

5-1-1992

## The End Justifies the Means: Affirmative Action, Standards of Review, and Justice White

Christopher S. Miller

Follow this and additional works at: <https://repository.law.miami.edu/umlr>



Part of the [Civil Rights and Discrimination Commons](#)

---

### Recommended Citation

Christopher S. Miller, *The End Justifies the Means: Affirmative Action, Standards of Review, and Justice White*, 46 U. Miami L. Rev. 1305 (1992)

Available at: <https://repository.law.miami.edu/umlr/vol46/iss5/7>

This Comment is brought to you for free and open access by the Journals at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact [library@law.miami.edu](mailto:library@law.miami.edu).

# The End Justifies the Means: Affirmative Action, Standards of Review, and Justice White

I. INTRODUCTION .....	1305
II. CONSTRUCTION OF THE <i>METRO BROADCASTING</i> MAJORITY OPINION BASED ON JUSTICE WHITE'S AFFIRMATIVE ACTION VOTING RECORD .....	1308
A. <i>Bakke</i> .....	1310
B. <i>Fullilove</i> .....	1312
C. <i>Croson</i> .....	1313
III. JUSTICE WHITE'S INCONSISTENCY IN ADOPTING INTERMEDIATE SCRUTINY IN <i>METRO BROADCASTING</i> .....	1315
A. <i>The Concept of Consistent Application</i> .....	1315
B. <i>Analysis of Justice White's Past Government Affirmative Action Record</i> ....	1315
1. <i>BAKKE</i> .....	1316
2. <i>FULLILOVE</i> .....	1317
C. <i>Croson</i> .....	1318
IV. THE ACTUAL SIGNIFICANCE OF THE STANDARD OF REVIEW IN JUSTICE WHITE'S AFFIRMATIVE ACTION ADJUDICATION .....	1319
A. <i>Congressional Action</i> .....	1320
B. <i>Diversity Understood as Benefiting Society</i> .....	1322
V. CONCLUSION .....	1324

## I. INTRODUCTION

Constitutional skepticism arises whenever governmental policies provide benefits to certain members of society based on race or ethnicity.<sup>1</sup> "Except in the narrowest of circumstances, the Constitution bars such racial classifications as a denial to particular individuals, of any race or ethnicity, of 'the equal protection of the laws.'"<sup>2</sup> Therefore, "[a]ny preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees."<sup>3</sup>

Due to the significant possibility of Equal Protection violations, the judicial system has developed heightened standards of review for determining the legitimacy of programs which consider race as a fac-

---

1. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 291 (1978) ("Racial and ethnic distinctions of any sort are inherently suspect."); BERNARD SCHWARTZ, *BEHIND BAKKE: AFFIRMATIVE ACTION AND THE SUPREME COURT* 67 (1988). Former Chief Justice Warren Burger said: "No member of this Court, so far as I recall, has ever had any question but that racial classifications are suspect under all circumstances." Memorandum to the Conference at 2, *Regents of the Univ. of Cal. v. Bakke*, reprinted in SCHWARTZ, *supra*, at 168.

2. *Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997, 3029 (1990) (O'Connor, J., dissenting) (quoting U.S. CONST. amend. XIV, § 1).

3. *Fullilove v. Klutznick*, 448 U.S. 448, 491 (1980).

tor.<sup>4</sup> Before a court can examine the details of a race-based policy, it must ascertain which of the available standards is appropriate for the specific program. Certain members of the judiciary particularly emphasize this preliminary stage of the constitutional analysis. As Justice O'Connor notes:

This dispute regarding the appropriate standard of review may strike some as a lawyers' quibble over words, but it is not. The standard of review establishes whether and when the Court and Constitution allow the Government to employ racial classifications. A lower standard signals that the Government may resort to racial distinctions more readily.<sup>5</sup>

Whether, as Justice O'Connor asserts, the standard of review is truly determinative of the constitutionality of government race-based policies will be the ultimate focus of this Comment.

Throughout the relatively recent history of governmental affirmative action adjudication,<sup>6</sup> members of the Supreme Court have frequently disagreed on the appropriate standard of review for such cases.<sup>7</sup> However, in *City of Richmond v. J.A. Croson*,<sup>8</sup> the Court appeared to put to rest the certainty surrounding the appropriate standard of review for cases involving public affirmative action programs. *Croson* marked the first time a majority of the court agreed on

---

4. The origin of more exacting standards of review for race-based measures is footnote four to Justice Stone's opinion in *United States v. Carolene Products*, 304 U.S. 144 (1938). See SCHWARTZ, *supra* note 1, at 73. One of Justice Stone's former law clerks termed the note "The Famous Footnote Four." Alpheus Thomas Mason, *The Core of Free Government, 1938-1940: Mr. Justice Stone and "Preferred Freedoms,"* 65 YALE L.J. 597, 598 (1956). In that note, Justice Stone stated that legislation which considers race as a special condition "may call for a correspondingly more searching judicial inquiry." *Carolene*, 304 U.S. at 152 n.4. In explaining the note to Chief Justice Hughes, Justice Stone stated:

"It seemed to me desirable to file a caveat in the note" to the rational-basis standard applied in "the ordinary run of . . . cases" for "these other more exceptional cases. . . . [T]he court should be more alert to protect constitutional rights in those cases where there is a danger that the ordinary political processes for the correction of undesirable legislation may not operate."

SCHWARTZ, *supra* note 1, at 74 (quoting ALPHEUS THOMAS MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 514 (1956)).

5. *Metro Broadcasting*, 110 S. Ct. at 3033 (O'Connor, J., dissenting).

6. This comment will explore only the line of cases involving government-sponsored affirmative action programs. It will not, for instance, address the legitimacy under Title VII of affirmative action policies initiated by private employers.

7. The *Bakke* opinions articulated two disparate standards. The opinion of Justice Powell advocated one standard; Justice Brennan's opinion advocated another. Two years later, in *Fullilove*, various members of the court again proposed the use of the same two standards. Chief Justice Burger, writing a plurality opinion, did not advocate a specific standard, but rather implemented his own test. See *infra* p. 1313. Later in *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), the court again split on the standard of review question.

8. 488 U.S. 469 (1989).

a standard in a government affirmative action case.<sup>9</sup> The Court explicitly stated in Justice O'Connor's majority opinion that, unless Congress enacted a particular policy under its "unique remedial powers . . . under section 5 of the Fourteenth Amendment,"<sup>10</sup> the Court should apply the strict scrutiny test.<sup>11</sup> However, *Croson* proved not to be as definitive on the issue as it may have initially seemed.

