



TOURO UNIVERSITY
JACOB D. FUCHSBERG LAW CENTER
Where Knowledge and Values Meet

Digital Commons @ Touro Law
Center

Scholarly Works

Faculty Scholarship

1996

The Case For Color-Blind Distress Sales

Michael Lewyn

Touro Law Center, mlewyn@tourolaw.edu

Follow this and additional works at: <https://digitalcommons.tourolaw.edu/scholarlyworks>



Part of the [Agency Commons](#)

Recommended Citation

19 Hastings Comm. & Ent. L.J. 31 (1996)

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Commons @ Touro Law Center. It has been accepted for inclusion in Scholarly Works by an authorized administrator of Digital Commons @ Touro Law Center. For more information, please contact lross@tourolaw.edu.

The Case For Color-Blind Distress Sales

by
MICHAEL E. LEWYN*

Table of Contents

I. Background: FCC Renewal and Revocation Policy	33
II. The Rise and (Possible) Fall of Distress Sales	35
A. The Rise of Race-Consciousness at the FCC	35
B. The Birth and Evolution of Distress Sales	36
C. Congress and the Courts Uphold Distress Sales	38
1. Congressional Action	38
2. The Courts Speak	39
D. The Supreme Court Switches Sides	44
1. <i>Adarand Construction, Inc. v. Peña</i>	44
2. Is the FCC's Current Policy Constitutional?	48
III. What Next for Distress Sales?	49
A. The Case for a Color-Blind Distress Sale Policy	49
1. Distress Sales and Diversity	50
2. Administrative Economy	53
3. Better Broadcasters	54
B. Arguments Against Distress Sales	55
1. Distress Sales and Diversity	55
2. Distress Sales and Licensee Wrongdoing	56
IV. Conclusion	56

* Associate, Climaco, Climaco, Seminatore, Lefkowitz & Garofoli, Cleveland, OH. Formerly Visiting Assistant Professor, University of Miami School of Law, and Law Clerk to Judges Theodore McMillian (8th Cir.) and Morris Arnold (8th Cir.). B.A., Wesleyan University; J.D., University of Pennsylvania. I would like to thank S. White Rhyne of Mullin, Rhyne, Emmous & Topel for his assistance. Any errors of fact, logic, or law, however, are mine alone.

Introduction

The Federal Communications Commission ("FCC" or "Commission") has adopted a policy (generally known as the "distress sale" policy)¹ which allows "a broadcaster whose license has been designated for a revocation hearing, or whose renewal application has been designated for hearing, to assign the license to an FCC-approved minority enterprise"² at a discount price before the hearing.³ By contrast, broadcasters⁴ who are unable or unwilling to engage in distress sales before the hearing may not sell their licenses until the FCC has held a hearing and issued a favorable decision.⁵

The Supreme Court in *Metro Broadcasting, Inc. v. FCC*⁶ examined the FCC's distress sale policy. The Court explained that to take advantage of the policy, "[t]he buyer must purchase the license before the start of the revocation or renewal hearing, and the price must not exceed 75 percent of fair market value."⁷

The Supreme Court has recently addressed the constitutionality of race-conscious federal measures such as the distress sale policy. In *Adarand Constructors, Inc. v. Peña*,⁸ the Supreme Court held that "all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny."⁹ Under the strict scrutiny standard, racial classifications are unconstitutional unless they "serve a compelling governmental interest, and . . . [are] narrowly tailored to further

1. *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 552 (1990).

2. *Id.* at 557 (describing policy).

3. *See Stereo Broadcasters, Inc. v. FCC*, 652 F.2d 1026, 1028 (D.C. Cir. 1981)(upholding refusal to allow distress sale after administrative law judge denied renewal application)(citing Clarification of Distress Sale Policy, 44 Rad. Reg. 2d (P&F) 479, 481 (1978)).

4. The phrase "broadcasting" encompasses both radio and television. *See* 47 C.F.R. Part 73 (regulations governing "Radio Broadcast Services," subparts of which govern "AM Broadcast Stations," "FM Broadcast Stations," "Noncommercial Educational FM Broadcast Stations," "Television Broadcast Stations," and "International Broadcast Stations").

5. *See Jefferson Radio, Inc. v. FCC*, 340 F.2d 781, 783 (D.C. Cir. 1964); Stephen F. Sewell, *Assignments and Transfers of Control of FCC Authorizations Under Section 310(d) of the Communications Act of 1934*, 43 FED. COMM. L.J. 277, 347 (1991). Two exceptions (other than the distress sale policy itself) exist to this rule: "one allowing seriously ill licensees to transfer their licenses, the other allowing licensees in bankruptcy to transfer their licenses under certain conditions." *Stereo Broadcasters*, 652 F.2d at 1028 n.1.

6. *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 557-58 (1990).

7. *Id.*

8. 115 S. Ct. 2097 (1995).

