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Recent Developments: Metro Broadcasting, Inc. v. FCC: Intermediate Scrutiny Held Applicable to Federal Race-Conscious Programs

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Recent Developments

Metro Broadcasting, Inc. v. FCC:
INTERMEDIATE SCRUTINY HELD APPLICABLE TO FEDERAL RACE-CONSCIOUS PROGRAMS

In *Metro Broadcasting, Inc. v. FCC,* 110 S. Ct. 2997 (1990), the Supreme Court held that FCC race-conscious minority preference policies did not violate equal protection principles. The Court applied a mid-level standard of review to determine that the FCC policies were substantially related to the achievement of the important governmental objective of broadcast diversity.

In the first of two consolidated cases the petitioner, Metro Broadcasting (Metro), challenged the Federal Communication Commission's (FCC) policy awarding preference to minority broadcast station owners in comparative hearings. Rainbow Broadcasting (Rainbow), a minority owned company, received a contract to construct and operate a new UHF television station, upon which Metro Broadcasting, a nonminority company, also bade. After a comparative hearing, the FCC gave Rainbow a higher rating than Metro based on Rainbow's ninety percent minority ownership. The Board determined that Rainbow's minority credit outweighed Metro's local residence and civic participation, and thus awarded the contract to Rainbow. *Metro Broadcasting,* 110 S. Ct. at 3005-06.

In the companion case, respondent, Shurberg Broadcasting of Hartford (Shurberg), challenged the FCC's "distress sale" policy contending it violated its equal protection rights under the fifth amendment. The distress sale policy permitted a radio or television broadcaster, whose license has been designated for a revocation hearing, to assign or transfer the license to an FCC approved minority enterprise. Astroline Communications (Astroline), a minority enterprise, purchased an existing broadcast license through a distress sale, thereby precluding Shurberg, a nonminority enterprise, from competing for the license. The FCC relied on congressional action and found Shurberg's equal protection claim meritless. *Id.* at 3007. Both Shurberg and Metro appealed to the United States Court of Appeals for the District of Columbia. On appeal, the Court of Appeals invalidated the FCC distress sale policy as it deprived Shurberg of its constitutional right to equal protection under the fifth amendment. *Id.* The court affirmed the FCC's decision in Metro as supported by congressional action. Metro's petitions for a rehearing were denied.

The United States Supreme Court granted certiorari to review the issue of whether the FCC's minority preference policies violated equal protection principles under the fifth amendment. In reviewing these consolidated cases, the Court emphasized the expressed action of Congress to implement these policies. The Court, relying on *Fullilove v. Klutznick,* 448 U.S. 448 (1980), noted that the appropriate deference must be given to Congress' power to provide for the general welfare of the United States and enforce by legislation the equal protection guarantees of the fourteenth amendment. *Metro Broadcasting,* 110 S. Ct. at 3008.

In deciding *Metro Broadcasting,* the Court had to choose between its analysis in *Fullilove v. Klutznick* and *City of Richmond v. J.A. Croson Co.,* 488 U.S. 469 (1989). In *Fullilove* the Court applied a mid-level scrutiny analysis and found constitutional a congressionally imposed minority set-aside under which ten percent of all federal funds used for local public works projects were required to go to Minority Business Enterprises. *Metro Broadcasting,* 110 S. Ct. at 3009. However, in *Croson,* a recent minority set-aside case, the Court applied a strict scrutiny analysis and rejected as unconstitutional a Minority Business Enterprise program enacted by a local government. *Id.*

Adopting the position taken by three justices in *Fullilove,* the Court determined that an intermediate level of scrutiny should be applied to the FCC race-based classifications. In doing so, the Court held that benign racial measures mandated by Congress were constitutionally permissible to the extent that they served an important governmental objective and are substantially related to the achievement of those objectives. *Id.* The Court reasoned that such race-conscious measures mandated by Congress were permissible even if they were not "'remedial' in the sense of being designed to compensate victims of past governmental or societal discrimination. . . ." *Id.*

The Court went on to distinguish *Metro Broadcasting* from *Croson.* The Court noted the presence of congressional action in *Metro* as opposed to state legislative action in *Croson. Id.* The Court then determined that *Croson* did not undermine *Fullilove,* but underscored it. Reasoning that the federal government had traditionally been more instrumental than state legislatures in combatting racial discrimination, the Court held the rationale in *Fullilove* recognized that the race-conscious classifications adopted by Congress were

subject to a different standard of review than classifications prescribed by state and local governments. *Id.* Thus, applying the mid-level standard of scrutiny proposed by *Fullilove,* the Court held the FCC minority ownership policies constitutional. *Id.* at 3008-09.

In upholding the FCC's minority policy, the Court held that promoting minority ownership of broadcasting stations served an important governmental objective. *Id.* The Court agreed with the congressional and FCC findings that minority preference policies promoted diversity in programming. *Id.* The role of the government, the Court reasoned, is to promote the dissemination of diverse information. *Id.* at 3010. The Court determined that the process of disseminating diverse information, through programming, was essential to the public welfare, and thus an important governmental objective.

