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Minority Ownership of Broadcast Properties: A Legal Analysis

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Minority Ownership of Broadcast Properties: A Legal Analysis

Summary

Amidst growing media ownership consolidation and a significant decline in minority ownership of telecommunications businesses, there has been renewed interest in programs that foster diversity among telecommunications business owners. One potential avenue is to revive, in revised fashion, a tax program that would allow current owners who sell their broadcast properties to eligible purchasers to defer taxes on gains from the sale. That program had been available for sales to minority-owned firms, defined as socially and economically disadvantaged businesses (SDBs). It was abolished by Congress in 1995 amidst allegations of abuse. In that same year, the Supreme Court held that all government race based classifications must meet the most exacting standard of review applied by the Court, meaning that all racial classifications must be narrowly tailored to achieve a compelling government interest. Two bills — H.R. 600 and H.R. 3003 — have been introduced in the 110th Congress to create a revised tax incentive. One criterion for eligibility in H.R. 600 is designation of the purchaser as an SDB. Also, the FCC is seeking comment on a proposal to define SDBs for the purposes of implementing other programs that foster minority ownership of broadcast properties. To the extent the legislation or FCC programs seek to increase racial and ethnic minority ownership of broadcast stations, they are likely to be subjected to intense scrutiny if challenged in court.

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Minority Ownership of Broadcast Properties: A Legal Analysis

Overview

Diversity of viewpoint has long been a primary goal of U.S. communications policy. Congress and the Federal Communications Commission (FCC) have a history of supporting programs that foster diversity of broadcast station ownership, in general, and minority and female ownership, in particular, as a means to achieve that goal. The courts have reinforced the notion that minority ownership is a valid concern that should be addressed by the FCC when constructing its media ownership rules,[1] but also have set restrictions on how programs can be structured to foster that goal.[2] The FCC has issued a Second Further Notice of Proposed Rulemaking (SFNPR) seeking comment on new broadcast ownership rules[3] and two bills have been introduced in the 110th Congress that would revive a tax incentive to aid certain businesses seeking to acquire telecommunications, including broadcast, properties.[4] Legislation has also been introduced in the House and Senate that would require the FCC to convene an independent panel to study minority ownership of broadcast stations and make recommendations to the FCC.[5] The bills also would prevent the FCC from acting on any other ownership rules before taking action in response to the independent panel's recommendations.

Legislation in the 110th Congress that would reinstitute a tax incentive for certain sales of telecommunications properties seeks to address the concerns the previous program raised by placing a cap on the amount of gain that could be deferred by a single sale and by lengthening the amount of time that a buyer must hold the property. Furthermore, H.R. 600 would expand the coverage of the tax incentives for sales beyond the sale of broadcast stations to a greater variety of telecommunications properties. In a related matter, the FCC is under judicial mandate to consider how its ownership rules will affect minority ownership of such

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[1] Prometheus Radio Project v. FCC, 373 F.3d 372 (2004).

[2] Adarand Constructors v. Peña, 515 U.S. 200, 227 (1995).

[3] *In the Matter of 2006 Quadrennial Regulatory Review - Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Second Further Notice of Proposed Rule Making, 22 FCC Rcd 14215 (2007) [hereinafter *Ownership Rulemaking]*.

[4] *See* H.R. 600, H.R. 3003, 110th Cong. (2007).

[5] *See* H.R. 4835, 110th Cong. (2007), S. 2332, 110th Cong. (2007).

businesses.[6] It is possible that these new proposals will directly target minority ownership. Insofar as these proposals define minorities based on race, they will be subject to strict review by the courts. Structuring the programs narrowly may be necessary in order to survive a judicial challenge.

