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Equal Protection and Affirmative Action in Broadcast Licensing

Michael Bressman

EQUAL PROTECTION AND AFFIRMATIVE ACTION IN BROADCAST LICENSING: *Metro Broadcasting, Inc. v. Federal Communications Commission*, 110 S. Ct. 2997 (1990).

As the Supreme Court's 1989 Term reached its conclusion, observers expected the Court to follow *City of Richmond v. J.A. Croson Co.*[1] and invalidate two Federal Communications Commission (FCC) minority preference policies aimed at promoting broadcast diversity. Instead, in one of the major surprises of the Term,[2] the Court upheld both FCC racial preference programs in *Metro Broadcasting, Inc. v. Federal Communications Commission*.[3] Finding no equal protection violation, the Court ruled that "benign" race-conscious programs designed by Congress to "serve important governmental objectives" are constitutional if they are "substantially related to [the] achievement of those objectives."[4] The Court's application of an intermediate-scrutiny test to evaluate the FCC's race-conscious measures, in direct contradiction of *Croson*, has destabilized affirmative action jurisprudence. The intermediate-scrutiny test does not require that programs be narrowly tailored to remedy identified past discrimination. Thus, this standard of review will justify

1. 488 U.S. 469 (1989). In *Croson*, the Court, applying a strict-scrutiny test, invalidated a Richmond, Virginia ordinance that required construction firms receiving city contracts to set aside 30 percent of the value of a contract for minority-owned or controlled subcontractors.

2. *See, e.g.*, *Vacancy of the Court: An Activist's Legacy*, N.Y. Times, July 22, 1990, § 1, at 22, col. 3.

3. 110 S. Ct. 2997 (1990). The decision addressed two cases before the Court that had been consolidated, Winter Park Communications, Inc. v. Federal Communications Comm'n, 873 F.2d 347 (D.C. Cir. 1989), and Astroline Communications Co. v. Shurberg Broadcasting of Hartford, Inc., 876 F.2d 902 (D.C. Cir. 1989).

4. *Metro Broadcasting*, 110 S. Ct. at 3008-09.

many suspect uses of racial classifications merely because the government claims that the created programs serve an important governmental interest.

Since gaining exclusive authority to license broadcast stations, the FCC has attempted to increase minority involvement in the broadcast industry. Minorities owned only ten of the approximately 8,500 American radio and television stations in 1971; as of 1986, they owned only 2.1 percent of the country's 11,000 stations.[5] Concluding that audience interests were under-served by the lack of minority participation in the industry,[6] the Commission promulgated new employment rules in the hope that increased minority employment would promote programming diversity.[7]

Although these rules initially enjoyed some success, the FCC soon determined "that the views of racial minorities continue[d] to be inadequately represented" and decided that "ownership . . . is another significant way of fostering the inclusion of minority views in . . . programming."[8] The Commission then developed two methods to increase minority ownership. First, it revised its comparative hearing proceedings. When issuing a new license in a particular area, the Commission now evaluates competing companies based on certain factors and awards licenses through a weighted lottery system.[9] Aiming to increase minority participation in the industry, the FCC added minority ownership or involvement in station management to the list of relevant factors considered in the comparative hearings.

Second, the Commission enacted new measures to increase the likelihood that licenses of existing stations would be transferred or reassigned to minorities. Previously, when an existing license-holder's qualifications were questioned, a transfer or assignment could not occur until the FCC held a hearing.[10]

5. *See id.* at 3003.

6. *See id.* (citing MINORITY OWNERSHIP TASK FORCE, FEDERAL COMMUNICATIONS COMM'N, REPORT ON MINORITY OWNERSHIP IN BROADCASTING 1 (1978)).

7. *See id.* at 3003 & n.3.

8. *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 42 Rad. Reg. 2d (P & F) 1689, 1691 (1978) [hereinafter *Statement on Minority Ownership*].

9. *See Metro Broadcasting*, 110 S. Ct. at 3004-05. The six factors include: "diversification of control of mass media communications, full-time participation in station operations by owners . . . , proposed program service, past broadcast record, efficient use of the frequency, and the character of the applicants." *Id.*

10. *See id.* at 3005.