9. *Id.* at 2113.

that interest.”¹⁰ *Adarand* at least partially overruled the *Metro Broadcasting* decision,¹¹ because *Metro Broadcasting* adopted a more lenient “intermediate scrutiny” standard.¹² Because the courts have not yet applied the strict scrutiny standard to the distress sale policy, it is unclear whether the distress sale policy is constitutional under *Adarand*.

If the distress sale policy does not survive strict scrutiny, the FCC has two significant alternatives. First, it can abolish distress sales entirely, thereby increasing the number of broadcasters who are forced to undergo revocation and renewal hearings. Second, the FCC could create a color-blind distress sale policy which allows broadcasters who are in danger of losing their licenses to sell their station at a discount price to any small business, regardless of the race of its owner. This article contends that the latter policy is preferable, because color-blind distress sales, like distress sales to minorities, increase broadcast diversity, reduce the number of time-consuming FCC hearings, and encourage unqualified¹³ broadcasters to sell their stations rather than continuing to operate.

I

Background: FCC Renewal and Revocation Policy

In 1934, Congress enacted the Communications Act of 1934¹⁴ which established the FCC.¹⁵ Since 1934, the FCC has regulated radio and television stations, as well as numerous other communications industries.¹⁶ The FCC has exclusive authority to grant licenses to

10. *Id.* at 2117.

11. *Id.* at 2113 (“[t]o the extent that *Metro Broadcasting* is inconsistent with [the strict scrutiny rule] it is overruled.”).

12. *See id.* at 2111-12 (describing *Metro Broadcasting*). Under the intermediate scrutiny standard, benign federal racial classifications “are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives.” *Metro Broad.*, 497 U.S. at 565. A benign classification is one that is intended to remedy discrimination or otherwise aid disadvantaged groups. *Id.* at 564 n.12 (citing measures providing special assistance to African-Americans and those with compensatory purposes as examples of “benign” discrimination).

13. *See infra* notes 21-23 and accompanying text (describing when FCC licensees’ misconduct justifies “disqualification,” *i.e.*, revocation and nonrenewal of licenses).

14. 47 U.S.C. §§ 151-159 (1994).

15. *See* 47 U.S.C. § 151 (creating FCC for “the purpose of regulating interstate and foreign commerce in communication by wire and radio.”).

16. *See, e.g.*, 47 U.S.C. §§ 201-229 (1994)(governing FCC regulation of common carriers), 47 U.S.C. §§ 301-399 (1994)(governing FCC regulation of broadcasting), 47 U.S.C. §§ 531-537 (1994)(governing FCC regulation of cable television).

persons wishing to operate radio and television stations in the United States.¹⁷ The FCC may grant or deny renewal of broadcast licenses¹⁸ at the expiration of a license term.¹⁹ The FCC will generally refuse to renew a license only if the station has not served the public interest or has committed serious misconduct.²⁰ The FCC may also revoke licenses during the license term for certain specified forms of misconduct.²¹ The FCC will generally revoke (or refuse to renew) a license if it finds that the licensee is not "qualified to remain a Commission licensee."²²

If a substantial or material question of fact exists as to whether a license should be renewed, the FCC must designate a renewal application for hearing, and then hold a hearing.²³ Similarly, the FCC must hold a hearing before deciding whether to revoke a license or permit, unless this right is waived by the licensee.²⁴ The FCC, however, has the discretion to refuse to initiate revocation proceedings even if the terms of the Communications Act would justify such proceedings.²⁵

17. *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 553 (1990).

18. See 47 U.S.C. § 307(c) (1) (1994)(licenses may be renewed "if the Commission finds that public interest, convenience and necessity would be served thereby.").

19. Until 1996, radio licenses were generally renewable every seven years and television ("TV") licenses were renewable every five years. See 47 C.F.R. § 73.1020 (1995). However, the Telecommunications Act of 1996 has lengthened the license term for both categories of stations to eight years. 47 U.S.C.A. § 307(c)(1) (West Supp. 1996).

20. Specifically, the Telecommunications Act of 1996 provides that the FCC shall renew a broadcast license if (a) the station has served the public interest, convenience and necessity, (b) the licensee has committed no serious violations of the Communications Act or FCC regulations, and (c) the licensee has committed no other violations of the Communications Act or FCC regulations which, taken together, constitute a pattern of abuse. See 47 U.S.C.A. § 309(k)(1)(West Supp. 1996). If a broadcast licensee fails to meet the standards of § 309(k)(1) the FCC has discretion to either deny renewal or renew a license for a term of less than eight years. 47 U.S.C.A. § 309(k)(2)(West Supp. 1996).