Background

From 1978 to 1995, the FCC operated a tax certificate program under §1071 of the Internal Revenue Code (IRC) that was designed, among other goals, to aid minority-owned economically disadvantaged businesses in acquiring broadcast properties in furtherance of the FCC's congressional mandates relating to ownership and control of broadcasting stations.[7] To qualify for a tax certificate, the purchasing business had to be controlled by a minority.[8] At the time, the FCC defined minorities as those of "Black, Hispanic Surnamed, American Eskimo, Aleut, American Indian, or Asiatic American extraction."[9] If the certificate was granted the selling corporation was allowed to defer paying taxes on any capital gain from the sale.

In 1995, certain aspects of the program were questioned by Congress when Viacom structured a deal to sell a large portion of its broadcast property to an entity that qualified as a minority-owned business. The deal was conditioned upon receiving the tax certificate under the FCC's program. Some Members of Congress took notice when they learned that the deal could allow Viacom to defer an estimated $440 million to $640 million in taxes.[10]

Congress expressed concern that the tax certificate program provided little protection from abuse.[11] There was no limit to the amount of gain on a sale that could be deferred.[12] Furthermore, minority ownership was only required to continue for one year from the date of sale.[13] Members were also concerned that the short holding period requirement rendered the tax incentive ineffective, because properties

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[6] *See* Prometheus, 373 F.3d at 421.

[7] 26 U.S.C. §1071 (repealed 1995, P.L. 104-7, §2); Statement of Policy on Minority Ownership of Broadcast Facilities, 68 F.C.C. 2d 979 (1978).

[8] Control was defined as ownership of more than 50 percent of the voting power in the business. Commission's Policy Regarding the Advancement of Minority Ownership in Broadcasting, and Notice of Proposed Rulemaking, 92 F.C.C. 2d 853-855 (1982).

[9] Statement of Policy on Minority Ownership of Broadcast Facilities, 68 F.C.C. 2d 979 at note 8.

[10] *FCC's Tax Certificate Program: Hearings Before the Senate Comm. On Finance*, 104th Cong. 21-22 (1995) [hereinafter *Hearings*].

[11] *Hearings*, *supra* note 10, at 22-23, 28-29.

[12] *In the Matter of Amendment of Section 73.3597 of the Commission's Rules (Applications for Voluntary Assignments or Transfer of Control)*, 99 F.C.C. 2d 971, 974 (1985).

[13] *Id.*

could quickly transfer from minority ownership without penalty.[14] Amidst these concerns, Congress repealed IRC §1071.[15]

The FCC also currently has in place a "distress sale" policy that allows broadcasters whose licenses have been designated for a revocation hearing to sell those licenses to qualified minority-owned buyers before the hearing.[16] Usage of the "distress sale" program and other FCC policies that encourage minority ownership of broadcast stations has declined since the Supreme Court announced its opinion in *Adarand Construction v. Peña* amidst concerns that the programs, in their current form, could not withstand a legal challenge.[17]

On August 1, 2007, the FCC issued an SFNPR in its review of the Commission's Broadcast Ownership Rules. The SFNPR contains 14 proposals for the amendment of the FCC's Broadcast Ownership Rules, 10 of which require a definition for SDBs.[18] The SFNPR invites comment for the definition of SDBs, including how such a definition would comply with constitutional standards.[19] Reply comments were due for the SFNPR on October 16, 2007.[20]

The FCC adopted new rules to promote diversification of broadcast ownership on December 18, 2007.[21] The order was published on March 5, 2008.[22] The new rules define eligible entities as "any entity that would qualify as a small business consistent with Small Business Administration standards for its industry grouping,

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[14] *Hearings*, *supra* note 10, at 23-25.

[15] An Act to amend the Internal Revenue Code of 1986 to permanently extend the deduction for the health insurance costs of self-employed individuals, to repeal the provision permitting nonrecognition of gain on sales and exchanges effectuating policies of the Federal Communications Commission, and for other purposes, P.L. 104-7, §2.

[16] Statement of Policy on Minority Ownership of Broadcast Facilities, 68 F.C.C. 2d at 983.

