

The Court's Little Surprise

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The Supreme Court saved its most surprising decision for the last batch of opinions from the 1989-90 term. In *Metro Broadcasting Inc. v. Federal Communications Commission*, 58 U.S.L.W. 5053 (June 27, 1990), by a 5-4 vote, the Court upheld two FCC policies favoring minorities who seek broadcast licenses.

The *Metro* case itself involved the policy of enhancing the scores of minority applicants in comparative licensing proceedings. The policy had been upheld by a divided panel of the U.S. Court of Appeals for the D.C. Circuit.

The Supreme Court's opinion also resolved the case of *Astroline Communications Co. v. Shurberg Broadcasting of Hartford Inc.*, where another divided panel of the D.C. Circuit had struck down the FCC's distress-sale policy. That policy allows a broadcaster whose license is in jeopardy to transfer it to a minority-owned enterprise for up to 75 percent of market value.

In upholding both preferences in his final majority opinion of his career, Justice William Brennan Jr. (joined by Justices Thurgood Marshall, Byron White, Harry Blackmun, and John Paul Stevens) relied on the governmental interest in diversity of programming. Though the policies had been implemented by the FCC, the Court, citing among other indications of congressional approval and appropriations rider precluding the FCC from reconsidering the policies, treated them as if they had been enacted by Congress. The Court also articulated a relaxed standard for review of congressionally mandated "benign" racial preferences – specifically, that such measures are constitutional "to the extent that they serve important governmental objectives within the power of Congress and are substantially related to the achievement of those objectives."

Justice Sandra Day O'Connor wrote a vigorous dissent, joined by Chief Justice William Rehnquist and Justices Antonin Scalia and Anthony Kennedy. Kennedy, joined by Scalia, added an even stronger dissent, maintaining that the majority's reasoning harked back to the long-discredited separate-but-equal doctrine of *Plessy v. Ferguson*, 163 U.S. 537 (1986).

After last year's 6-3 decision in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), striking down Richmond's minority set-aside program, few expected the Court to uphold the FCC policies. With White presumably joining Rehnquist, Scalia, and Kennedy in opposing both

preferences, at least the distress-sale policy (at issue in *Shurberg*) seemed certain to fall. Though O'Connor's *Croson* opinion had suggested that she might look more tolerantly upon congressionally mandated race-conscious action than she had upon Richmond's set-aside, she appeared certain to find the distress-sale policy too rigid to survive constitutional challenge, even if she accepted the FCC's diversity-of-programming rationale. That policy would then fall even if Stevens should find the diversity rationale sufficiently plausible to meet the social utility standard that has lately guided his treatment of preferential measures.

Even in *Metro*, it appeared likely that the bid enhancement policy would be struck down – although there seemed some chance that both Stevens and O'Connor might join Brennan, Marshall, and Blackmun to uphold the preference.

With Stevens voting in favor of both policies, however, White's unanticipated vote to uphold – coming a decade after he had last supported an affirmative-action program – proved decisive.

Nothing in White's recent actions suggested he would join the liberals in affirmative-action decision (though he has recently sided with the liberal bloc in a number of notable cases). True, in 1978, he had co-authored (with Brennan, Marshall, and Blackmun) an opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265, that proposed for all governmentally imposed affirmative-action measures the same relaxed standard of review that the *Metro* majority has now adopted for congressionally mandated affirmative action.

The following year, he helped form the majority that held, in *Steelworkers v. Weber*, 443 U.S. 193 (1979), that Title VII of the 1964 Civil Rights Act does not prohibit employment preferences in the context of reasonable affirmative action programs.

But by 1980, when in *Fullilove v. Klutznick*, 448 U.S. 448, a 6-3 majority upheld congressionally mandated set-asides on federally funded construction projects, White declined to join Brennan, Marshall, and Blackmun in the restatement of their *Bakke* position. Instead, he joined in Chief Justice Warren Burger's more moderate opinion.

Throughout the 1980s, White did not vote again to uphold an affirmative-action program. In *Firefighters v. Stotts*, 467 U.S. 561 (1984), his language in the majority

opinion striking down a layoff quota led many observers to believe wrongly for two years that court-ordered employment quotas were impermissible remedies for violations of Title VII. In 1987, dissenting from the reaffirmance of *Weber* in *Johnson v. Santa Clara County Transportation Department*, 480 U.S. 616, White maintained that *Weber* had been stretched too far, and agreed with Rehnquist and Scalia that it should be overruled. And it was White's opinion last term in *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115 (1988), that emphasized the dangers of hiring by quota in the process of casually discarding almost two decades of precedent concerning the burden of proof in Title VII disparate-impact cases.

Yet if 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. All along, White might well have approved of race-conscious provisions that seemed to pursue sensible goals without unduly infringing the rights of the disfavored groups; he simply did not find the measures confronted in the cases between *Fullilove* and *Metro* to meet such a standard.

Certainly, White did not find that standard met in the three affirmative-action cases that solely involved constitutional, and not statutory, issues. When the Court struck down the layoff quota in *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), White's concurrence made clear that he viewed a layoff quota to be an unjustifiably extreme measure. Similarly, dissenting in *United States v. Paradise*, 480 U.S. 149 (1987), he argued that a District Court had gone too far in imposing a black promotion quota of 50 percent, far in excess of black representation in the promotable pool. And in *Croson*, which involved a 30-percent set-aside for minority contractors, White joined O'Connor's opinion that drew the distinction between congressionally mandated and state and locally imposed race-conscious measures that later formed the linchpin of *Metro*.

