Broadcasting Cases to Transmit Message on Racial Preferences

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Sooner than anyone expected, the Supreme Court is again to consider the constitutionality of governmentally imposed affirmative-action measures. On March 28, the Court will hear arguments in two cases concerning the validity of racial preferences in Federal Communications Commission licensing proceedings.

After last year's 6-3 ruling striking down Richmond's minority set-aside program in *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706, there was reason to expect an unbroken line of Supreme Court decisions invalidating one affirmative-action program after another – all may never be a factor in the government's distribution of economic benefits. The Court's treatment of the two cases now before it will conform to that expectation – probably.

In *Astroline Communications v. Schurberg Broadcasting* (No. 89-700), the Court will review the FCC's distress-sale policy. Under that policy, the holder of a broadcast license who is in jeopardy of losing the license may sell it to a minority owned enterprise – for up to 75 percent of market value – instead of simply forfeiting it to the FCC. In March 1989, relying on the *Croson* decision, a divided panel of the U.S. Court of Appeals for the D.C. Circuit found the policy unconstitutional (876 F. 2d 902).

The following month, in *Metro Broadcasting Inc. v. FCC*, 873 F.2d 347, a divided panel of the same court, notwithstanding *Croson* (and *Schurberg*), upheld the FCC policy of enhancing the scores of applicants in competitive licensing proceedings on the basis of minority ownership. Although the appeals court did not address the constitutionality of a similar enhancement for female ownership, that issue appears to be within the scope of the questions the Supreme Court has agreed to look at (No. 89-453), and the petitioner, a non-minority license applicant, has briefed it extensively.

These two policies, which were adopted during the Carter administration, do not necessarily reflect current FCC thinking about the propriety of considering race or gender in the distribution of broadcast licenses. But Congress has interceded to preclude the FCC from reviewing them. Because the Justice Department is seeking to have the policies invalidated, the FCC is representing itself in their defense.

Counting Votes

An early vote count indicates that the distress-sale policy is virtually certain to fall in the Supreme Court. The enhancement policy, on the other hand, might not.

The votes of seven justices are thoroughly predictable in both cases. For these seven, the fact that the preferences are imposed by the federal government rather than by a state or local government and the precise nature of the preferences are likely to matter little. Whatever arguments the parties make, Justices William Brennan Jr., Thurgood Marshall, and Harry Blackmun can be expected to support the preferences. Similarly, Chief Justice William Rehnquist and Justices Byron White, Antonin Scalia, and Anthony Kennedy are almost sure to vote to strike down both preferences.

Two for Speculation

There is room for speculation, however, on the votes of Justices John Paul Stevens and Sandra Day O'Connor. Although the two voted to strike down Richmond's set – aside program in *Croson*, there is a chance that Stevens will vote to uphold the preference in both cases and that O'Connor will vote to uphold the preference in *Metro*, the bid enhancement case.

The history of Stevens' approach to affirmative action is an interesting one. In 1978; he voted against the preferential-admissions policy at issue in *Regents of the University of California v. Bakke*, 438 U.S. 265. In 1980, he strongly dissented from the decision in *Fullilive v. Klutznick*, 448 U.S. 448, upholding the constitutionality of congressionally mandated set-asides on federally funded construction projects. As of that date, Stevens would have been considered one of the justices most opposed to racial preference of any sort.

But more recently, Stevens has emerged as one of the strongest supporters of employment quotas. In doing so, he has gone his own route, emphasizing what he has termed "forward-looking" justifications. For example, he dissented from the 1986 decision in *Wygant v. Jackson Board of Education*, 476 U.S. 276, which struck down a school district's layoff quota, arguing that the educational benefits of an integrated faculty could justify racial preferences to speed the integration. Although he reiterated that reasoning in *Croson*, he sided with the majority because he does not believe set-asides are socially useful.

Will Stevens think the two FCC programs are socially useful? Certainly both look a good deal like the set-asides for which he has shown little sympathy. On the other hand, the argument that the measures serve a compelling governmental interest by increasing the diversity of viewpoints communicated over the airwaves is very much a "forward-looking" rationale, and one Stevens may find analogous to the argument that convinced him in *Wygant.*

Moreover, Stevens is a great respecter of precedent. If he feels that *Fullilove* controls in a situation where the federal government implements a preferential measure, he will follow it despite his view that *Fullilove* was wrongly decided.

So although he remains difficult to predict, Stevens easily could provide a fourth vote to uphold the preferences in both cases.

The critical question, then, is whether O'Connor could provide a fifth. While she has twice voted to uphold preferential measures, she seems to be growing more conservative on these issues. Yet, there are reasons to question whether in both FCC cases she will join the four justices who appear categorically opposed to governmentally decreed racial preferences.

O'Connor's Reluctance

For one thing, O'Connor wrote the opinion in *Croson* that, in distinguishing Richmond's set-aside from the congressionally mandated set-aside upheld in *Fullilove*, stressed that Congress has more latitude than state and local governments do in setting racial preferences. While much will be made of the indirectness of Congress' role in implementing the FCC policies, O'Connor may nevertheless be reluctant, only a year after *Croson*, to subject a federally imposed preference to the same rigorous scrutiny she gave to Richmond's measure in *Croson*.

(Chief Justice Rehnquist and Justice White joined this part of the O'Connor opinion. But Rehnquist has never voted to uphold a racial preference and, it seems safe to say, never will. Although White helped from the majority in *Fullilove*, he has not since voted to uphold a preference.)

In addition, in her concurrence in *Wygant*, O'Connor noted that diversity had been found a sufficiently compelling interest in the contest of higher education to justify the use of racial preferences to promote that diversity. She also suggested that there might be similar interests that the Court would one day find to support affirmative-action measures. Assuming her *Croson* opinion does not signal a withdrawal from this view, O'Connor might hold that diversity of viewpoints transmitted over the airwaves is a sufficiently compelling interest to justify certain racial or gender preferences.

'Plus' Factors Preferred

Finally, O'Connor's decisions have been much influenced by the nature of the preference. As made clear in *Croson*, she is quite hostile to measures that set aside some portion of the benefits at issue for a particular group. But she has viewed preferences more leniently where race or gender appears to be merely a "plus" factor in the selection process.

The policy of according certain groups additional points in the selection process, which is at issue in the *Metro* case, may be characterized as involving such "plus" factors – and may, therefore, survive O'Connor's scrutiny. By contrast, the distress-sale policy at issue in *Schurberg* – which does not merely set aside a certain proportion of benefits for minorities, but limits competition solely to minorities – will surely be seen by O'Connor as the type of "rigid quota" that she condemned in *Croson*.

Given this last reason, the distress-sale policy is almost certain to fall, regardless of how Justice Stevens ends up viewing the social utility of racially diversified (or gender-diversified) radio and television station ownership. Even in *Metro*, the odds are against both Stevens and O'Connor joining Brennan, Marshall, and Blackmun to uphold the bid enhancement policy – but the odds are not as great.

Should the policy in *Metro* be upheld, it would be unfortunate if the nature of the preference proved decisive. Such a decision would likely be read as a blueprint for salvaging preferential programs that have been called into question by *Croson*. But the distinction between reserving a certain proportion of benefits for a favored group and allowing race or gender to determine a competition is a dubious one that we must expect eventually to be discarded. When it is, there will ensue a painful process of undoing the programs designed in reliance upon it.