[17] *Ownership Rulemaking*, *supra* note3, Appendix A.

[18] *Ownership Rulemaking*, *supra* note3, Appendix A.

[19] *Ownership Rulemaking*, *supra* note3, at para. 9.

[20] *Ownership Rulemaking*, *supra* note 3.

[21] Press Release, FCC Adopts Rules to Promote Diversification of Broadcast Ownership (Dec. 18. 2007), *available at* [http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-279035A1.pdf].

[22] *In the Matter of Promoting Diversification of Ownership in Broadcasting Services, 2006 Quadrennial Regulatory Review — Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 2002 Regulatory Review — Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Cross-Ownership of Broadcast Stations and Newspapers, Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets, Definition of Radio Markets, Ways to Further Section 257 Mandate to Build on Earlier Studies*, MB Docket No. 07-294, MB Docket No. 06-121, MB Docket No. 02-277, MM docket No. 01-235, MM Docket No. 01-317, MM Docket No. 00-244, MB Docket No. 04-228 adopted December 18, 2007, released March 5, 2008.

based on revenue."[23] This definition does not appear to take the race or gender of the owner of the eligible entity into account, however, the FCC is seeking further comment on whether the definition of "eligible entity" may be expanded.[24]

Judicial Review of Racial Classifications in Broadcast Ownership Policies

In 1995, the Supreme Court decided *Adarand Construction v. Peña*, which held that all race-based classifications by the federal government must withstand strict scrutiny, as discussed in the following section.[25] New tax incentives or other broadcast ownership policies that give preference to racial minorities, therefore, would need to withstand close judicial analysis.

Strict Scrutiny

In *Adarand*, the Supreme Court declared that any racial classification by government at any level (state, local, or federal) must comply with strict scrutiny.[26] Strict scrutiny is the most exacting review a court will undertake and requires the government to prove the measure is necessary to achieve a compelling government interest and that the program is narrowly tailored to achieve that interest.[27] The Court reasoned that this requirement was in line with the intentions of the Fifth and Fourteenth Amendments, which protect individuals and not groups from discrimination based on race.[28] Government action that distinguishes between individuals based on membership in a racial or ethnic group is inherently suspect and warrants the most exacting review.[29]

Compelling Interest. Law or regulation that would attempt to define SDBs using the race or ethnicity of the business owners as a factor in determining eligibility would have to meet strict scrutiny, as mandated by the Court in *Adarand*. The first question a reviewing court would ask is whether the interest the legislation or regulation seeks to achieve is "compelling." In the context of tax provisions and FCC programs that encourage SDBs to own broadcast properties, the government interest that has been articulated is to promote broadcast viewpoint diversity.[30] The theory underlying this interest is that diverse ownership creates diversity of voices

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[23] *Id.* at ¶ 6.

[24] *Id.* at ¶¶ 80-83.

[25] Adarand, 515 U.S. at 227. For a more detailed discussion of the *Adarand* decision, and the proceedings following that case, see CRS Report RL33284, *Minority Contracting and Affirmative Action for Disadvantaged Small Businesses: Legal Issues*, by Jody Feder.

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *See* Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 567 (1991).

and viewpoints in the marketplace of ideas, a concept essential to our democracy and embodied within the First Amendment.[31] The Supreme Court has acknowledged that diversity of viewpoint in public discussion benefits the populace[32] and that the government has an interest in encouraging such diversity over the broadcast airwaves,[33] however, whether that interest is sufficiently compelling to survive strict scrutiny remains a matter of debate.