One year later, in *Metro Broadcasting, Inc. v. FCC*,<sup>12</sup> the Court stated that "*Croson* . . . does not prescribe the level of scrutiny to be applied to a benign racial classification employed by Congress."<sup>13</sup> In upholding certain minority preference policies of the FCC, the Court instead chose to employ a less exacting standard. Rather than requiring that race-based programs be "necessary and narrowly tailored to achieve a compelling interest,"<sup>14</sup> the Court, in an opinion written by Justice Brennan, merely inquired whether the FCC policies were "substantially related to the achievement" of "important governmental objectives within the power of Congress."<sup>15</sup> Justice Brennan had previously advocated this intermediate scrutiny standard of review in *Regents of the University of California v. Bakke*,<sup>16</sup> in an opinion which Justices Marshall, Blackmun, and White<sup>17</sup> joined. Since *Bakke*, however, only Justices Brennan, Marshall, and Blackmun had endorsed the use of intermediate scrutiny for reviewing government sponsored affirmative action programs.<sup>18</sup> Indeed, no majority of the Court had ever endorsed the use of relaxed scrutiny for cases involving legislative racial preferences.<sup>19</sup> The question thus becomes: why did the Court choose *Metro Broadcasting* to diverge from its recent course?<sup>20</sup>

---

9. See *Croson*, 488 U.S. at 493 (O'Connor, J., joined in relevant part by Rehnquist, C.J., White and Kennedy, J.J.); *id.* at 520 (Scalia, J., concurring).

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

11. *Id.* at 493.

12. 110 S. Ct. 2997 (1990).

13. *Id.* at 3009.

14. *Id.* at 3029 ("Strict scrutiny" is defined as "necessary and narrowly tailored to achieve a compelling interest").

15. *Id.* at 3008 ("Intermediate scrutiny" is defined as "substantially related to the achievement of important governmental objectives within the power of Congress").

16. 438 U.S. 265 (1978).

17. It is not entirely clear whether Justice White fully endorsed this standard of review in *Bakke*. While joining Justice Brennan's opinion (along with Justices Marshall and Blackmun), Justice White was the only Justice to also join part III-A of Justice Powell's opinion which expressly endorsed the use of strict scrutiny. See *infra* p. 1316.

18. *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986); *Croson*, 488 U.S. at 469.

19. Charles Fried, *Metro Broadcasting, Inc. v. FCC: Two Concepts of Equality*, 104 HARV. L. REV. 107, 112 (1990).

20. The significance of *Metro Broadcasting* extends beyond the Court's use of a relaxed standard of review: The Court acknowledged the Government's legitimate interests in curing the effects of past discrimination, and found that the FCC's stated goal of achieving broadcast

The most plausible explanation lies in Justice Brennan's strategic ability to build a coalition on the bench in order to realize a desired result.<sup>21</sup> In *Metro Broadcasting*, Justice Brennan's last major victory on the Supreme Court, he was able to forge a majority which predictably included Justices Marshall and Blackmun, as well as Justice Stevens, who had previously split with the conservatives in *Wygant v. Jackson Board of Education*.<sup>22</sup> Moreover, Justice White also voted with the majority to employ intermediate scrutiny, in seeming contradiction of his position in *Croson*.

Part I of this Comment will explore the possible rationale behind Justice White's decision to join the majority in its adoption of intermediate scrutiny. This section will focus on White's past voting record in this area.<sup>23</sup> This Comment suggests that Justice Brennan was able to garner Justice White's support for a relaxed standard of review by making the use of intermediate scrutiny in *Metro Broadcasting* appear consistent with positions Justice White had previously taken. Part II will explore the flaws in this reasoning, and the judicial inconsistencies resulting from Justice White's decision to employ intermediate scrutiny in this case.<sup>24</sup> Part III will show that the particular standard of review may not necessarily determine the outcome of affirmative action cases before the Supreme Court. Instead, at least for Justice White, the ultimate determination hinges on the goals of the particular governmental program, and on who is trying to achieve them. The specific standard of review thus becomes a mere procedural means to accomplish a desired end.

## II. CONSTRUCTION OF THE *METRO BROADCASTING* MAJORITY OPINION BASED ON JUSTICE WHITE'S AFFIRMATIVE ACTION VOTING RECORD

The Court's use of strict scrutiny in *Croson* seemed to firmly establish a uniform standard of review for both state and federal

---

diversity was, in itself, valid. Although vital to the future of affirmative action adjudication, the question of whether diversity constitutes a "compelling" interest under strict scrutiny, or an "important" interest under intermediate scrutiny, is beyond the scope of this Comment.

21. See Neal E. Devins, *Metro Broadcasting v. FCC: Requiem for a Heavyweight*, 69 TEX. L. REV. 125, 128 (1990).

22. 476 U.S. 267 (1986).

23. To ascertain Justice White's position on the issue, it is necessary to examine his voting record, because he has authored few opinions in this area. Justice White did write concurring opinions in *Bakke* and *Wygant*, but he never expressly adopted a standard of review.

24. This section is premised on the theory advocated by Justice O'Connor, that members of the Court should be consistent in their adoption of a particular level of scrutiny, and that they should not allow the level to vary based on the circumstances of the case before the Court. See *infra* p. 1315.

affirmative action programs.<sup>25</sup> However, the result in *Metro Broadcasting*, where the majority relied on intermediate scrutiny as the standard of review, proved such conclusions to be premature.

*Metro Broadcasting* became the most unexpected success of the 1989 term for Justice Brennan.<sup>26</sup> But in retrospect, and given the nature of the opinion, the outcome is not quite as surprising as it first appeared. Brennan devised the opinion with the specific intention of holding the pivotal fifth vote, that of Justice White.<sup>27</sup> White had joined without comment Justice O'Connor's plurality opinion in *Croson*, which employed strict scrutiny as the standard of review, and he seemed unlikely to deviate from that position in *Metro Broadcasting*. But to ensure a majority, Justice Brennan needed the crucial swing vote of Justice White.<sup>28</sup> Brennan appears to have intentionally fashioned the *Metro Broadcasting* opinion to win Justice White's support. To that end, he drew on three particular cases, *Bakke*, *Fullilove* and *Croson*, which focus on issues particularly important to White.<sup>29</sup>

In *Metro Broadcasting*, the Court considered the constitutionality of two minority preference policies of the Federal Communications Commission.<sup>30</sup> The policies were challenged under the Equal Protection Clause of the Fifth Amendment.<sup>31</sup> The first policy awards an enhancement for minority<sup>32</sup> ownership<sup>33</sup> in comparative proceedings grants of new broadcast licenses.<sup>34</sup> The second policy, called the "distress sale" program, permits a broadcaster, in certain circum-

---

25. Devins, *supra* note 21, at 146 n.141.

26. Ruth Marcus, *Supreme Court Liberals Savor Wins Amid Conservative Majority*, WASH. POST, July 2, 1990, at A5.

27. Fried, *supra* note 19, at 126. See also Devins, *supra* note 21, at 128 n.21 (attributing critical features of the Court's analysis to "Justice Brennan's efforts to have Justice White provide the critical fifth vote.").