After finding FCC preference policies served an important governmental objective, the Court determined that the FCC's policies were substantially related to the achievement of the government's interest. *Id.* In reviewing the nexus between minority ownership and programming diversity, the Court deferred to the fact-finding abilities of Congress and the FCC's expertise and noted that Congress made clear its view that minority ownership policies advanced the goal of diverse programming. The Court further noted Congress' continually expressed support of diversity in programming through minority ownership. *Id.* at 3012-13.

The Court found race-based classification may be permissible in some instances. In supporting permissible benign discrimination, the Court analogized diversity in programming and the fair cross-section requirement of the sixth amendment, which forbids excluding groups from a jury venire on the basis of race or sex. In addition, the Court compared *Metro Broadcasting* with voting rights cases that permit benign discrimination to involve minorities in the political process. *Id.* at 3019. Similarly, the Court reasoned, benign discrimination is permissible to promote programming diversity. *Id.*

Next, the Court rejected Shurberg's final contention that the minority distress policy operated to exclude nonminorities from consideration in the transfer of certain stations, and thus unduly burdens nonminorities. *Id.* at 3025. As the majority noted, the policy could only be invoked at the Commission's discretion and distress sales only involved a small number of broadcast licenses. Furthermore, the power to invoke the distress sale was in the hands of the nonminority station owner who may choose to seek renewal by attending an FCC hearing, rather than sell his license to a minority group. This, the Court found, decreased the chance that nonminorities would suffer an undue burden. *Id.* at 3027.

In a lengthy dissent, Justice O'Connor, joined by the Chief Justice, Justice Scalia, and Justice Kennedy, contended that the constitution's guarantee of equal protection bound the federal and state governments equally, and that no lower level of scrutiny should be applied for federal action. *Id.* at 3030 (O'Connor, J., dissenting). Justice O'Connor opined that the guarantee of equal protection extended to each citizen, regardless of race. *Id.* at 3032 (O'Connor, J., dissenting). Neither the federal government nor the states may deny any person equal protection of the laws and governmental distinctions, she contended, among citizens based on race or ethnicity would exact costs and carry substantial dangers. *Id.* (O'Connor, J., dissenting). Justice O'Connor believed the FCC policies should have been evaluated under strict scrutiny and that under such analysis, the FCC policies would fail. *Id.* at 3044.

Metro Broadcasting is significant as it illustrates the Supreme Court's implementation of an intermediate level of review for federal race-conscious affirmative action policies. While state programs continue to receive a strict scrutiny standard of review, federal affirmative action programs with the approval of Congress, need only survive the mid-level test for constitutionality. *Metro Broadcasting* also signifies that *Fullilove* remains good law.

— Daryl D. Jones

Michigan Dep't of State Police v. Sitz: STATE'S USE OF SOBRIETY CHECKPOINTS DOES NOT VIOLATE THE FOURTH AMENDMENT

In *Michigan Department of State Police v. Sitz,* 110 S. Ct. 2481 (1990), the United States Supreme Court held that state highway sobriety checkpoints do not violate the Fourth or Fourteenth Amendments to the United States Constitution. The Court ruled that the state's interest in preventing drunk driving outweighed any intrusion upon drivers.

The Michigan Department of State Police established a sobriety checkpoint program in 1986. Under specific guidelines, sobriety checkpoints would be set up at selected sites along state roads. Vehicles passing through the checkpoints would be stopped, and their drivers would be briefly examined for signs of intoxication. Drivers displaying signs of alcohol impairment would be directed to a location out of the traffic flow where an officer would check the driver's license and car registration and, if warranted, conduct further sobriety tests. An arrest would be made if the test results and observations by the police suggested that the driver was intoxicated. *Id.* at 2484. At the only checkpoint operated under the program, two of the drivers stopped were arrested for driving under the influence of alcohol. *Id.*

Respondents, the day before the operation of the first checkpoint, filed a complaint seeking relief from potential subjection to the checkpoints. The trial court applied the balancing test set forth in *Brown v. Texas,* 443 U.S. 47 (1979), to decide the program's constitutionality. This three prong test involved "balancing the state's interest in preventing accidents caused by drunk drivers, the effectiveness of sobriety checkpoints in achieving that goal, and the level of intrusion on an individual's privacy caused by the checkpoints." *Sitz,* 110 S. Ct. at 2484 (citing *Brown,* 433 U.S. at 50-51). After applying the test, the trial court determined that the program violated the fourth amendment. *Id.*

Affirming the decision, the Michigan Court of Appeals stated that the trial court was correct in its findings that the state had "a 'grave and legitimate' interest in curbing drunken driving; [but] that sobriety checkpoint programs are