Prior to *Adarand*, the Supreme Court decided *Metro Broadcasting v. FCC*, and upheld the FCC's minority broadcast ownership policies after applying intermediate scrutiny.[34] Intermediate scrutiny is a less exacting standard than strict scrutiny and requires the government to prove only that the relevant classification is substantially related to an important government interest. The Court, agreeing with Congress and with the FCC, held that enhancing broadcast diversity "is, at the very least, an important government interest."[35]

The *Metro Broadcasting* majority grounded their "important interest" analysis in the scarcity of electromagnetic spectrum and the government's duty to distribute that spectrum to encourage the availability of the widest array of information sources and viewpoints.[36] The Court noted that "it is axiomatic that broadcasting may be regulated in light of the rights of the viewing and listening audience, and that the 'widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.'"[37] According to the Court, it is the right of the public to receive a diverse array of viewpoints and programming over the publicly owned broadcast airwaves, and it is the duty of Congress and the FCC to safeguard that right.[38] Against this backdrop, the *Metro Broadcasting* majority concluded that the diversity of viewpoints on the broadcast airwaves serves important First Amendment principles and that this was sufficient basis for the minority ownership policies.[39] Though *Metro Broadcasting* can provide some guidance as to the arguments that would be advanced in favor of finding that broadcast viewpoint diversity is a compelling government interest, because the Court applied a lower standard of scrutiny to what it termed a "benign racial classification," deeper analysis is required to determine if the interest is sufficiently compelling to withstand strict scrutiny.[40]

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[31] *Id.*

[32] *See* Associated Press v. U.S., 326 U.S. 1 (1945).

[33] *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

[34] Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 566 (1991).

[35] *Id.*

[36] *Id.* at 567.

[37] *Id.*

[38] Red Lion, 395 U.S. at 390, *see also* Metro Broadcasting, 497 U.S. at 567.

[39] Metro Broadcasting, 497 U.S. at 567.

[40] To the extent that *Metro Broadcasting* applied intermediate scrutiny to race-based classifications, *Adarand* overruled *Metro Broadcasting*. 515 U.S. at 227.

The Court made clear in *Adarand* that strict scrutiny is not "strict in theory, but fatal in fact."[41] Justice O'Connor noted, "[t]he unhappy persistence of both the practices and lingering effects of racial discrimination against minorities in this country is an unfortunate reality, and the government is not disqualified from acting in response to it."[42] This language suggested to some that in order to survive strict scrutiny racial classifications would be permissible only to remedy the effects of past discrimination. Such an interpretation probably would have ruled out the legitimacy of all other justifications for classification of individuals based on their race. The dissent in *Metro Broadcasting*, in fact, would have applied strict scrutiny to the ownership rules at issue in that case.[43] The dissenters would have determined that broadcast ownership diversity was not a compelling interest and noted that only one compelling interest supporting a race-based classification had ever been recognized - to remedy past discrimination.[44]

In light of recent decisions, however, it is possible that diversity of broadcast viewpoint could be classified as a compelling interest.[45] In *Grutter v. Bollinger*, the Court made clear that remedial classifications are not the only racial classifications that will survive strict scrutiny.[46] In *Grutter*, the Court held that diversity within a student body is a compelling interest sufficient to withstand strict scrutiny.[47] The Court relied heavily upon the reasoning of Justice Powell's opinion in *Regents of University of California v. Bakke* for its determination that student body diversity is a compelling government interest.[48] Underpinning Powell's opinion in *Bakke* were strongly rooted First Amendment principles and the educational need for diverse viewpoints to enhance the learning experience.[49] Powell argued that in "seeking the right to select those students who will contribute most to the 'robust exchange of

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[41] 515 U.S. at 237.

[42] *Id.*

[43] 497 U.S. at 614.

[44] *Id.*

[45] Grutter v. Bollinger, 539 U.S. 306, 329 (2003) (holding that "[n]ot every decision influenced by race is equally objectionable and strict scrutiny is designed to provide a framework for carefully examining the importance and sincerity of the reasons advanced by the governmental decisionmaker in that particular context"). For a detailed discussion of racial classifications as it pertains to school admissions policies, see CRS Report RL30410, *Affirmative Action and Diversity in Public Education: Legal Developments,* by Jody Feder.