28. See James Scanlan, *Affirmative Action: The Court's Surprise?*, TEX. LAW., July 20, 1990 at S-14 ("White's unanticipated vote to uphold—coming a decade after he had last supported an affirmative action program—proved decisive.").

29. See Marcia Coyle, *A Final Victory Marks End of a Career*, NAT'L L.J., Aug. 13, 1990, at S4 (observing that *Metro Broadcasting* reflects Brennan's "consummate skill and brilliance in fine-tuning decisions in such a way that the essential fifth vote either signed on to or wrote the majority opinion.").

30. *Metro Broadcasting*, 110 S. Ct., at 2999, 3002.

31. *Id.*

32. *Id.* n.1. ("The FCC has defined the term 'minority' to include 'those of Black, Hispanic Surnamed, American Eskimo, Aleut, American Indian and Asiatic American extraction.'" (quoting Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 F.C.C.2d 979, 980 n.8 (1978))).

33. The minority ownership preference is given to applicants "a majority of whose ownership interests are held by a member or members of a minority group." H.R. CONF. REP. NO. 765, 97th Cong., 2d Sess. 44 (1982), reprinted in 1982 U.S.C.A.N. 2261, 2288.

34. *Metro Broadcasting*, 110 S. Ct. at 3002.

stances, to transfer his license only to minority controlled firms.<sup>35</sup> The Court found that neither of the policies violated Equal Protection principles.

"The real surprise of *Metro Broadcasting*, however, is not its outcome,"<sup>36</sup> but rather the means by which it came about. Justice Brennan's analysis first discussed the standard of review the Court applied to determine the legitimacy of the FCC policies. Pointing to the Court's decision in *Fullilove*, Brennan noted that three of the Court's members would have upheld benign racial classifications that "serve important governmental objectives and are substantially related to achievement of those objectives."<sup>37</sup> This is the classic language of intermediate scrutiny.<sup>38</sup> Justice White, however, was not one of the three who used this standard in *Fullilove*. Therefore, the argument that certain members of the court had previously employed intermediate scrutiny would not have been enough to convince Justice White to agree on the use of intermediate scrutiny in *Metro Broadcasting*. But based on White's past voting record and despite Justice White's recent allegiance with the conservatives in this area,<sup>39</sup> Justice Brennan had ample evidence that it would not be impossible to convince Justice White to adopt intermediate scrutiny in *Metro Broadcasting*.<sup>40</sup>

#### A. *Bakke*

Justice White had supported a standard of intermediate scrutiny when Justice Brennan initially applied it to an affirmative action plan in *Regents of the University of California v. Bakke*.<sup>41</sup> *Bakke* was the first case in which the Supreme Court directly confronted the reverse discrimination issue.<sup>42</sup> In *Bakke*, the plaintiff was a white male applicant who had been denied admission to the medical school of the Uni-

---

35. *Id.*

36. Devins, *supra* note 21, at 126.

37. *Metro Broadcasting*, 110 S. Ct. at 3008 (quoting *Fullilove*, 448 U.S. 448, 519) (Marshall, J., concurring).

38. Richard C. Reuben, *Affirmative Action OK'd by Justices*, L.A. Daily J., June 28, 1990, at 8, col. 2 (quoting Erwin Chemerinsky, a constitutional law scholar at the University of Southern California Law Center in Los Angeles).

39. "Nothing in White's recent actions suggested he would join the liberals in an affirmative action decision." Scanlan, *supra* note 27, at S-14.

40. *Cf.* Scanlan, *supra* note 27, at S-14 ("[I]f there was little reason to expect to find White voting to uphold the FCC preferences, there is nothing in his prior opinions that necessarily makes *Metro* a radical departure. Although his recent opinions reflect an aversion to race conscious measures, that aversion was not declared as absolute.").

41. 438 U.S. 265 (1978).

42. David B. Stoelting, Note, *Minority Business Set-Asides Must Be Supported By Specific Evidence of Prior Discrimination: City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706 (1989), 58 U. CIN. L. REV. 1097, 1101 (1990).

versity of California at Davis.<sup>43</sup> He claimed that the admissions policy violated the Equal Protection Clause, because the school had implemented an affirmative action program which reserved sixteen of the one hundred places in each entering class for disadvantaged members of minority groups.<sup>44</sup> By a five-to-four plurality vote, the Court held that this specific program violated the Equal Protection Clause.<sup>45</sup> Nevertheless, a majority of the Justices concluded that race might, under certain circumstances, be a proper admissions criterion.<sup>46</sup>

Justice Brennan, joined by Justices Marshall, Blackmun, and White, borrowed from the language of the gender discrimination cases<sup>47</sup> and stated that racial classifications designed to further remedial purposes "must serve important governmental objectives and must be substantially related to achievement of those objectives."<sup>48</sup> Justice White's endorsement of intermediate scrutiny for reviewing a government-funded affirmative action programs in *Bakke* was to provide a foundation for his support of intermediate scrutiny in *Metro Broadcasting*, more than a decade later.

*Bakke* is a significant precursor of the *Metro Broadcasting* decision for another reason. Applying the intermediate scrutiny test, the *Metro Broadcasting* majority found that the interest in enhancing broadcast diversity is, at the very least, an important governmental objective.<sup>49</sup> The Court stated that "just as a 'diverse student body' contributing to a 'robust exchange of ideas' is a 'constitutionally permissible goal' on which a race-conscious university admissions program may be predicated, the diversity of views and information of the airwaves serves important First Amendment values."<sup>50</sup> Although the question whether diversity is a legitimate goal under either strict or intermediate scrutiny is beyond the scope of this Comment,<sup>51</sup> *Bakke* at least offers some explanation why diversity was accepted as a legitimate goal in *Metro Broadcasting*.<sup>52</sup>

---

43. 438 U.S. at 276, 277.

44. *Id.* at 275.

45. *Id.* at 305-15.

46. *Id.* at 320 (Powell, J.) ("[T]he State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin."); *id.* at 326 (opinion of Brennan, White, Marshall, and Blackmun, JJ.).

47. *Craig v. Boren*, 429 U.S. 190 (1976), and its progeny.

48. *Bakke*, 438 U.S. at 359 (Brennan, White, Marshall, and Blackmun, JJ.) (quoting *Califano v. Webster*, 430 U.S. 313, 317 (1977); *Craig v. Boren*, 429 U.S. 190, 197 (1976)).

