed a potentially far-reaching principle disturbingly at odds with our traditional equal protection doctrine."[95] Justice O'Connor reasoned that "[t]he FCC's choice to employ a racial criterion embodies the related notions that a particular and distinct viewpoint inheres in certain racial groups, and that a particular applicant, by virtue of race or ethnicity alone, is more valued than other applicants because 'likely to provide [that] distinct perspective.' "[96]

Justice O'Connor viewed the minority preference programs as having the flaw of being both overinclusive and underinclusive. The policy was overinclusive because some members of the minority group would "have no interest in advancing the views the FCC believes to be underrepresented, or [would] find them utterly foreign."[97] The policy was also underinclusive because "it award[ed] no preference to disfavored individuals who may be particularly well versed in and committed to presenting those views."[98] Justice O'Connor failed to see a reason why the Commission did not make an evaluation of each individual case since it already conducted some individual hearings.[99]

Alternatively, Justice O'Connor asserted that even if a lesser level of scrutiny were appropriate, the minority preference policies would not survive an intermediate level of scrutiny because there are available methods of increasing diversity of viewpoints which do not involve racial classifications that the Commission had not tried.[100] For example, "[t]he FCC could evaluate applicants upon their ability to provide and commitment to offer whatever programming the FCC believes would reflect under-

92. *Id.* at 3034.
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.* at 3037 (quoting Brief for FCC in No. 89-453, p. 17).
97. *Id.* at 3039.
98. *Id.*
99. *Id.*
100. *Id.*

represented viewpoints."[101] Further, "[i]f the FCC truly seeks diverse programming rather than allocation of goods to persons of particular racial backgrounds, it has little excuse to look to racial background rather than programming to further the programming interest."[102]

Justice O'Connor noted the Court's characterization of the Commission's decision to focus on ownership as rationally related to the goal of diversity, as well as the Court's failure to demonstrate any direct and substantial relationship between the two in its discussion.[103] The "nexus" between the owner's race and the goal of diversity is "considerably less than substantial" for three reasons.[104]

First, market forces effect programming, and minority owners will be likely to select programming that appeals to the largest audience rather than programming that expresses the personal viewpoints of the owner.[105] Second, owners of broadcast stations may not be involved in the day-to-day operations of the station and therefore may not actually exercise much control over programming content.[106] Third, the Commission had not established a factual basis for the minority preference policies.[107] Justice O'Connor observed that even "[u]ntil the mid-1970s, the FCC believed that its public interest mandate and 1965 Policy Statement precluded it from awarding preference based on race and ethnicity, and instead required applicants to demonstrate particular entitlement to an advantage in a comparative hearing."[108]

Justice O'Connor criticized the significance the Court attached to the fact that Congress backed the Commission programs.[109] She asserted that "[e]ven the most express and lavishly documented congressional declaration that members of certain races will as owners produce distinct and superior programming would not allow the Government to employ such reasoning to allocate benefits and burdens among citizens on that basis."[110] Justice O'Connor reasoned that "no degree of congressional endorsement may transform the equation of race with behavior and thoughts into a permissible basis of governmental action."[111]

Last, Justice O'Connor asserted that the racial classifications in the policies did not meet the independent requirement that they not unduly

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101. *Id.*
102. *Id.* at 3039-40.
103. *Id.* at 3041.
104. *Id.*
105. *Id.* at 3041.
106. *Id.*
107. *Id.* at 3042.
108. *Id.*
109. *Id. See id.* at 3010.
110. *Id.* at 3043.
111. *Id.* at 3042.

burden nonminorities.[112] Justice O'Connor characterized the Commission's programs as having "created a specialized market reserved exclusively for minority controlled applicants."[113]

Justice Kennedy's Dissent. Justice Kennedy, with whom Justice Scalia joined, drew similarities between the majority's opinion and the decision of *Plessy v. Ferguson*.[114] According to Justice Kennedy, "[t]he *Plessy* Court concluded that the 'race-conscious measures' it reviewed were reasonable because they served the governmental interest of increasing the riding pleasure of railroad passengers."[115] Justice Kennedy disagreed with the Court