The Commission now gives station owners the option to avoid a hearing by engaging in a "distress sale" to "an FCC-approved minority enterprise."[11]

In 1983, Metro Broadcasting, Inc. (Metro) and several other companies applied for an FCC license to construct and operate a new television station in Orlando, Florida.[12] The Commission initially awarded Metro the license because its primary competitor, Rainbow Broadcasting (Rainbow), an Hispanic-owned company, was disqualified. The FCC's review board reinstated Rainbow's application, however, and after a comparative hearing granted Rainbow the license because "Rainbow's minority credit outweighed Metro's local residence and civic participation advantage."[13]

Metro appealed to the United States Court of Appeals for the District of Columbia Circuit. At the FCC Commissioner's request, the court of appeals remanded the case for further consideration in light of an ongoing FCC investigation into the validity of minority preference policies. Before the study was completed, however, Congress passed appropriations legislation prohibiting the use of appropriated FCC funds to evaluate minority ownership policies.[14] The FCC curtailed its investigation and reaffirmed its grant of the license to Rainbow. Citing circuit precedent and Congress's desire to increase minority representation in the broadcasting industry, the court of appeals affirmed Rainbow's license grant.[15]

In the other case considered in *Metro Broadcasting*, Faith Center, Inc. (Faith Center) twice sought FCC approval, in February 1981 and again in September 1983, to transfer its Hartford, Connecticut station's license in a distress sale. Both

11. *Id.* The three criteria necessary for a "distress sale" are: (1) Minority ownership of the buyer must exceed 50 percent or be controlling; (2) the license must be purchased before the start of the hearing; and (3) the price for the license must not exceed 75 percent of fair market value. *See id.*

12. The facts of the consolidated cases are drawn from the Court's opinion in *Metro Broadcasting*. *See id.* at 3005-08.

13. *Id.* at 3005-06.

14. *See* Continuing Appropriations Act for Fiscal Year 1988, Pub. L. No. 100-202, 101 Stat. 1329, 1329-31 (1987). The Act stated in pertinent part: "[N]one of the funds appropriated by this Act shall be used to repeal, to retroactively apply changes in, or to continue a reexamination of, the policies of the [FCC] with respect to comparative licensing [or] distress sales . . . ." *Id.*

15. *See* Winter Park Communications, Inc. v. Federal Communications Comm'n, 873 F.2d 347, 353 (D.C. Cir. 1989) (quoting West Michigan Broadcasting Co. v. Federal Communications Comm'n, 735 F.2d 601, 613 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1027 (1985)), *cert. granted*, 110 S. Ct. 715 (1990).

attempts, however, proved unsuccessful. Meanwhile, in December 1983, Shurberg Broadcasting of Hartford, Inc. (Shurberg) applied for a license to construct a new television station in Hartford. Shurberg sought a comparative hearing when Faith Center, unable to transfer its license, filed for a license renewal. In June 1984, Faith Center again requested approval for a distress sale—this time to Astroline Communications Company, Limited Partnership (Astroline), another minority-owned applicant. Although Shurberg claimed that the distress sale violated its right to equal protection, the FCC permitted the license transfer to Astroline.[16]

Shurberg appealed to the United States Court of Appeals for the District of Columbia Circuit, but the appeals court similarly delayed deciding this case until the FCC completed its minority preference study. When Congress prohibited further use of appropriated funds for the investigation, the FCC reaffirmed the distress sale. A divided court of appeals invalidated the distress sale policy, however, holding that it unconstitutionally "denies [Shurberg Broadcasting] equal protection under the due process clause of the Fifth Amendment."[17]

By a five-to-four vote,[18] the Supreme Court affirmed the District of Columbia Circuit's decision upholding the use of race as a factor in comparative hearings and reversed the same court's invalidation of the distress sale program. Writing for the majority, Justice Brennan maintained that neither FCC policy violated notions of equal protection.

After discussing FCC efforts to increase programming diversity through minority involvement in the broadcast industry, the Court noted 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."[19] This comment underscored the important role that deference

16. *See Metro Broadcasting*, 110 S. Ct. at 3000.

17. Shurberg Broadcasting of Hartford, Inc. v. Federal Communications Comm'n, 876 F.2d 902, 934 (D.C. Cir. 1989). The court found an equal protection violation because "the program [was] not narrowly tailored to remedy past discrimination or to promote programming diversity . . . ." *Id.*

18. Justice Brennan filed the opinion of the Court, in which Justices White, Marshall, Blackmun, and Stevens joined. Justice Stevens delivered a brief concurring opinion. Justice O'Connor filed a dissenting opinion, in which Chief Justice Rehnquist and Justices Scalia and Kennedy joined. Justice Kennedy, joined by Justice Scalia, filed a separate dissent.