21. Specifically, the FCC may revoke a license if: the licensee has made false statements to the FCC; the FCC has become aware of facts which would have warranted rejection of the original license application; the licensee has willfully or repeatedly failed to operate substantially as set forth in its license; the licensee has willfully or repeatedly violated the Communications Act or FCC rules (including rules requiring licensees to give candidates for federal office access to broadcast time); or the licensee has violated an FCC cease and desist order or statutes relating to obscenity, indecency, fraud or lotteries. 47 U.S.C. § 312(a) (1994). These rules also apply to entities with construction permits to build stations. *Id.*

22. *Trinity Broad. of Florida, Inc.*, 10 FCC Rcd. 12020, 12062 (A.L.J. 1995)(refusing to renew license).

23. See *Office of Communications of the United Church of Christ v. FCC*, 359 F.2d 994, 1007 (D.C. Cir. 1966)(citation omitted).

24. 47 U.S.C. § 312(c) (1994).

25. *MCI Telecomms. Corp.*, 3 FCC Rcd. 509, 513-14, 515 n.18 (1988)(citations omitted).

The FCC has held that where "qualifications issues have been designated against a licensee in a renewal or revocation hearing, the license cannot be assigned until the licensee is found qualified."²⁶ It logically follows that if a licensee (a) cannot sell its station at a distress sale price and (b) is found unqualified to retain its license, it will lose its license outright without receiving any compensation.²⁷

II

The Rise and (Possible) Fall of Distress Sales

A. The Rise of Race-Consciousness at the FCC

The FCC enacted its distress sale policy (and other policies relating to minority ownership)²⁸ in order to solve the perceived problem of minority underrepresentation in the broadcast industry. As of June 30, 1994, members of ethnic minority groups²⁹ had comprised almost 23% of the national workforce but controlled only 2.9% of all commercial radio and TV stations.³⁰

Initially, the FCC refused to consider ethnicity in licensing decisions. For example, in 1972 the FCC's Review Board³¹ refused to consider minority ownership as a factor supporting one of several

26. Chestnut Broad. Co., 9 FCC Rcd. 6141, 6141 (M.Med. Bur. 1994)(citing *Jefferson Radio, Inc. v. FCC*, 340 F.2d 781 (D.C. Cir. 1964)). The distress sale policy is one exception to this rule. See *Metro Broad.*, 497 U.S. at 557-58.

27. See *Cactoctin Broad. Corp. of New York*, 4 FCC Rcd. 6312, 6313 (1989)(approving Mass Media Bureau argument that applicant should not be allowed to sell station after hearing because decision allowing sale would be "tantamount to holding that any unqualified renewal applicant will be permitted to assign his license for compensation at the conclusion of proceedings should he not prevail on the merits.").

28. Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities, *Notice of Proposed Rule Making*, 10 FCC Rcd. 2788, 2788-89 (1995)[hereinafter *Minority Ownership Notice*].

29. In recent years, the FCC has defined the term "minorities" to include African-Americans, Hispanics, Asian-Americans, Native Americans, and Americans of Eskimo and Aleut extraction. *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 553 n.1 (1990)(citations omitted).

30. See *Minority Ownership Notice*, *supra* note 28, at 2789. Similarly, minorities controlled fewer than 1% of broadcast stations in 1978, and 2.1% of broadcast stations in 1986. *Metro Broad.*, 497 U.S. at 553. See also Antoinette Cook Bush & Marc S. Martin, *The FCC's Minority Ownership Policies from Broadcasting to PCS*, 48 FED. COMM. L.J. 423, 424 (1996)(noting there were no minority-owned radio stations until 1949, and no minority-owned TV stations until 1973).

31. Until 1996, the FCC's Review Board reviewed adjudicatory decisions by FCC Administrative Law Judges, and its decisions were in turn reviewed by the full Commission. See 47 C.F.R. §§ 0.361(a), 1.115(b)(5) (1995). However, the FCC abolished the Review Board in 1996. See *In re Elimination of the Review Board*, FCC 96-4 (Jan. 23, 1996).

competing broadcast applications.³² The full Commission affirmed the Review Board's decision,³³ but its decision was overturned by the U.S. Court of Appeals for the District of Columbia Circuit.³⁴ The court explained that minority ownership was "likely to increase diversity of content, especially of opinion and viewpoint"³⁵ and should accordingly be considered as a relevant factor.³⁶

The FCC then conducted a conference on minority broadcast ownership, and adopted numerous strategies to increase minority ownership.³⁷ One of these policies was the distress sale policy.

B. The Birth and Evolution of Distress Sales

The FCC created the distress sale policy in a 1978 policy statement, in which the FCC stated:

[W]e will permit licensees whose licenses have been designated for revocation hearing, or whose renewal applications have been designated for hearing on basic qualifications issues, but before the hearing is initiated, to transfer or assign their licenses at a 'distress sale' price to applicants with a significant minority ownership interest, assuming the proposed assignee or transferee meets our other qualifications.³⁸

Shortly thereafter, the FCC clarified its policy by holding that licensees may elect distress sales "only where no competing applicant is involved in the hearing"³⁹ and "must explore and resolve the

32. *Mid-Florida Television Corp.*, 33 F.C.C.2d 1 (Rev. Bd. 1972), *review denied*, 37 F.C.C.2d 559 (1972), *rev'd sub nom.* *TV-9 v. FCC*, 495 F.2d 929 (D.C. 1973), *cert. denied*, 419 U.S. 986 (1974). The Review Board stated that because "the Communications Act, like the Constitution, is color blind . . . [minority] ownership must be shown on the record to result in some [independent] public interest benefit." 33 F.C.C.2d at 17-18.