The absence of a separate concurrence from White in *Metro* makes it hard to predict his future actions. But to the extent that his 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.

For one thing, perhaps as important as what *Metro* may suggest about White's unanticipated readiness to uphold some affirmative-action provisions is what it suggests about

O'Connor's growing antipathy toward them. While O'Connor has twice supported racial or gender preferences, her opinions have reflected grave misgivings about affirmative action. Even her *Croson* comments arose from a more restrictive approach than she had taken three years earlier concurring in *Wygant*. While in *Croson* she had emphasized that Congress has greater latitude in enacting preferential measures than do state and local governments, she argued in her dissent in *Metro* that such latitude applied solely to limited remedial contexts.

O'Connor also gave short shrift to the diversity rationales that she had previously suggested might support race-conscious measures. In further contrast to her prior opinions, her dissent reflected the recognition that a so-called plus factor that commonly tips the balance in favor of a racial minority does not meaningfully differ from a rigid quota. The very fervor of her dissent makes it difficult to imagine the circumstances in which she would again vote to uphold a preferential measure, regardless of the entity imposing it.

If O'Connor could be counted on generally to oppose such provisions (along, of course, with Rehnquist, Scalia, and Kennedy), White's support of a preference still would not assure that it would be upheld, because of the possibility that Stevens would not support it.

In several recent opinions, including a separate concurrence in *Metro*, Stevens has focused on the importance of what he has termed "forward-looking" rationales to justify preferential measures. He would, for example, approve of hiring quotas to integrate a police force rapidly because an integrated police force might better serve the community. He has also argued that diversity in public school faculties and student bodies of professional schools, as well as in broadcasting, sufficiently advances the public interest to justify race-conscious actions to promote that diversity.

But Stevens has made clear, both in his dissent in *Fullilove* and in his concurrence in *Croson*, that he does not think set-asides are socially useful. The major federal race-conscious measures not yet reviewed by the Supreme Court – principally, Small Business Administration loan programs and Transportation Department set-asides for highway and mass transit projects, as well as an assortment of agency-specific procurement and funding preferences – are much closer to set-asides than any of the forward-looking measures that Stevens has noted approvingly.

With respect to most of these programs, Stevens cannot be expected to be sympathetic. Any chance that he would vote to uphold one of these measures would probably depend on whether he felt compelled to reach such a result by *Metro* or *Fullilove*. Given his statements in *Metro* that racial classifications should be limited to "extremely rare situations, "where the reasons for the classifications are "clearly identified and unquestionably legitimate," it seems doubtful that he would read either precedent to require a result with which he otherwise clearly disagreed.

Stevens might view programs involving education more favorably, at least those aimed at promoting an integrated educational environment. And there is reason to expect that he would be positively disposed toward the affirmative-action programs for government contractors, established through executive orders of the president and enforced by the Labor Department. Though the social utility of the integration of a work force may be less obvious in the case of a federal contractor than in the case of a police force, Stevens' concurrence in *Johnson v. Santa Clara County Transportation Department* suggests that he might find the integration of any work force to promote the public good.

On the other hand, White's dissent in the same case shows that White could be hostile to such measures absent proof that the particular employer had engaged in past discrimination.

To my mind, one of the more intriguing issues regarding the constitutionality of congressionally mandated preferences involves a gender preference. In comparative licensing proceedings, the FCC enhances the scores not only of minority applicants but also of female applicants. Although the petitioner in *Metro* (where the bid enhancement policy was at issue) urged the Supreme Court to consider the constitutionality of the gender preference, the Court declined to do so because the question had not been treated by the U.S. Court of Appeals. But the issue remains.

The crucial consideration for gender preferences in broadcasting is that the Court in *Metro* found the diversity rationale persuasive because it believed that minority broadcasters would offer different programming from that of white broadcasters, and cited empirical evidence to support that view. Whether there is sufficient reason to believe that expanding female ownership serves similar purposes is quite a different question. If any of the members of the *Metro* majority considers the issue seriously enough, the gender preference could fall.

Local Prospects Bleak

With respect to preferences imposed at the state and local levels, the prospect for race-conscious action remains as bleak as it was after *Croson*. And it is bleak indeed with regard to set-asides, given Stevens' lack of support and Brennan's departure from the Court. Various jurisdictions are endeavoring to make the appropriate findings of discrimination that O'Connor's *Croson* opinion indicated would be a necessary predicate to securing her support for any set-aside program. But whatever findings are made, the Court will never uphold set-asides like those in Atlanta and Richmond, which called for minorities to receive many times the share of contracting dollars that they would have received absent current discrimination.

With this said about what the *Metro* decision signals regarding the Court's approach to looming affirmative-action issues, one must yet consider that the most notable feature of *Metro* could be the fact that, for the first time in

an affirmative action case, the majority and dissent were strictly divided by age. The five older justices (with an average age of 78) formed the majority, while the four youngest (with an average age of 58) formed the dissent. This simple statistic – the ramifications of which became starker with Justice Brennan's July 20 retirement – may tell more about the future of affirmative action than many supporters want to know.