19. *Metro Broadcasting*, 110 S. Ct. at 3008.

to Congress played in the opinion. Justice Brennan opined that while evaluating racial classifications normally demands a high level of scrutiny, *Fullilove v. Klutznick*[20] required that "a program employing a benign racial classification . . . adopted by an administrative agency at the explicit direction of Congress" be viewed "with appropriate deference."[21] More importantly, Justice Brennan noted that benign race-conscious programs may be constitutionally acceptable even if they are not specifically aimed at remedying the effects of past discrimination.[22]

Deeming the FCC minority ownership policies benign, the Court applied a two-part test to determine whether the programs were constitutionally permissible.[23] The Court first examined whether the race-conscious measures served important governmental objectives. Although the Court recognized that societal discrimination is primarily responsible for the lack of minority involvement in broadcasting, it accepted the conclusion of Congress and the Commission that programming diversity is itself an important governmental objective because the public has a "right to receive a diversity of views and information over the airwaves."[24] Justice Brennan concluded that preference programs designed to augment minority ownership will diversify the limited number of broadcasters on the airwaves, just as "a diverse student body" will encourage "a robust exchange of ideas"[25]—a constitutionally acceptable justification for including race as a factor in university admissions decisions.

The second prong of the Court's test consisted of evaluating whether the programs substantially relate to fulfilling the government's objective. The Court examined whether there is a nexus between minority ownership and broadcast diversity. Justice Brennan noted that both Congress and the Commission

20. 448 U.S. 448 (1980). In *Fullilove*, the Court rejected a challenge to the minority business enterprise (MBE) provision of the Public Works Employment Act of 1977. The Act dictated that at least 10 percent of federal funds for local public works projects be set aside to acquire services or supplies from MBEs, unless an administrative waiver is granted. Congress justified this provision with a finding of past discrimination in the construction industry nationwide.

21. *Metro Broadcasting*, 110 S. Ct. at 3008 (quoting *Fullilove*, 448 U.S. at 472 (plurality opinion)).

22. *See id.* at 3008-09.

23. The test that the Court applied was the same one advocated by Justices Brennan, White, Marshall, and Blackmun in their opinion in University of Cal. Regents v. Bakke, 438 U.S. 265, 359 (1978) (opinion of Brennan, White, Marshall, and Blackmun, JJ., concurring in judgment in part and dissenting in part).

24. *Metro Broadcasting*, 110 S. Ct. at 3010.

25. *Id.* (citing *Bakke*, 438 U.S. at 311-13 (Powell, J.)).

had found a correlation between the two,[26] and that such a finding should be accorded "great weight."[27] To avoid the appearance of simply deferring to the dictates of Congress and the FCC, however, Justice Brennan recounted the numerous acts and reports that had concluded that minority ownership polices were necessary to achieve broadcast diversity.[28]

The Court worried that the finding of such a relationship would be perceived as based on stereotyping.[29] To dispel such notions, Justice Brennan noted that "[c]ongressional policy does not assume that in every case minority ownership and management will lead to minority-oriented programming or to . . . a discrete 'minority viewpoint' . . . ."[30] Instead, he said, the programs will lead to diversity "in the aggregate."[31] He buttressed this conclusion by citing various studies and the Court's reasoning in *Bakke*.[32]

The final section of the Court's opinion served two purposes: to show that the FCC had rejected more extreme actions to achieve programming diversity and to prove that the methods chosen would not unduly burden non-minorities. The Court noted that although the Commission had concluded that race-neutral methods such as equal employment rules were unsuccessful, it was unwilling to invoke more extreme policies such as set-asides.[33] Justice Brennan also insisted that consideration of race as a factor is fair to minorities and non-minorities alike for two reasons. First, companies competing for licenses through the lottery system have no guarantee of receiving one; thus, no legitimate expectations have been dashed.[34] Second, the FCC has a responsibility to license in the "public interest, convenience, or necessity," and because there are a limited number of electromagnetic frequencies, "[n]o one has a First Amendment right to license."[35] Thus, the FCC was fulfilling its

26. *See id.* at 3011.
27. *Id.* (quoting Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 102 (1973)).
28. *See id.* at 3011-16. *See, e.g.*, *Statement on Minority Ownership*, *supra* note 8, at 1692-93.
29. *See Metro Broadcasting*, 110 S. Ct. at 3016.
30. *Id.*
31. *Id.*
32. *See id.* at 3017-18 & n.33.
33. *See id.* at 3022-23.
34. *See id.* at 3026.
35. *Id.* (quoting Red Lion Broadcasting Co., Inc. v. Federal Communications Comm'n, 395 U.S. 367, 389 (1969)).

mission to support the "public interest."