33. 33 F.C.C. 2d 1 (Rev. Bd. 1972).

34. *TV-9, Inc. v. FCC*, 495 F.2d 929 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974).

35. *TV-9*, 495 F.2d at 938.

36. *Id.*

37. See *Metro Broad.*, 497 U.S. at 555-57 (describing conference and FCC policies adopted thereafter); *Minority Ownership Notice*, *supra* note 28, at 2788-89 (updated listing of minority ownership-related policies). I note that the FCC's policies have apparently increased minority ownership. See *Bush & Martin*, *supra* note 30, at 426 (noting that FCC has not enacted minority ownership preferences for cellular industry, and that as a result, "levels of minority ownership in the cellular industry have not approached even the modest levels of those in the broadcast sector.").

38. Statement of Policy on Minority Ownership of Broad. Facilities, 68 F.C.C.2d 979, 983 (1978)[hereinafter *Policy Statement*].

39. Clarification of Distress Sale Policy, 44 Rad. Reg. 2d 479, 480 n.3 (1978)(pointing out distress sale inappropriate where competing applicants involved because all applicants have right to full comparison with incumbent)[hereinafter *Clarification*].

prospects for such an assignment prior to, or, possibly, shortly following the commencement of hearing.”⁴⁰ The FCC did not explicitly define the term “distress sale price” but a 1980 decision stated that a distress sale price is one which “does not exceed 75 percent of a station’s fair market value.”⁴¹ The FCC has further explained that “the determination of an allowable distress sale price involves a balancing of the conflicting interests of deterrence to licensee misconduct and the promotion of significant minority ownership [T]hose divergent goals are most adequately met when a distress sale price does not exceed 75% of the station’s fair market value.”⁴²

A 1982 FCC policy statement expanded distress sales in two ways. First, the FCC authorized “distress sales in transfers to limited partnerships where the general partner, or partners [is/are minorities and] owns more than 20 percent of the broadcasting entity.”⁴³ By contrast, under prior law, limited partnerships could be “distress buyers” only if “the minority ownership interest in the entity exceeded fifty percent or was controlling.”⁴⁴ Second, the FCC expedited processing of distress sales by allowing the FCC’s bureaus⁴⁵ (rather than the full Commission) to process distress sale petitions that did not involve novel questions of fact, law, or policy.⁴⁶ By contrast, under prior law, the full Commission (rather than the bureaus) administered the distress sale policy on a case-by-case basis.⁴⁷ Where the distress sale policy is not applicable, “a licensee whose qualifications to hold a broadcast license come into question may not assign or transfer that

40. *Id.* at 480. However, licensees involved in hearings as of May 25, 1978 could apply for distress sales at any time prior to April 21, 1979, subject to the limitation that they could not do so after an administrative law judge had declared them unqualified to be an FCC licensee. *Id.* See also *Stereo Broadcasters, Inc. v. FCC*, 652 F.2d 1026 (D.C. Cir. 1981)(upholding FCC refusal to allow distress sales after decision by administrative law judge rejecting renewal application).

41. *Lee Broad. Corp.*, 76 F.C.C.2d 462, 463 (1980).

42. *Id.* (citation omitted).

43. Commission Policy Regarding the Advancement of Minority Ownership in Broad., *Policy Statement and Notice of Proposed Rule Making*, 92 F.C.C.2d 849, 855 (1982)[hereinafter *Proposed Rule Making*].

44. *Id.* at 853.

45. The FCC has several bureaus that perform a variety of functions. 47 C.F.R. §§ 0.51-0.131, 0.261-332 (1995). For example, the Mass Media Bureau advises the full Commission in matters pertaining to radio and TV, processes applications, participates in hearings within the Commission, develops rulemaking proceedings, conducts studies, and investigates complaints and other matters relating to broadcasting. 47 C.F.R. § 0.61 (1995).

46. *Proposed Rule Making*, *supra* note 43, at 859.