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

50. *Metro Broadcasting*, 110 S. Ct. at 3010 (quoting *Bakke*, 438 U.S. at 311-13 (opinion of Powell, J.)).

51. See *supra* note 20.

52. The significance of diversity as an objective in the adjudication of these cases is discussed in detail in *infra* part III.



### B. *Fullilove*

While *Bakke* may have been one basic reason for Justice White to side with the majority and to apply intermediate scrutiny in *Metro Broadcasting*, Justice Brennan's extensive reliance on the rationale of *Fullilove* throughout his *Metro Broadcasting* opinion probably most profoundly influenced Justice White. *Fullilove* involved a constitutional challenge to a congressionally created provision of the Public Works Employment Act of 1977.<sup>53</sup> The affirmative action program required that, in the absence of an administrative waiver, ten percent of the federal funds granted for local projects be allocated to businesses owned by members of specified minority groups.<sup>54</sup> By a six-to-three vote, the Court upheld the measure, concluding that it did not violate the Equal Protection Clause of the Constitution.<sup>55</sup>

According to "the most important scholarly analysis of *Fullilove*,"<sup>56</sup> that case clearly focused on the constitutionality of a congressionally mandated program.<sup>57</sup> The majority adopted the same focus in *Metro Broadcasting*, stating that "the FCC's minority ownership policies have been specifically approved—indeed, mandated—by Congress."<sup>58</sup> Justice Brennan embraced Chief Justice Burger's position in *Fullilove*, stressing the necessity of giving deference to Congress as a co-equal branch of the government.<sup>59</sup> Because of that necessity, Brennan concluded, the Court should employ a lesser standard when reviewing federal affirmative action legislation.<sup>60</sup> The significance of Brennan's apparent concern over giving deference to Congress, because Congress had "mandated" the FCC's racial policies, cannot be emphasized enough in the analysis of Justice White's position in

---

53. 448 U.S. at 455-56.

54. *Id.* at 454.

55. *Id.* at 492 (opinion of Burger, C.J. and White and Powell, JJ.); *id.* at 522 (opinion of Marshall, Brennan and Blackmun, JJ.).

56. Earl M. Maltz, *Affirmative Action and Employer Autonomy: A Comment on City of Richmond v. J.A. Croson Co.*, 68 OR. L. REV. 459, 464 n.44 (1989).

57. Drew S. Days, *Fullilove*, 96 YALE L.J. 453, 474 (1987); *see also* Stoelling, *supra* note 42, at 1118 n.163.

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

59. *Fullilove v. Klutznick*, 448 U.S. 448, 472 (1980). "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.'" Devins, *supra* note 21, at 133 (quoting *Metro Broadcasting*, 110 S. Ct. at 3008.).

60. Although the affirmative action program in *Metro Broadcasting* was not enacted by Congress itself, the majority reasoned that Congress had nevertheless mandated it. In particular the Court attached significance to an appropriations rider for the fiscal year 1988, effectively prohibiting the FCC from reviewing any of its policies relating to minority preferences. *Id.* at 3016.

*Metro Broadcasting*.<sup>61</sup> In *Fullilove*, only Chief Justice Burger and Justice White found the fact that the measure emanated from Congress dispositive.<sup>62</sup> Moreover, Justice White's personal preference for yielding to Congress is well known.<sup>63</sup> There is little question that this preference provided a strong impetus for Justice White to join Justice Brennan in adopting a less exacting standard of review.<sup>64</sup>

Justice Brennan also relied on a second facet of Burger's *Fullilove* opinion to sway Justice White. In his *Fullilove* opinion, which Justice White had joined, Chief Justice Burger expressly declined to adopt strict scrutiny in his analysis of the Congressional program in question.<sup>65</sup> Because *Fullilove* did not formally endorse any standard of review, Brennan concluded that precedent did not constrain the *Metro Broadcasting* Court's choice of a standard of review.<sup>66</sup> Similarly, because Justice White had never applied strict scrutiny when reviewing a federal measure in the past, his record did not require him to apply it in *Metro Broadcasting*. Viewed in this light, Justice White's endorsement of intermediate scrutiny in *Metro Broadcasting* does not appear to be inconsistent with his established credo.

### C. Croson

After determining that *Fullilove* did not prescribe the appropriate standard of review for *Metro Broadcasting*, Justice Brennan had to

---

61. See Bruce Fein et al., *The Brennan Legacy: A Roundtable Discussion*, A.B.A. J., Feb. 1991, at 53. According to Jesse Choper, Dean of Boalt Hall School of Law, University of California at Berkeley, the portion of Brennan's analysis stressing that Congress mandated the FCC policies "was put in there for Justice White." Moreover, "it didn't make the least bit of difference to Justice Brennan whether it was enacted by Congress or not—he would have approved it in any event." *Id.*

62. See Days, *supra* note 57, at 474.

63. Devins, *supra* note 21, at 125 n.6; see also David O. Stewart, *White to the Right?*, A.B.A. J., July 1990, at 42 (Justice White has a tendency to vote with the federal government says one of his former law clerks. Another former clerk agreed that with 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.").

64. See Neil A. Lewis, *Court Ruling Encourages Affirmative Action*, N.Y. Times, July 4, 1990, at 12 (According to former Solicitor General Charles Fried, Professor of Law at Harvard University, White provided the critical fifth vote because he is highly respectful of Congress. Fried found that "Congress looms very large in White's jurisprudence." Fried's colleague, Professor Kathleen Sullivan of Harvard Law School, offered a similar analysis, stating that White joined the majority because of his deference to other branches of government.) Note, again, that it is questionable whether Congress ever "mandated" the FCC policies. See *infra* notes 110-112 and accompanying text. Rather, Congress seemed to "allow" the FCC policies. See *supra* note 60.

65. 448 U.S. at 492 ("This opinion does not adopt, either expressly or implicitly, the formulas of analysis articulated in such cases as *University of California Regents v. Bakke*," of which strict scrutiny was one.) (opinion of Burger, C.J.).