In a brief concurring opinion, Justice Stevens emphasized that affirmative action policies should not aim to remedy past wrongs, but instead should "focus on future benefit."[36] He stressed, however, that racial distinctions should rarely be used, and then only for "clearly identified and unquestionably legitimate"[37] purposes.

Justice O'Connor dissented, recalling that last Term the Court required that a strict-scrutiny test be applied when evaluating racial classifications.[38] In contrast to the majority view, she argued that the congressional actions involved in *Metro Broadcasting* should be judged with this same level of review.[39] Justice O'Connor warned that by failing to strike down the FCC's policies, the Court was "[endorsing] race-based reasoning and the conception of a Nation divided into racial blocs, thus contributing to an escalation of racial hostility and conflict."[40]

A significant portion of Justice O'Connor's dissent attacked the Court's reliance on *Fullilove* to justify "benign" race-conscious policies. First, she pointed out that Congress's remedial powers under Section Five of the Fourteenth Amendment were central to the decision in *Fullilove*;[41] they were not at issue in *Metro Broadcasting*.[42] Second, *Fullilove* insisted "that careful review was essential to ensure that Congress acted solely for remedial rather than other, illegitimate purposes."[43] Broadcast diversity, she noted, is obviously a forward-looking, not remedial, purpose. Finally, in *Fullilove* the Court had already rejected the intermediate-scrutiny approach adopted by the Court in *Metro Broadcasting*.[44]

After rejecting the Court's approach, Justice O'Connor ana-

36. *Id.* at 3028 (Stevens, J., concurring).

37. *Id.* (Stevens, J., concurring) (quoting *Fullilove*, 448 U.S. at 535 (Stevens, J., dissenting)).

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

39. *See Metro Broadcasting*, 110 S. Ct. at 3030 (O'Connor, J., dissenting).

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

41. *See id.* at 3031 (O'Connor, J., dissenting). Section Five of the Fourteenth Amendment provides that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

42. *See Metro Broadcasting*, 110 S. Ct. at 3030-31 (O'Connor, J., dissenting) ("Section 5 empowers Congress to act respecting the States, and of course this case concerns only the administration of federal programs by federal officials.").

43. *Id.* at 3031 (O'Connor, J., dissenting). *See Fullilove*, 448 U.S. at 486-87 (plurality opinion).

44. *See Metro Broadcasting*, 110 S. Ct. at 3032 (O'Connor, J., dissenting).

lyzed the case using a strict-scrutiny test. She found that the FCC programs failed to satisfy the test's first prong—that there be a compelling government interest—because "[m]odern equal protection doctrine [recognizes] only one such interest: remedying the effects of racial discrimination."[45] Broadcast diversity did not qualify as a compelling interest because she viewed the concept as "too amorphous, [and] too insubstantial."[46] Compelling interests must be "specific and verifiable,"[47] according to Justice O'Connor, and cannot be based on generalized notions of remedying societal discrimination.[48]

Justice O'Connor determined that the FCC policies also did not satisfy the test's second prong because they were not narrowly tailored to achieve the governmental interest. The FCC's programs are premised on the notion that different racial groups possess distinct viewpoints.[49] These policies do not guarantee that a license grant to a minority firm would increase the expression of minority viewpoints, however, because many factors, such as market forces, affect programming decisions.[50] Moreover, she noted that in *Bakke*, the Court rejected the supposition that there are distinct racial viewpoints.[51] Finally, Justice O'Connor indicated that race-neutral approaches exist that would more effectively further the FCC's goal of programming diversity.[52]

In a scathing dissent, Justice Kennedy compared the Court's reasoning in *Metro Broadcasting* to the rationale used in *Plessy v. Ferguson*[53] and a quotation from a publication of the South African government.[54] With these analogies he sought to demon-