47. *Id.*

license until the FCC has resolved its doubts in a . . . hearing.”⁴⁸ Thus, the distress sale policy reduces the time spent by the FCC and private parties in renewal and revocation hearings.⁴⁹ The impact of the distress sale policy, however, has been less than overwhelming: between 1978 and 1995, only 42 distress sales were approved by the FCC.⁵⁰

C. Congress and the Courts Uphold Distress Sales

1. Congressional Action

In 1986, the FCC began an inquiry regarding the validity of its minority/female ownership policies (including the distress sale policy).⁵¹ The FCC expressed concern about the constitutionality of these policies,⁵² and sought to “determine whether there is a nexus between minority/female ownership and viewpoint diversity, and whether such ownership is necessary to achieve this goal.”⁵³ The FCC also sought comment on the effectiveness of its ownership policies in increasing minority ownership, and the social costs and benefits of those policies. Because a pending lawsuit challenged the distress sale policy on constitutional grounds,⁵⁴ the FCC also ordered the Mass Media Bureau to “hold in abeyance all other pending or future applications for distress sales . . . until such time as a decision in [the distress sale] proceeding has become final.”⁵⁵

Congress responded to the notice of inquiry quickly and unfavorably. On December 22, 1987, the President signed into law the FCC’s 1988 appropriations bill.⁵⁶ This legislation appropriated money for FCC expenses with the following proviso:

48. *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 557 (1990).

49. See *Policy Statement*, *supra* note 38, at 983 (citing “avoidance of time consuming and expensive hearings” as one likely advantage of distress sale policy).

50. *Minority Ownership Notice*, *supra* note 28, at 2789.

51. *Notice of Inquiry, Reexamination of the Commission’s Comparative Licensing, Distress Sale and Tax Certificate Policies Premised on Racial, Ethnic or Gender Classifications*, 1 FCC Rcd. 1315 (1986)[hereinafter *Reexamination*].

52. *Id.* at 1317.

53. *Id.*

54. At the time of the FCC’s inquiry, an appeal to the D. C. Circuit in the case of *Shurberg Broadcasting of Hartford, Inc. v. FCC*, 876 F.2d 902 (D.C. Cir. 1989), was pending before the court.

55. *Reexamination*, *supra* note 51, at 1319.

56. Continuing Appropriations, Fiscal Year 1988, Pub. L. 100-202, 101 Stat. 1329 (1987)(signed Dec. 22, 1987), *cited in* *Reexamination of the Commission’s Comparative*

That none of the funds appropriated in this Act shall be used to repeal, to retroactively apply changes in, or to continue a reexamination of, the policies of the Federal Communications Commission with respect to comparative licensing, distress sales, and tax certificates granted under 26 U.S.C. § 1071, to expand minority and women ownership of broadcasting licenses . . . other than to close [the FCC inquiry into these issues] with a reinstatement of prior policy and a lifting of suspension of any sales, licenses, applications, or proceedings, which were suspended pending the conclusion of the inquiry.⁵⁷ The FCC obeyed Congress by terminating its inquiry and renewing implementation of the distress sale policy and other minority ownership-related policies.⁵⁸

2. *The Courts Speak*

After Congress endorsed the distress sale policy, the Supreme Court upheld that policy in the *Metro Broadcasting* case. In *Metro Broadcasting*, the Supreme Court consolidated two cases: one involving the FCC's policy awarding preferences to minority owners in comparative licensing proceedings⁵⁹ and another involving the distress sale policy.⁶⁰ The latter case arose out of the attempts of Faith Center, Inc. ("Faith Center"), a TV licensee, to execute a distress sale. In 1980, the FCC designated Faith Center's renewal application for a hearing.⁶¹ In 1984, Faith Center petitioned the FCC for permission to transfer its license under the distress sale policy to Astroline Communications Company Limited Partnership ("Astroline"), a minority applicant.⁶² Shurberg Broadcasting of Hartford, Inc. ("Shurberg"), a competing applicant, opposed the distress sale on the ground that, *inter alia*, the distress sale policy violated the Constitution's Equal Protection Clause.⁶³ The FCC disagreed, and approved Faith Center's application

Licensing, Distress Sale, and Tax Certificate Policies Premised on Racial, Ethnic and Gender Classifications Order, 3 FCC Rcd. 766, 766-67 n.6 (1988)[hereinafter *Reexamination II*].

57. *Reexamination II*, 3 FCC Rcd. at 766 (emphasis added).

58. *Id.*

59. *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 558-61 (1990)(citing *Winter Park Communications, Inc. v. FCC*, 873 F.2d 347 (D.C. Cir. 1989)).

60. *Metro Broad.*, 497 U.S. at 561-63 (citing *Shurberg Broad. of Hartford, Inc. v. FCC*, 876 F.2d 902 (D.C. Cir. 1989)).

61. *Metro Broad.*, 497 U.S. at 561.

62. *Id.* at 562. This petition was Faith Center's third; two other distress sales (both of which were approved by the FCC) were never consummated due to financial difficulties on the buyer's part. *Id.* at 561.