66. Devins, *supra* note 21, at 133.

distinguish *City of Richmond v. J.A. Croson Co.*<sup>67</sup> *Croson* was the first case in which a majority of the Court used strict scrutiny to review a government sponsored affirmative action program. In *Croson*, the Court examined the constitutionality of an affirmative action program implemented by the City of Richmond. In a six-to-three decision, the Court found the Minority Business Utilization Plan unconstitutional because it required prime contractors holding city construction contracts to sub-contract at least thirty percent of the dollar amount of each contract to minority-owned businesses.<sup>68</sup> The rationale of *Croson* was critical to Justice Brennan's argument for adopting intermediate scrutiny in *Metro Broadcasting* and his ability to convince Justice White to go along. In her *Croson* opinion, which Justice White joined in full, Justice O'Connor asserted that strict scrutiny was the appropriate standard to apply in that case.<sup>69</sup> She distinguished the City of Richmond Plan from the Public Works Act in *Fullilove* on the grounds that the *Fullilove* program was established by Congress.<sup>70</sup> Thus, Justice O'Connor was able to dismiss the *Fullilove* court's failure to adopt strict scrutiny,<sup>71</sup> in her standard of review discussion *Croson*.<sup>72</sup>

In *Metro Broadcasting*, Justice Brennan reversed Justice O'Connor's *Croson* rationale in order to convince Justice White to adopt intermediate scrutiny. Brennan first distinguished *Croson* by stating that it concerned a minority set-aside program adopted by a municipality whereas *Metro Broadcasting* arose from federal policies.<sup>73</sup> He asserted that *Croson* did not prescribe the level of scrutiny to be applied to an affirmative action program employed by Congress because the question of congressional action was not before the *Croson* Court.<sup>74</sup> Instead, Justice Brennan concluded that "*Croson* reaffirmed the lesson of *Fullilove* that race-conscious classifications adopted by Congress to address racial and ethnic discrimination are subject to a *different* standard than such classifications prescribed by

---

67. 488 U.S. 469 (1989).

68. *Id.* at 477-78.

69. *Id.* at 494.

70. *Id.* at 487-91.

71. See *supra* note 65 and accompanying text.

72. *Croson*, 488 U.S. at 486-93.

73. *Metro Broadcasting*, 110 S. Ct. at 3009.

74. *Id.* This distinction between congressional action and state or municipal action appears to have been crucial to Justice White's decision to apply intermediate scrutiny. See Scanlan, *supra* note 28, at S-14 (analyzing Justice White's position in *Metro Broadcasting* and stating that "the distinction between congressionally mandated and state and locally imposed race-conscious measures [drawn in *Croson*] . . . later formed the linchpin of *Metro*.").

state and local governments."<sup>75</sup> Finally, Justice Brennan concluded that because neither *Croson* nor *Fullilove* dictated the standard of review to be adopted in *Metro Broadcasting*,<sup>76</sup> the Court was free to employ intermediate scrutiny in reviewing the FCC policies.

The manner in which Justice Brennan structured his argument in favor of intermediate scrutiny enabled Justice White to join the majority without appearing to be overtly inconsistent with his positions in *Fullilove* and *Croson*. Justices Brennan, Blackmun and Marshall each had endorsed intermediate scrutiny since the inception of its application to government affirmative action in *Bakke*. However, for Justice White *Metro Broadcasting* was the first government affirmative action case in which he employed the standard.

### III. JUSTICE WHITE'S INCONSISTENCY IN ADOPTING INTERMEDIATE SCRUTINY IN *METRO BROADCASTING*

#### A. *The Concept of Consistent Application*

According to Justice O'Connor, the standard of review that the Court applies to a race-conscious governmental action is of vital importance.<sup>77</sup> Her concerns lie not only with implementing the correct standard,<sup>78</sup> but also with consistently applying the same standard to like cases.<sup>79</sup> As she stated in *Wygant*,

the analysis and level of scrutiny applied to determine the validity of [a racial] classification do not vary because the objective appears acceptable to individual Members of the Court. While the validity and importance of the objective may affect the outcome of the analysis, the analysis itself does not change.<sup>80</sup>

The following discussion of Justice White's decision to apply intermediate scrutiny in *Metro Broadcasting* is premised on Justice O'Connor's view that members of the Court should remain consistent in their application of a particular standard of review.

#### B. *Analysis of Justice White's Past Government Affirmative Action Record*

As demonstrated above Justice Brennan was able to clear the

---

75. *Metro Broadcasting*, 110 S. Ct. at 3009 (emphasis added).

76. *Croson* never addressed congressional action and *Fullilove* did not formally adopt any specific standard of review.

77. See *supra* p. 1306.

78. See *supra* note 24.

79. Cf. NATHANNE W. GREENE, AFFIRMATIVE ACTION AND PRINCIPLES OF JUSTICE 160 n.21 (1989).

80. 476 U.S. at 285-86 (quoting *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724 n.9 (1982)).

way for Justice White's adoption of intermediate scrutiny in *Metro Broadcasting*. He made that adoption appear consistent with Justice White's positions in *Bakke*, *Fullilove*, and *Croson*, resulting in an unexpected victory for Brennan.<sup>81</sup> Notwithstanding Justice Brennan's ability to make it appear otherwise, Justice White's decision to side with the liberals in applying a relaxed level of scrutiny is far from harmonious with his past record. A number of glaring inconsistencies exist between his affirmative action record and the use of a relaxed standard of review in *Metro Broadcasting*. Justice White's decision to adopt intermediate scrutiny appears flawed when held up to Justice O'Connor's concept of consistent application.

### 1. BAKKE

In *Bakke*, Justice White did join Justice Brennan's opinion endorsing the application of intermediate scrutiny to the review of government affirmative action measures.<sup>82</sup> However, of the four members of the Brennan group, White was the only one who also joined Part III-A of Justice Powell's opinion.<sup>83</sup> In that section of his analysis, Justice Powell endorsed the use of strict scrutiny for race conscious measures adopted by government.<sup>84</sup>

Justice White's decision to join Part III-A of Powell's opinion created two major inconsistencies; one within the framework of the *Bakke* decision itself, the second with White's acceptance of intermediate scrutiny in *Metro Broadcasting*. The first inconsistency stems from White's simultaneous acceptance of intermediate scrutiny in Justice Brennan's opinion and of strict scrutiny in Justice Powell's opinion.<sup>85</sup> The two standards are unquestionably at odds with each other, and the adoption of both in the same decision appears irreconcilable. The second inconsistency is created by White's decision to subscribe to the use of intermediate scrutiny in *Metro Broadcasting*.<sup>86</sup> One of the key rationales for White's use of a relaxed standard in *Metro Broadcasting* was the fact that he had joined Justice Brennan in espousing intermediate scrutiny in *Bakke*.<sup>87</sup> The argument loses considerable credibility, however, given White's less than convincing

---

81. The use of intermediate scrutiny decided this case early. See Devins, *supra* note 21, at 135. Diversity, if not a "compelling" objective under strict scrutiny, is at least an "important" one under intermediate scrutiny. *Id.*

82. See *supra* text accompanying note 17.

83. *Bakke*, 438 U.S. at 387 n.7.

84. *Id.* at 287-91.

85. *Id.* at 359.

86. 110 S. Ct. at 3009.