[46] Grutter, 539 U.S. at 332 (noting that the Court has "never held that the only governmental use of race that can survive strict scrutiny is remedying past discrimination").

[47] *Id.* at 330; *see also* Parents Involved in Comm. Sch. v. Seattle Sch. Dist. No. 1, 127 S.Ct. 2738, 2789 (2007)(Kennedy J. concurring)(stating that "[d]iversity, depending on its meaning and definition, is a compelling educational goal a school district may pursue").

[48] Regents of Univ. Of California v. Bakke invalidated an admissions policy at a California medical school which set aside a certain number of seats each year for a certain number of particular minority groups. 438 U.S. 265 (1978). Though invalidating the admission policy at issue, Justice Powell nonetheless held that student body diversity was a permissible interest sufficiently compelling to warrant the use of a racial classification. *Id.* at 311-312.

[49] Bakke, 438 U.S. at 312.

ideas,' a university seeks to achieve a goal that is of paramount importance to the fulfillment of its mission."[50] The *Grutter* majority adopted this analysis, and further justified its determination by according deference to the University administration in the selection of it students.[51] The Court noted that selection of a diverse student body is "at the heart of the" school's "proper institutional mission," and that "good faith" on the part of the university should be presumed.[52] Because the educational benefits that diversity provided were supported by the evidence, the Court accorded the university's judgment of a compelling interest in student body diversity a degree of deference.[53]

Arguably, there are a number of similarities between the compelling interest found in creating a diverse student body and that found in creating diversity of broadcast programming. The majority in *Metro Broadcasting* equated the interest in the creation of a diverse student body with the interest in creating diversity over the broadcast airwaves.[54] Both interests have as their foundation the First Amendment principles encouraging the 'robust exchange of ideas.'[55] Both interests serve the important purposes of public education and freedom of speech.[56] Both interests also serve a wider range of people than the minority groups who would benefit ostensibly from any implemented policy.[57] The entire student body benefits from exposure to diverse people and ideas.[58] Likewise, the entire audience benefits from diverse viewpoints aired over broadcast, regardless of their race or ethnic background.[59] Consequently, it appears that a case could be made based on these similarities for a finding that broadcast diversity is a compelling interest.

Narrow Tailoring. Assuming that viewpoint diversity in broadcasting is a compelling governmental interest, the government then must prove that the program is necessary and narrowly tailored to achieve that interest. The Supreme Court has yet to decide the parameters of a narrowly tailored program in this context, however, examples of narrow tailoring in other contexts and the Court's analysis in *Metro Broadcasting* may provide guidance.

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[50] Grutter, 539 U.S. at 324, citing Bakke, 438 U.S. at 312, 314.

[51] Grutter, 539 U.S. at 332.

[52] *Id.* at 333.

[53] *Id.*

[54] Metro Broadcasting, 497 U.S. at 568.

[55] Metro Broadcasting, 497 U.S. at 567-68; Grutter 539 U.S. at 333; *see also* Bakke 438 U.S. at 312.

[56] Metro Broadcasting, 497 U.S. at 567-68; Grutter 539 U.S. at 333.

[57] Metro Broadcasting, 497 U.S. at 567-68 (arguing that the benefits of diversity "redound to all members of the viewing and listening audience"); Grutter 539 U.S. at 334 (noting that increased diversity helps students to better understand different races).

[58] Grutter 539 U.S. at 334.

[59] Metro Broadcasting, 497 U.S. at 567-68.