63. See U.S. CONST. amend. XIV (no state may deny "the equal protection of the laws"); *Bolling v. Sharpe*, 347 U.S. 497 (1954)(holding equal protection principles also apply to federal government and prohibit federal denial of equal protection).

for permission to assign its license to Astroline pursuant to the distress sale policy.⁶⁴ Shurberg appealed this decision to the D.C. Circuit, but disposition of the appeal was delayed pending the completion of the FCC's inquiry into its minority ownership and distress sale policies.⁶⁵ After Congress forced the FCC to terminate that inquiry,⁶⁶ the FCC reaffirmed its decision.⁶⁷ The D.C. Circuit reversed the FCC, holding that the distress sale policy unconstitutionally deprived "Alan Shurberg and Shurberg Broadcasting of their equal protection rights under the Fifth Amendment because the program is not narrowly tailored to remedy past discrimination or to promote programming diversity, [and] . . . unduly burdens Shurberg, an innocent non-minority, and is not reasonably related to the interests it seeks to vindicate."⁶⁸

The Supreme Court reversed the D.C. Circuit and upheld the distress sale policy. The dispositive issues facing the Court were (a) whether the Court should apply the strict scrutiny test or the intermediate scrutiny test in reviewing the policy, and (b) the constitutionality of the policy under the latter test. As to the first issue, the Court held that Congressionally mandated race-conscious measures such as the distress sale policy "are constitutionally permissible to the extent that they serve important governmental objectives . . . and are substantially related to achievement of those objectives."⁶⁹ This standard is generally known as the "intermediate scrutiny" test.⁷⁰ The Court admitted that it had applied strict scrutiny to race-conscious measures enacted by state and local governments,⁷¹ but held that Congressionally mandated policies should be subjected to a more lenient standard for two reasons. First, the Court interpreted earlier case law to mean that it should defer to "Congress, a co-equal branch charged by the Constitution with the power to provide for the . . . general Welfare of the United States and to enforce, by appropriate legislation, the equal protection guarantees of

64. *Faith Center, Inc.*, 99 F.C.C.2d 1164 (1984). The FCC described Shurberg's equal protection challenge as "without merit." *Id.* at 1170-71.

65. *Metro Broad.*, 497 U.S. at 562.

66. See *supra* notes 51-58 and accompanying text (describing birth and termination of FCC inquiry).

67. See *Faith Center, Inc.*, 3 FCC Rcd. 868 (1988)(subsequent history omitted).

68. *Shurberg*, 876 F.2d at 902-03.

69. *Metro Broad.*, 497 U.S. at 565 (citations omitted).

70. *Id.* at 606 (O'Connor, J., dissenting).

71. *Id.* at 565 (citing *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989)). See also *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2117 (1995)(describing strict scrutiny).

the Fourteenth Amendment.”⁷² Second, the federal government, unlike local governments, is unlikely to be captured by minority interests and used to oppress whites.⁷³

The Court went on to find that the FCC’s minority ownership policies (including the distress sale policy) satisfied the requirements of the intermediate scrutiny test. The Court found that those policies served an “important governmental objective” because “diversity of views and information on the airwaves”⁷⁴ was an important governmental objective,⁷⁵ and that the FCC’s policies were “substantially related” to achievement of that objective.⁷⁶ The Court admitted that the “nexus between minority ownership and programming diversity . . . [is a] complex empirical question.”⁷⁷ The Court wrote, however, that it was bound to defer to Congress and the FCC on this issue.⁷⁸ The Court added that the FCC had considered all available alternatives⁷⁹ and that the FCC’s reasoning was “consistent with long standing practice under the Communications Act . . . [because] public regulation of broadcasting has [traditionally] been premised on the assumption that diversification of ownership will broaden the range of programming available to the broadcast audience.”⁸⁰ Finally, the Court cited numerous studies to support its claim that minority ownership was substantially related to broadcast diversity.⁸¹

72. *Metro Broad.*, 497 U.S. at 563 (citation omitted). The Court also relied on the Commerce Clause, which gives Congress the power to regulate interstate commerce. *Id.* (citations omitted).

73. *Id.* at 566 (citation omitted).

74. *Id.* at 568.

75. *Id.* at 567.

76. *Id.* at 569.

77. *Id.* (citing *Columbia Broad. Sys., Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 102 (1973)).

78. *Metro Broad.*, 497 U.S. at 569 (citing *Columbia Broad. Sys.*, 412 U.S. at 102).

79. *Metro Broad.*, 497 U.S. at 584. In fact, the FCC had even rejected certain other types of minority preferences. *Id.* at 591-92.

80. *Id.* at 570. For example, the FCC has restricted the number of broadcast stations one entity may own and has limited broadcasters’ ownership of newspapers and cable systems. *Id.* at 570 n.16 (citations omitted).

81. *Id.* at 581. For example, a Congressional Research Service study showed that 65% of stations owned by African-Americans (as opposed to 20% of other broadcast stations) attempted to direct programming to African-American audiences, and a University of Wisconsin study showed that African-American-owned, African-American oriented radio stations had more diverse play lists than white-owned, African-American-oriented radio stations. *Id.* at 580 n.31 (citations omitted).