87. See *supra* note 16 and accompanying text.

endorsement of intermediate scrutiny in *Bakke*. Justice White offered no explanation for his reasoning in *Bakke*;<sup>88</sup> neither did he attempt to resolve the inconsistency in *Metro Broadcasting*.<sup>89</sup>

## 2. FULLILOVE

The position Justice White adopted in *Metro Broadcasting* is also inconsistent with his stance in *Fullilove*. Justice Brennan's strong reliance on *Fullilove* to justify intermediate scrutiny in *Metro Broadcasting* should not have convinced Justice White to do so.

In voting to uphold the congressionally enacted affirmative action program at issue in *Fullilove*, Justice Marshall, in a concurring opinion joined by Justices Brennan and Blackmun, supported the use of intermediate scrutiny.<sup>90</sup> Justice White, on the other hand, dropped out of the "Brennan group," of which he was a member in *Bakke*, and instead joined the plurality opinion of Chief Justice Burger. That opinion, while not adopting strict scrutiny,<sup>91</sup> expressly declined to adopt any of the tests from *Bakke*,<sup>92</sup> of which intermediate scrutiny was obviously one. Therefore, by joining the Burger opinion, Justice White implicitly rejected the use of intermediate scrutiny for evaluating congressionally mandated affirmative action policies. Even if FCC policies were mandated by Congress,<sup>93</sup> by choosing to review them through an intermediate scrutiny analysis in *Metro Broadcasting*, Justice White endorsed an entirely new and inconsistent position. In order to remain consistent with his *Fullilove* position, while at the same time voting to uphold the FCC policies, Justice White would have had to write separately in *Metro Broadcasting*, applying a test similar to that articulated by Chief Justice Burger in *Fullilove*.

---

88. See Herman Schwartz, *The 1986 and 1987 Affirmative Action Cases: It's All Over but the Shouting*, 86 MICH. L. REV. 524, 544 n.114 (1987) (Justice White may have joined that part of Justice Powell's opinion for reasons other than the standard of review, but he made no such distinction in *Bakke*).

89. Another potential inconsistency arises from Justice White's likely reliance on *Bakke* to support diversity as a legitimate goal in *Metro Broadcasting*. Aside from the debate about whether diversity should ever be a legitimate goal under any standard of review, *Bakke* should have no bearing at all on the specific situation at issue in *Metro Broadcasting*. See Fried, *supra* note 19, at 113 ("analogizing the FCC to the governing body of a university, protected by the ancient value of academic freedom, is almost derisory.").

90. *Fullilove*, 448 U.S. at 519 (Marshall, J., concurring).

91. See *supra* notes 65, 66 and accompanying text.

92. *Fullilove*, 448 U.S. at 491-92 (Burger, C.J., plurality opinion) ("This opinion does not adopt, either expressly or implicitly, the formulas of analysis articulated in such cases as *University of California Regents v. Bakke*.").

93. For a discussion of whether this particular program was congressionally mandated, see Devins, *supra* note 21. For a general criticism of the use of appropriations riders as a means of determining the desires of Congress, see Neal E. Devins, *Regulation of Government Agencies Through Limitation Riders*, 1987 DUKE L.J. 456, 458 n.16 (1987).

Instead, he joined the majority, and in turn adopted a position which he had previously repudiated.

*Fullilove* is an improper basis for Justice White's decision to apply intermediate scrutiny in *Metro Broadcasting* for yet another reason. According to Justice O'Connor, *Fullilove* concerned the exercise of congressional powers under section five of the Fourteenth Amendment.<sup>94</sup> O'Connor stated that "the opinions make clear that it was section five that led the Court to apply a different form of review to the challenged program."<sup>95</sup> In defending the application of a relaxed standard of review, Justice Brennan disputed O'Connor's assertion, claiming it was simply incorrect.<sup>96</sup> Instead, Brennan noted that Chief Justice Burger's *Fullilove* opinion expressly provided that in enacting the Public Works Act, "Congress employed an amalgam of its specifically delegated powers."<sup>97</sup> Although scholars recognized that *Fullilove* technically mentioned some of these powers, namely Congress' Spending and Commerce Power,<sup>98</sup> most believed that *Fullilove* primarily rested on section five of the 14th Amendment.<sup>99</sup>

### C. *Croson*

Justice White's decision to apply intermediate scrutiny in *Metro Broadcasting* is inconsistent, regardless of whether Justice O'Connor is correct in her reading of *Fullilove*. As Justice O'Connor pointed out in *Metro Broadcasting*, even if it was questionable whether *Fullilove* was actually based on an exercise of section five powers by Congress, "*Croson* resolved any doubt that might remain regarding this point."<sup>100</sup> In her *Croson* opinion, Justice O'Connor expressly stated that in *Fullilove* "Congress was exercising its powers under section

---

94. *Metro Broadcasting*, 110 S. Ct. at 3030 (stating that the Congress shall have "power to enforce, by appropriate legislation, the provisions of this article," including the Equal Protection Clause, citing U.S. CONST. amend. XIV, § 5.).

95. *Id.*

96. *Id.* at 3008 n.11.

97. *Id.* (quoting *Fullilove*, 448 U.S. at 473.).

98. *Fullilove*, 448 U.S. at 475.

99. See, e.g., Michel Rosenfeld, *Decoding Richmond: Affirmative Action and the Elusive Meaning of Constitutional Equality*, 87 MICH. L. REV. 1729, 1731 n.14 (stating that the program in *Fullilove* was "mandated by Congress, which was acting, *inter alia*, pursuant to its special powers under § 5 of the fourteenth amendment.").

100. *Metro Broadcasting*, 110 S. Ct. at 3031. See also Jennifer M. Bott, Note, *From Bakke to Croson: The Affirmative Action Quagmire and the D.C. Circuit's Approach to FCC Minority Preference Policies*, 58 GEO. WASH. L. REV. 845, 852 (analyzing the distinction between *Croson* and *Fullilove* by focusing on Congress' constitutional mandate to enforce the 14th Amendment); see also Stoelting, *supra* note 42, at 1105 (concluding that Chief Justice Burger's majority opinion in *Fullilove* "placed considerable significance on the fact that Congress enacted [the program] pursuant to its powers under section 5 of the fourteenth amendment").

five of the Fourteenth Amendment. . . ."<sup>101</sup> The lack of ambiguity in this language should have solidified the constitutional basis of *Fullilove*, at least for the Justices who joined Justice O'Connor's opinion.