The government must first show that diversity of broadcast ownership is necessary to increase diversity of broadcast viewpoint. The *Metro Broadcasting* majority gave weight to the findings of Congress and the FCC that minority-owned broadcast stations produced programming that was qualitatively different from their counterparts, and the finding that this programming contributed to broadcast programming diversity.[60] The Court also deferred to the findings of Congress and the FCC that many minority viewpoints were underrepresented in broadcast programming and that race-neutral methods of increasing that representation had failed repeatedly.[61] With these conclusions in mind, the Court found that increased diversity of broadcast property ownership is substantially related to increased diversity of broadcast programming.[62] A conclusion, however, that a policy is substantially related to the achievement of an interest does not mean that the program is "necessary" to achieve that interest. The concerns of the dissenting Justices in *Metro Broadcasting* could provide guidance for the required nexus between broadcast property ownership and diversity of programming that would support a finding of necessity.

The dissenting justices in *Metro Broadcasting* found no supporting evidence for the concept that increased diversity among owners increased diversity of viewpoint, much less that a policy favoring minority ownership was necessary to increase diversity of viewpoint.[63] The dissenters observed that the ownership policies were based on the assumption that minority-owned stations provide desired viewpoints, and that stations not owned by minorities do not or cannot provide these viewpoints.[64] The dissenters opined that the FCC was barred by Congress from examining the factual basis for the asserted nexus between broadcast programming diversity and diversity among broadcast property owners, and that the evidence purporting the existence of a nexus was too weak to support a finding of necessity.[65] Without stronger evidence that this assumption was correct, the dissenters could not conclude that increased minority ownership was necessary to achieve increased diversity of broadcast programming.[66] The *Metro Broadcasting* dissenter's opinion could suggest a closer examination by the Court of the factual basis supporting the minority ownership program, than the deference accorded to Congress's fact finding by the *Metro Broadcasting* majority. Consequently, any future minority ownership policies that use race as a factor may need to be supported by evidence that demonstrates a tighter correlation between diversity of ownership and diversity of

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[60] Metro Broadcasting, 497 U.S. at 578-579.

[61] *Id.* at 553-554.

[62] *Id.* at 564.

[63] *Id.* at 617-619.

[64] *Id.* at 618.

[65] *Id.* at 628.

[66] *Id.* at 627 (noting that to "the extent that the FCC cannot show the nexus to be nearly complete, that failure confirms that the chosen means do not directly advance the asserted interest").

viewpoint in programming in order to establish that such policies are necessary to increase diversity of broadcast viewpoint.[67]

Not only must the government show that diversity of broadcast station ownership leads to diversity of broadcast viewpoint, the government must also show that other race-neutral methods of achieving the goal of broadcast viewpoint diversity were considered. In *Grutter*, the Court held that "[n]arrow tailoring does not require exhaustion of every conceivable alternative," but does require "serious, good faith consideration of workable race-neutral alternatives."[68] The government likely would be required, therefore, to consider race-neutral options for fostering diversity before adopting a program that takes race into account.

Assuming that a court found that diversity of ownership is necessary to achieve diversity of viewpoint, the government again must then prove that the program encouraging diversity of ownership is narrowly tailored to achieve the stated interest. Again, looking to the higher education cases and the dissent in *Metro Broadcasting* could inform the analysis of whether a particular minority broadcast ownership program would be narrowly tailored. In *Metro Broadcasting*, the dissent took particular issue with the fact that the policies at issue in that case were geared solely towards benefitting certain minorities, calling the policies "a 100% set aside," which placed impermissible burdens on non-minorities.[69] The dissenters concluded that the FCC was attempting to allocate certain licenses based on race, an action prohibited by the Constitution.[70] "Quotas" or "set asides" that place rigid numeric goals for inclusion of certain racial groups also fail in the school admissions cases.[71] Whenever a school admissions policy has placed a numeric goal on the numbers or

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[67] On July 31, 2007, the FCC released 10 economic research studies on media ownership to the public and sought comment on those studies. FCC Seeks Comment on Research Studies on Media Ownership, MB Docket No. 06-121. At least three of the studies directly address minority and female ownership. Whether the data they provide would be sufficient to sustain a finding that minority and female ownership of broadcast stations is necessary to achieve broadcast viewpoint diversity is uncertain. For a more detailed discussion of the ownership studies released for comment by the FCC, see CRS Report RL34271, *The FCC's 10 Commissioned Economic Research Studies on Media Ownership: Policy Implications*, by Charles B. Goldfarb. See also *Oversight of the Federal Communications Commission - Media Ownership: Hearing Before the Subcom. on Telecommunications and the Internet*, 110th Cong. (Dec. 5th 2007).