Under the intermediate scrutiny test, an otherwise satisfactory race-conscious measure may be invalid if it imposes undue burdens on non-minorities.⁸² The Court found that “[t]he burden on nonminorities is slight”⁸³ because applicants have no right to a broadcast license⁸⁴ and the distress sale policy governed only a small fraction of all sales of broadcast stations.⁸⁵

Justice Stevens wrote a brief concurrence, which emphasized that the Court “squarely rejects the proposition that a governmental decision that rests on a racial classification is never permissible except as a remedy for a past wrong.”⁸⁶

Four Justices (Justices O'Connor, Rehnquist, Scalia, and Kennedy) dissented. Justice O'Connor's dissent, which was joined by the other three dissenters, stated that federal race-conscious measures, like those enacted by the states, should be subject to strict scrutiny because “[t]he Constitution's guarantee of equal protection binds the Federal Government as it does the States.”⁸⁷ Under strict scrutiny, “only a compelling interest may support the Government's use of racial classifications.”⁸⁸ Justice O'Connor wrote that the FCC's “interest in increasing the diversity of broadcast viewpoints is clearly not a compelling interest. It is simply too amorphous, too insubstantial, and too unrelated to any legitimate basis for employing racial classifications.”⁸⁹

Justice O'Connor further found that even under the intermediate scrutiny test adopted by the majority, the FCC's minority ownership policies were deficient because the government's interest in broadcast diversity was not an “important”⁹⁰ interest as required by the intermediate scrutiny test. Justice O'Connor reasoned that this interest was so “amorphous”⁹¹ that it would “support indefinite use of racial classifications, employed first to obtain the appropriate mixture of racial views and then to ensure that the broadcast spectrum

82. *Id.* at 597 (citing *Fullilove v. Klutznick*, 448 U.S. 448, 484 (1980)).

83. *Metro Broad.*, 497 U.S. at 597.

84. *Id.*

85. *Id.* at 598, 600 (noting only 0.2% of renewal applications involved distress sales).

86. *Id.* at 601 (Stevens, J., concurring).

87. *Id.* at 604 (O'Connor, J., dissenting).

88. *Id.* at 612.

89. *Id.*

90. *Id.* (noting majority claimed government's asserted interest need only be “important”).

91. *Id.* at 614.

continues to reflect that mixture.”⁹² Moreover, the government’s interest in diversity could be used to support absurd policies, such as governmental efforts to identify “a black viewpoint,” an “Asian viewpoint,” an “Arab viewpoint,” and so on.⁹³

Justice O’Connor further found that the FCC’s minority ownership policies failed the “substantial relationship” half of the intermediate scrutiny test, because “race-neutral and untried means of directly accomplishing the governmental interest are readily available.”⁹⁴ For example, the FCC could directly require “diverse” programming,⁹⁵ favor applicants who promised to provide such programming⁹⁶ or whose backgrounds indicated that they were likely to do so,⁹⁷ or enact race-neutral financial and informational measures to “overcome barriers of information, experience, and financing that inhibit minority ownership.”⁹⁸ Justice O’Connor went on to suggest that minority ownership was not substantially related to the nature of a licensee’s programming, because programming is frequently shaped by the market or station managers rather than by owners.⁹⁹

Finally, Justice O’Connor wrote that even if the FCC’s minority ownership policies were substantially related to an important governmental objective, such policies unduly burdened nonminorities.¹⁰⁰ She stated that the distress sale policy “imposes a particularly significant burden”¹⁰¹ because it “created a specialized market reserved exclusively for minority controlled applicants.”¹⁰²

Justice Kennedy filed a separate dissent, which was joined by Justice Scalia. The Kennedy dissent did not address the details of the intermediate scrutiny test. Instead, the Kennedy dissent focused more broadly on the evils of race-conscious measures, and noted that race-conscious policies defended as benign often are not seen that way by the individuals affected by them.¹⁰³

92. *Id.*

93. *Id.* at 615.

94. *Id.* at 622.

95. *Id.*

96. *Id.* at 623.

97. *Id.*

98. *Id.* (citing *Metro Broad.*, 497 U.S. at 593-94). The majority opinion criticized Justice O’Connor’s proposals as impractical and possibly unconstitutional. *Id.* at 589 n.42.

99. *Id.* at 626-27.

100. *Id.* at 630-31.

101. *Id.* at 630.

102. *Id.*

103. *Id.* at 635 (Kennedy, J., dissenting).

After *Metro Broadcasting*, the law seemed clear: intermediate scrutiny governed federally imposed race-conscious measures, and the distress sale policy was constitutional under the intermediate scrutiny test. But five years later, another Supreme Court decision turned the law upside down.