45. *Id.* at 3034 (O'Connor, J., dissenting).
46. *Id.* (O'Connor, J., dissenting).
47. *Id.* (O'Connor, J., dissenting).
48. *See Croson*, 488 U.S. at 505; *see also* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 276 (1986) (plurality opinion). In *Wygant*, the Court held unconstitutional the layoff provision of a collective-bargaining agreement between the teachers' union and the board of education. Under the layoff provision, teachers with the most seniority would be retained, except that the percentage of minority teachers laid off could not exceed the percentage of minority teachers employed at the time of the layoff. In so holding, the Court rejected the theory that the minority teachers were needed as role models to remedy past societal discrimination.
49. *See Metro Broadcasting*, 110 S. Ct. at 3037 (O'Connor, J., dissenting).
50. *See id.* (O'Connor, J., dissenting).
51. *See* University of Cal. Regents v. Bakke, 438 U.S. 265, 310-11 (1978) (Powell, J.).
52. *See Metro Broadcasting*, 110 S. Ct. at 3039 (O'Connor, J., dissenting).
53. 163 U.S. 537 (1896).
54. "The policy is not based on any concept of superiority or inferiority, but merely on the fact that people differ, particularly in their group associations, loyalties, cultures, outlook, modes of life and standards of development." *Metro Broadcasting*, 110 S. Ct. at

strate how policies that are justified as benign invariably harm someone.[55] He concluded by observing that the Court has shifted from endorsing *Plessy*'s "separate but equal" standard to *Metro Broadcasting*'s "unequal but benign."[56]

The Court's holding in *Metro Broadcasting* has placed affirmative action jurisprudence in conflict. Had the Court followed the precedent of *Croson*, it would have applied a routine strict-scrutiny analysis and struck down the FCC programs. Instead, by employing an intermediate-scrutiny test because the programs were deemed "benign," a term the Court never bothered to define, the outcome of future cases seems likely to be determined by the personal opinion of the judge hearing the case as to whether the program in question is invidious or benign. In other words, the fate of affirmative action programs may now turn on the personal whims of judges.

Applying a strict-scrutiny test to racial preference programs requires that some minimal level of objectivity be maintained in a court's decision. As Justice O'Connor noted, only remedying the effects of past racial discrimination would serve as an adequate compelling interest to satisfy the first prong of a strict-scrutiny analysis.[57] Speaking for the Court in *Croson*, she recognized that "the purpose of strict-scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant the use of a highly suspect tool."[58] Thus, a court must first make an objective determination of whether a minority preference program was designed to remedy specific past discrimination. Then, it can analyze whether the program is narrowly tailored to achieve that goal.

To the extent that a finding of specific past discrimination is no longer required under *Metro Broadcasting*, courts will be asked to judge a program in the context of generalized, societal discrimination. The Supreme Court itself, however, has rejected this approach on numerous occasions for two persuasive

3046 (Kennedy, J., dissenting) (quoting SOUTH AFRICA AND THE RULE OF LAW 37 (1968)).

55. *See id.* (Kennedy, J., dissenting).

56. *Id.* at 3047 (Kennedy, J., dissenting).

57. *See id.* at 3034 (O'Connor, J., dissenting).

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

reasons.[59] First, as Justice Powell commented in *Bakke*, societal discrimination is "an amorphous concept of injury that may be ageless in its reach into the past."[60] It simply would justify too many suspect uses of race classifications. Similarly, in *Croson*, the Court concluded that a claim of societal discrimination "provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy. It 'has no logical stopping point.' "[61]

The second and related reason for rejecting a societal discrimination justification is that its use will increase the need for racial classifications. Benign race-conscious measures necessitate dividing people into racial blocs: victim blocs and oppressor blocs. When remedying identified, particular discrimination, the beneficiary of such a policy can point to the specific wrong to highlight the obstacles to his achievement. The beneficiary of a program based on societal discrimination, however, cannot do the same. Instead, the program will "only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth."[62]

The Court in *Metro Broadcasting* attempted to avoid the societal discrimination dilemma by labelling the programs "benign" and by noting that *Congress* had created them. Thus, the Court asserted that only intermediate scrutiny need be applied when evaluating the FCC measures. In failing to define what constitutes "benign race-consciousness," however, the Court has left no guidelines for lower courts to follow in determining what is a legitimate race-based decision. For example, suppose a school district, alarmed by the high attrition rate and the low sense of self-esteem of its black male students, decides to create special schools for these youths to combat these problems.[63] A judge may conclude that under the intermedi-

59. *See id.* at 498-506; *Wygant*, 476 U.S. at 274-76 (plurality opinion); *Bakke*, 438 U.S. at 307-10 (Powell, J.).