[68] Grutter, 539 U.S. at 339.

[69] Metro Broadcasting, 497 U.S. at 630.

[70] *Id.* at 627.

[71] Recently, the Supreme Court struck down school plans that attempted to achieve a racial demographic balance at the primary and secondary school level as violating the Equal Protection Clause. *Parents Involved in Comm. Sch.*, 127 S.Ct. at 2746-2751. The Court found the programs were not narrowly tailored because their minimal impact on school enrollment was insufficient to support a finding that the program was necessary. *Id.* at 2759. Also, the Court was concerned that methods other than racial classifications could have been used to achieve the desired goals. *Id.*

percentages of minorities desired, the policy has been struck down by the Supreme Court as violating the Equal Protection Clause.[72]

In *Grutter*, however, the Court provided guidance for the types of permissible school admissions policies that use race as a factor.[73] The Court held that taking race into account when making graduate school admission decisions is permissible so long as no strict quota system is used.[74] Admissions decisions made on an individualized basis may take race into account, among the many other factors used, when deciding how a particular individual would contribute to the diversity of the educational environment.[75] The Court noted that many other variables were considered when deciding whether or not to admit an individual applicant and that race was only one factor included in determining the extent to which an individual would contribute to student body diversity.[76] The individualized nature of the determination seemed to assuage the Court's constitutional concerns, because the applicants were not evaluated or awarded admission based solely on their membership in a certain group.[77] Furthermore, because the admissions program was based on individual assessments of contributions to diversity, the program did not place an "undue burden" on non-minority applicants.[78]

Similarly, when encouraging diversity of broadcast ownership, it appears that a court would be more likely to uphold as narrowly tailored a program that accounts for the race of the owners if the program uses race as but one of a number of factors that could contribute to diversity of viewpoint.[79] In addition, consideration may need to be given to the amount of "diverse" programming already available in individual markets.

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[72] *See* Parents Involved in Comm. Sch., 127 S.Ct. at 2759; Gratz v. Bollinger, 539 U.S. 244 (2003) (striking down an admissions policy that awarded one-fifth of the total required points for guaranteed admission to applicants based solely on their race as not being narrowly tailored); Bakke, 438 U.S. at 265 (invalidating an admissions policy that set aside a certain number of seats for racial minorities).

[73] Grutter, 539 U.S. at 334. The school admissions program in *Grutter* sought to admit a "critical mass" of minority students *Id.* at 319. The Court held that this goal of admitting a not insignificant number of minority students did not transform the program "from a flexible admissions system into a rigid quota." *Id.* at 326-327. The Court noted the varying percentages of minority admissions from year to year, and was satisfied that the university was not concealing an attempt to achieve racial balancing. *Id.*

[74] Grutter, 539 U.S. at 334, *see also* Regents of Univ. of Cal. v. Bakke, 438 U.S. at 265.

[75] Grutter, 539 U.S. at 334.

[76] *Id.* at 337.

[77] *Id.*

[78] *Id.*

[79] *Id.* at 334.

An additional consideration in designing a narrowly tailored program that uses race as a factor is that the program must have reasonable durational limits.[80] In *Grutter* the Court indicated that, in the context of admissions preferences, a program could meet the durational requirement for narrow tailoring through sunset provisions or periodic reviews to determine whether the racial preference remained necessary.[81] Similar controls may be required as a component of any new minority ownership programs enacted by Congress or promulgated by the FCC

[80] *Id.* at 341-342.

[81] *Id.* at 342.