Nevertheless, in *Metro Broadcasting*, Justice Brennan disputed Justice O'Connor's reading of *Fullilove*.<sup>102</sup> Brennan, of course, did not contradict himself, because he did not join any part of Justice O'Connor's *Croson* opinion. In contrast, Justice White, who joined Justice O'Connor's opinion in full, is not privy to the same defense. Rather, by abdicating strict scrutiny in *Metro Broadcasting*, Justice White directly contradicted his position in *Croson*. In *Croson*, he had espoused a specific rationale to distinguish *Fullilove*; in *Metro Broadcasting* he renounced it without comment. Justice White's application of intermediate scrutiny to the FCC policies, which the majority does not claim were enacted under Congress' section five powers, is judicially inconsistent with his previous position on the proper standard of review to be applied to governmental affirmative action programs.

#### IV. THE ACTUAL EFFECT OF THE STANDARD OF REVIEW IN JUSTICE WHITE'S AFFIRMATIVE ACTION ADJUDICATION

When analyzed in accordance with Justice O'Connor's concept of rigid adherence to a particular level of scrutiny,<sup>103</sup> Justice White's decision to employ intermediate scrutiny in *Metro Broadcasting* appears questionable in light of his previous affirmative action positions. However, Justice White's decision to join the majority in upholding the FCC policies is not incompatible with his past affirmative action record. Instead, there appears to be a methodological difference in Justice White's approach to affirmative action adjudication.

As previously noted, Justice O'Connor postulates that "[w]hile the validity and importance of the objective may affect the outcome of the analysis, the analysis itself does not change."<sup>104</sup> In contrast, Justice White's method of constitutional adjudication appears to be opposite of Justice O'Connor's. For White, the validity and importance of the objective are not merely factors in the analysis. Instead, they seem to affirmatively determine the level of scrutiny he will apply. As a result, the standard of review becomes a procedural means for achieving what Justice White considers to be a legitimate

---

101. *City of Richmond v. Croson*, 488 U.S. 469, 504 (1989) (opinion of O'Connor, J., joined by Rehnquist, C.J., and White, J.).

102. See *supra* note 97 and accompanying text.

103. See *supra* notes 4, 5 and accompanying text.

104. See *supra* note 79 and accompanying text.



end.<sup>105</sup>

Justice White's decision to uphold the FCC policies in *Metro Broadcasting*, as well as his other recent decisions in the government affirmative action area, seem to hinge on two relevant factors: The first concerns the level of government implementing the race-based policies; the second involves the goals to be accomplished through these policies. Both facts appear to be equally relevant to Justice White's adjudication, and both are therefore crucial to a prediction of the possible outcome of future affirmative action cases before the Supreme Court.

### A. Congressional Action

As discussed, Justice White places a premium on judicial deference to congressional action.<sup>106</sup> This deference unquestionably played a significant role in the outcome of *Metro Broadcasting*.<sup>107</sup> Justice Brennan's opinion stressed that Congress, and not state or local government, had mandated the policies before the Court.<sup>108</sup> Whether Congress actually mandated the FCC policies is subject to debate.<sup>109</sup>

---

105. The key to understanding this reasoning lies in the realities of constitutional adjudication and the actual effect of each standard of review. Rarely will the Court uphold a government race-conscious measure under strict scrutiny. See SCHWARTZ, *supra* note 1, at 543 (under strict scrutiny "almost nothing goes."). From a pragmatic standpoint, strict scrutiny is often "strict in theory, but fatal in fact." *Id.* (quoting Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972)). Intermediate scrutiny, therefore, becomes a means for upholding programs which would otherwise fail under the stricter counterpart.

106. See *supra* note 63 and accompanying text. One possible explanation for Justice White's respect for congressional legislation in this area is the overwhelming factual record which usually accompanies a congressional decision to enact race-conscious legislation. In *Fullilove*, Chief Justice Burger stated that "Congress had abundant evidence from which it could conclude that minority businesses have been denied effective participation in public contracting opportunities by procurement practices that perpetuated the effects of prior discrimination." 448 U.S. at 477-78. Likewise, in *Metro Broadcasting*, Congress had made significant factual findings "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." H.R. CONF. REP. NO. 765, 97th Cong., 2d Sess. 43 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2261, 2287. Additionally, the likelihood of abuse by special interests has historically been much less of a concern at the federal level than at the local level. See *generally* THE FEDERALIST NO. 10 (J. Madison). The fact that the Richmond City Council in *Croson* had a black majority of five to four may have invigorated the Court's continued skepticism of local affirmative action programs.

107. Jesse Choper, Dean of Boalt Hall School of Law, University of California at Berkeley attributes Justice White's decision to join the Brennan majority to White's preference to defer to Congress' Fourteenth Amendment power to eliminate the effects of discrimination. See Reuben, *supra* note 38.

108. See *supra* notes 58 & 61 and accompanying text.

109. See Devins, *supra* note 21, at 137-41 (questioning whether limitation riders are appropriate sources for determining the dictates of Congress). For a general criticism of

Regardless, Justice White's comments at oral argument show that he realized the extent to which Congress actually approved of this program.<sup>110</sup> Even given that realization, Justice White was still willing to defer to what he perceived to be the dictates of Congress in this area.<sup>111</sup>

Because the Court, and particularly Justice White as the swing vote, emphasized that *Metro Broadcasting* dealt at least indirectly with congressional action, some scholars have concluded that "when it comes to an act of Congress, the analysis is intermediate scrutiny."<sup>112</sup> As a result, others predict that "by allowing the federal government to 'experiment with affirmative action in ways the states can't,' the Court had raised the prospect that civil rights groups will lobby Congress to authorize or order states to enact" additional race-based programs.<sup>113</sup>

The prediction that the Court will automatically apply intermediate scrutiny to any future affirmative action policy enacted by Congress—and thereby almost assuredly uphold it<sup>114</sup>—is far too broad a reading of the result in *Metro Broadcasting*. Even for Justice White's personal adjudication,<sup>115</sup> the mere fact that Congress has endorsed a particular program is not enough to elicit his blanket imprimatur. As one commentator wrote:

---

limitation riders as a valid means for ascertaining the desires of Congress, see Devins, *supra* note 94.

110. In response to the assertion made by counsel for the FCC that Congress had acted here, Justice White stated: "[B]ut all Congress said . . . [is] that it didn't want you to change your . . . preference policy." Transcript of Oral Arguments at 39, *Metro Broadcasting v. FCC*, 110 S. Ct. 2997 (1990) (No. 89-453).

111. A possible explanation for this willingness lies in the other evidence of Congress' findings quoted by Justice Brennan in *Metro Broadcasting*.

112. Reuben, *supra* note 38. This is the conclusion drawn, for example, by Erwin Chemerinsky, a constitutional scholar at the University of Southern California Law Center in Los Angeles.