60. *Bakke*, 438 U.S. at 307 (Powell, J.).

61. *Croson*, 488 U.S. at 498 (quoting *Wygant*, 476 U.S. at 275 (plurality opinion)).

62. *Bakke*, 438 U.S. at 298 (Powell, J.).

63. *See Schools Segregate Black Male Pupils*, Wash. Times, Oct. 19, 1990, at A1, col. 5. Milwaukee has established separate facilities for black male students, although the schools will be open to all students. Chicago has a program that takes black boys in the fourth-through-eighth grades out of their classrooms two or three times a week. In Baltimore, three elementary schools have separate classes for black males. New York City is considering establishing separate schools for black boys. *See* Jordan, *Segregation Won't Work*, N.Y. Times, Oct. 21, 1990, § 4, at 19, col. 5.

ate-scrutiny standard of *Metro Broadcasting*, the program is valid because the district's benign and sincere approach supports an important governmental interest and is substantially related to the achievement of that interest. If the school district never stated its reason for establishing the separate schools, though, would intermediate or strict scrutiny be applied?[64] Such difficulties could arise for all sorts of programs, regardless of whether such programs were created by Congress or by a local governmental unit.

In addition, the Court's reliance on *Fullilove* to support the application of intermediate scrutiny in this case is misplaced. *Fullilove* stands for the proposition that when Congress identifies specific discrimination within an industry, Congress can exercise its "unique remedial powers . . . under § 5 of the Fourteenth Amendment."[65] Unlike the discrimination identified in the construction industry in *Fullilove*, Congress found no specific discrimination in the broadcast industry. Because Congress here merely seeks to enhance programming diversity and not to remedy particular discrimination, the Court cannot invoke *Fullilove* to justify the FCC policies.

The Court analogized the FCC's goal of broadcast diversity to the classroom diversity it sought to attain in *Bakke*. This analogy seems premised on the belief that there are a limited number of broadcast frequencies, just as there are a limited number of admissions slots. This comparison fails for two reasons, however. First, Justice Powell explicitly stated in *Bakke* that "[p]referring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake."[66] Instead, the uniqueness of the academic environment and academic freedom associated with it permits a "university to make its own judgments as to education includ[ing] the selection of its student body."[67] Second, advances in technology have removed most practical limitations on the number of broadcast frequencies.[68] Thus, the Court has no real justifica-

64. How should a judge evaluate a program that has a benign stated purpose that may actually benefit the minority group, but in fact was created for an invidious reason?

65. *Croson*, 488 U.S. at 488.

66. *Bakke*, 438 U.S. at 307 (Powell, J.).

67. *Id.* at 312 (Powell, J.).

68. The Court's adherence to the view that there are a limited number of broadcast frequencies follows the approach of such cases as Red Lion Broadcasting Co. v. Federal Communications Comm'n, 395 U.S. 367 (1969). Because the Court has attached importance to this limitation, the broadcast industry has been treated differently than

tion for endorsing these FCC diversity efforts.

In conclusion, *Metro Broadcasting* conflicts with the Court's prior affirmative action decisions because it lowers the standard of review necessary for evaluating racial preference programs. If it continues to apply intermediate scrutiny to affirmative action programs, the Court will severely weaken contemporary notions of equal protection. With the retirement of Justice Brennan and the elevation of Judge Souter to the Supreme Court, however, *Metro Broadcasting*'s influence may be quite limited—and quite short-lived.

Michael B. Bressman

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other press media in First Amendment analysis. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-25, at 1001-10 (2d ed. 1988). The Court has permitted content-based restrictions in the broadcasting context. *See Red Lion*, 395 U.S. at 389. In *Metro Broadcasting*, the Court essentially allowed a viewpoint restriction—the FCC is permitted by the Court's holding to enhance the speech of certain racial groups by restricting the speech of others. This sort of orchestration is "wholly foreign to the First Amendment." Buckley v. Valeo, 424 U.S. 1, 49 (1976) (per curiam). With the advent of such technological advances as cable and satellite dishes, the Court should reconsider its differential treatment of broadcasters and other press media in its First Amendment jurisprudence. *See, e.g.*, Fowler & Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207 (1982). Under a more unified approach, the Court would not need to endorse the parcelling out of channels at the cost of the First Amendment.