> that the Constitution permits the Government to discriminate among its citizens on the basis of race in order to serve interests so trivial as "broadcast diversity." In abandoning strict scrutiny to endorse this interest the Court turns back the clock on the level of scrutiny applicable to federal race-conscious measures.[116]

The majority contended that the racial classifications were "benign," without explaining how it would effectively make this determination.[117] Justice Kennedy warned against this confidence the majority apparently had in its ability to determine which racial classifications were benign. Justice Kennedy found this confidence reminiscent of *Plessy*, and the concept of "benign" can be used to justify almost any racial classifications.[118]

Justice Kennedy also criticized the Court for not dealing squarely with the possibility that the "benign" classifications could have the effect of stigmatizing the same minorities whose interest and viewpoints the programs purport to advance.[119] The minority preference programs may "foster the view that members of the favored groups are inherently less able to compete on their own."1[120]

VI. ANALYSIS

The Court's decision in *Metro Broadcasting* indicates that the Court will subject Congressionally mandated racial classifications to a lesser

112. *Id.* at 3043.
113. *Id.*
114. 163 U.S. 537 (1896).
115. 110 S. Ct. at 3044 (Kennedy, J., dissenting).
116. *Id.* at 3045.
117. *Id.*
118. *Id.* at 3046.
119. *Id.* at 3046-47.
120. *Id.* at 3046.

level of scrutiny than the same types of racial classifications employed by state or local governments. In dissent, Justice O'Connor noted that there is no support for this dichotomy of treatment in either prior cases or the Constitution. Justice O'Connor suggested that "[t]his departure marks a renewed toleration of racial classifications and a repudiation of our recent affirmation that the Constitution's equal protection guarantees extend equally to all citizens."[121] It is somewhat difficult to conceptualize why racial classifications employed by the federal government should be subjected to different equal protection analysis.[122] The majority reasoned that the federal government is less likely to be captured by any certain racial or ethnic minority.[123] Justice O'Connor observed that the applicable standard of review is more than "a lawyers' quibble over words."[124] A lesser standard of review would allow the federal government to "resort to racial classifications more readily."[125] Justice O'Connor further cautioned that "[t]he Court's departure from our cases is disturbing enough, but more disturbing still is the renewed toleration of racial classifications that its new standard of review embodies."[126]

Justice O'Connor warned that "[d]ivorced from any remedial purpose and otherwise undefined, 'benign' means only what shifting fashions and changing politics deem acceptable. Members of any racial or ethnic group, whether now preferred under the FCC's policies or not, may find themselves politically out of fashion and subject to disadvantageous but 'benign' discrimination."[127]

Arguably the most troubling aspect of the decision to uphold the racial classification to promote programming diversity is that the Commission "has never identified any particular deficiency in programming diversity that should be the subject of greater programming, or that necessitates racial classifications."[128] The Commission has not indicated even what the minority viewpoints might be.[129] In 1986, when the Commission finally undertook to identify the nature of the minority viewpoints that might be inadequately represented in the broadcasting media and whether diversity could be achieved through means not involving racial classification, Congress halted the evaluation through appropriations legislation.[130]

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121. *Id.* at 3029 (O'Connor, J., dissenting).
122. *See supra* text accompanying notes 91-95.
123. 110 S. Ct. at 3033 (O'Connor, J., dissenting).
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.* at 3035.
128. *Id.* at 3030 (O'Connor, J., dissenting).
129. *Id.*
130. *Id.*

The Supreme Court's decision in *Metro Broadcasting, Inc. v. FCC* leaves the door open for Congressionally sponsored affirmative action programs that are aimed at perceived current social problems. By declining to subject the racial classifications contained in such programs to strict scrutiny, the Court gives considerable flexibility to federal programs which promote important governmental objectives. A reader might wonder whether these important governmental objectives are infinite in variety since an inestimable number of governmental objectives might be found to be of equal or greater importance than the goal of programming diversity in broadcasting. In the final analysis, we are left to trust the judgments of Congress and the Supreme Court to prevent these benign racial classifications from being used for improper purposes.

AMANDA ROBINSON