113. Linda Campbell, *State Fears More Issues Becoming a Federal Case*, CHI. TRIB., July 15, 1990, at 5 (quoting Professor David Strauss, of the University of Chicago). Senator Paul Simon (D-Ill.) has introduced a bill that would authorize state and local governments to have set-asides for minorities. *Engineering News-Record*, Aug. 16, 1990, at 7. Scholars have drawn other related conclusions in the wake of the *Metro Broadcasting* decision. For instance, Professor Kathleen Sullivan of Harvard Law School stated that "the Supreme Court had shown itself to be so deferential to Congress on affirmative action that it might uphold a Federal law, if one were enacted, overturning last year's ruling striking down the Richmond affirmative action plan." Neil Lewis, *Court Ruling Encourages Affirmative Action*, N.Y. TIMES, July 4, 1990, at 12. Representative John Conyers, Jr., D-Mich, chairman of the House Government Operations Committee, has already held hearings on a bill to overturn the Richmond ruling by act of Congress. *Id.* See also Campbell, *supra*, at 5.

114. See *supra* note 106.

115. The analysis of Justice White's position is important given his vote to uphold any government program which takes race into account.

To the extent that [Justice White's] vote can be essentially reconciled with his other post-*Fullilove* positions—and does not reflect a material modification of his views—the *Metro* decision need not signify a much more accommodating environment for governmentally imposed race-conscious action than we have observed in the recent past. And there is reason to believe that the continued difficulty of sustaining such measures may be almost as great for congressionally imposed measures as for those imposed at the state and local levels.<sup>116</sup>

The pessimism the above passage conveys about the continued expansion of affirmative action by Congress can be linked to the second of Justice White's factors, namely the goals to be achieved by government race-based policies.

### B. *Diversity Understood as Benefiting Society*

The supposition that Justice White will routinely uphold any affirmative action programs created by Congress through the use of intermediate scrutiny has no foundation in his affirmative action record. A more appropriate assumption is that Justice White will give Congress significant latitude to enact affirmative action legislation "*as long as it's tied to some kind of diversity that is understood as benefiting society.*"<sup>117</sup> The Court appears to require more than a simple showing of congressional assent before it relaxes its level of scrutiny.<sup>118</sup> In addition to the usual legislative reasons for enacting race-conscious measures,<sup>119</sup> the Court also requires that the legislation be designed to achieve some type of diversity which benefits society.

*Metro Broadcasting* may have been unique in its ability to meet this additional requirement, especially Justice White. Justice Brennan's majority opinion stressed that "the diversity of views and information on the airwaves serves important First Amendment values."<sup>120</sup> Justice Brennan thus diverted the Court's focus from the benefit accruing to the minority applicant to the "benefits [which] redound to all members of the viewing and listening audience."<sup>121</sup> He justified that redirection of attention using Congress' own statement that "the American public will benefit by having access to a wider diversity of information sources."<sup>122</sup> Ultimately, that shift in focus

---

116. Scanlan, *supra* note 28, at S-14.

117. Lewis, *supra* note 64 (quoting Professor Kathleen Sullivan) (emphasis added).

118. See *supra* note 5 and accompanying text.

119. See *infra* notes 123 & 127.

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

121. *Id.* at 3011.

122. *Id.* (quoting H.R. CONF. REP. NO. 765, 97th Cong., 2d Sess. 45 (1982), reprinted in 1982 U.S.C.C.A.N. 2261, 2289).

may have led to Justice White's decision to uphold the FCC policies.

Justice White's majority opinion in *Red Lion Broadcasting Co. v. FCC*<sup>123</sup> provides evidence of his support of the position that a diverse media is a significant benefit to society as a whole. In *Red Lion Broadcasting*, Justice White expressly stated that "it is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."<sup>124</sup> Moreover, "[i]t is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial . . . ."<sup>125</sup> Justice White may have felt that he was adhering to this position once again in *Metro Broadcasting*. His view that the public has a right to broadcast diversity probably facilitated the decision to uphold the FCC policies, especially in light of Congress' findings that preference policies "promot[e] the primary communications policy objective of achieving a greater diversification of the media of mass communications."<sup>126</sup>

Another recent decision of the Supreme Court furnishes support for the conclusion that congressional action alone is not enough to prompt the Court to automatically apply intermediate scrutiny and uphold the race-based program. Just one year before *Metro Broadcasting*, the Court refused to uphold the congressional affirmative action program at issue in *H.K. Porter Co. v. Metropolitan Dade County*.<sup>127</sup> In *H.K. Porter*, the Eleventh Circuit had upheld a congressionally funded affirmative action program that set percentage goals for minority business participation following congressional specifications.<sup>128</sup> Although Congress had acted more directly than in *Metro Broadcasting*, the Supreme Court, with Justice White joining the majority, vacated the judgment and remanded the case for further consideration in light of *City of Richmond v. J.A. Croson Co.*<sup>129</sup> The result in *H.K. Porter* seems to indicate that strict scrutiny will be applied to congressional affirmative action plans which do not benefit society through the promotion of diversity.<sup>130</sup>

---

123. 395 U.S. 367 (1969) (upholding the right of the FCC to regulate radio frequencies).

124. *Id.* at 390.

125. *Id.*

126. H.R. CONF. REP. NO. 765, 97th Cong., 2d Sess. 45 (1982), reprinted in 1982 U.S.C.C.A.N. 2261, 2288.

127. 489 U.S. 1062 (1989) (memorandum opinion).

128. 825 F.2d 324, 325-26 (11th Cir. 1987) (per curiam).

129. *H.K. Porter*, 489 U.S. at 1062.

130. The Eleventh Circuit had upheld the program at issue in *H.K. Porter* by using *Fullilove* as the basis of its analysis. *H.K. Porter*, 825 F.2d at 328-32. While the case can be distinguished from *Fullilove* in that Congress left the exact percentages to be awarded to minorities up to the local agency in *H.K. Porter*, the case still provides substantial proof that the Court will not routinely uphold congressional affirmative action programs which does not have attendant societal benefits accomplished through diversity.

## V. CONCLUSION

In all likelihood, the use of intermediate scrutiny in *Metro Broadcasting* provided Justice White with a suitable way to uphold a congressional program which he believed furthered a legitimate diversity interest to the benefit of society. Due to the unique factual setting of *Metro Broadcasting*, and in light of Justice White's views expressed in *Red Lion Broadcasting*, one should hesitate to read the result in *Metro Broadcasting* as opening the floodgates to additional affirmative action programs by Congress. Unless Congress is trying to foster a type of diversity the Court deems beneficial to society as a whole, the Court is unlikely to apply a relaxed standard of scrutiny in reviewing the particular race-based measure.

CHRISTOPHER S. MILLER