D. The Supreme Court Switches Sides

1. *Adarand Construction, Inc. v. Pena*

The *Adarand* Court overruled *Metro Broadcasting* by holding that all racial classifications, not just those imposed by state and local governments, are subject to strict scrutiny.¹⁰⁴ In *Adarand*, the plaintiff submitted a low bid for a federally funded highway construction subcontract. The prime contractor nevertheless awarded the subcontract to a Hispanic-owned competitor, because the prime contract contained a "subcontracting compensation clause"¹⁰⁵ providing that a prime contractor would receive additional compensation if it hired subcontractors controlled by socially and economically disadvantaged individuals.¹⁰⁶ Under relevant Small Business Administration and Transportation Department regulations, Hispanics are presumed to be socially and economically disadvantaged.¹⁰⁷

After losing the subcontract, the plaintiff sued various federal officials, claiming that the race-based presumptions in the main contract violated his right to equal protection.¹⁰⁸ The district court dismissed the case, and the U.S. Court of Appeals for the Tenth Circuit affirmed.¹⁰⁹ Based on *Metro Broadcasting*, the Court of Appeals held that intermediate scrutiny (not strict scrutiny) was the governing standard, and that the contract clauses at issue were constitutional under that test.¹¹⁰ The Supreme Court disagreed and reversed on a 5-4 vote.

The Court held that "all racial classifications, imposed by whatever federal, state or local governmental actor, must be analyzed

104. *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097, 2111 (1995).

105. *Id.* at 2104 (using term).

106. *Id.* at 2102. This clause applied, however, only to minority contractors that were also small businesses. *Id.*

107. *Id.* at 2102-03.

108. *Id.* at 2104.

109. *Id.* (citations omitted).

110. *Id.*

by a reviewing court under *strict scrutiny* To the extent that *Metro Broadcasting* is inconsistent with that holding, it is overruled.”¹¹¹ Under the strict scrutiny test, federally imposed racial classifications “must serve a compelling state interest, and must be narrowly tailored to further that interest.”¹¹² Unlike in *Metro Broadcasting*, the Court in *Adarand* did not apply its test to the plaintiff’s lawsuit, but instead decided “to remand the case to the lower courts for further consideration in light of the principles we have announced.”¹¹³ In support of its ruling, the Court relied on language in earlier cases suggesting that equal protection analysis under the Fifth Amendment (which affects the federal government) is identical to equal protection analysis under the Fourteenth Amendment (which applies to state and local governments).¹¹⁴

The Court admitted that “any departure from the doctrine of *stare decisis* demands special justification.”¹¹⁵ The Court found that such a “special justification” existed because *Metro Broadcasting* was itself a recent departure from precedent requiring identical equal protection analysis for state and federal governments.¹¹⁶ The Court explained that by holding the courts should treat federal race-conscious measures more leniently than similar state and local laws, *Metro Broadcasting* also undermined other Supreme Court decisions requiring skepticism of racial classifications and consistency of treatment irrespective of the race of the groups benefited or burdened by such classifications.¹¹⁷ Thus, *Metro Broadcasting* was inconsistent with “an accepted and established doctrine.”¹¹⁸ The Court added that *Metro Broadcasting*’s “application of federal and state racial classifications has been consistently criticized by commentators”¹¹⁹ and that *Metro Broadcasting* was so recently decided that it engendered no substantial reliance.¹²⁰

111. *Id.* at 2113 (emphasis added).

112. *Id.* at 2117 (citing *Fullilove v. Klutznick*, 448 U.S. 448, 496 (1980)(Powell, J., concurring)).

113. *Id.* at 2118.

114. *Id.* at 2111 (citations omitted). Some years earlier, the Court had held “that the Fourteenth Amendment requires strict scrutiny of all race-based action by state and local governments.” *Id.* at 178-79. *See also* *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-94 (1989).

115. *Adarand*, 115 S. Ct. at 2114 (citing *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984)).

116. *Adarand*, 115 S. Ct. at 2115, 2116.

117. *Id.* at 2112.

118. *Id.* at 2115.

119. *Id.* (citations omitted).

120. *Id.* at 2115-16.

The five justices in the majority split as to how “strict” strict scrutiny must be. The Court’s opinion (which on this issue, was merely a plurality opinion) emphasized that government “is not disqualified from acting in response to [past discrimination].”¹²¹ By contrast, Justice Scalia wrote that “government can never have a ‘compelling interest’ in discriminating on the basis of race in order to ‘make up’ for past racial discrimination in the opposite direction.”¹²² Justice Scalia added, however, that persons “who have been wronged by unlawful racial discrimination should be made whole.”¹²³ It therefore appears that under Justice Scalia’s proposed test, the government could enact race-conscious measures only if it showed that the beneficiaries of such measures had themselves been wronged by racial discrimination.

Justice Thomas also wrote a separate concurrence which did not directly address the dispute between Scalia and the plurality. Instead, Justice Thomas criticized the dissent and criticized race-conscious measures generally. For example, Justice Thomas wrote that “there is a moral [and] constitutional equivalence . . . between laws designed to subjugate a race and those that distribute benefits on the basis on race in order to foster some current notion of equality.”¹²⁴ Justice Thomas added that as a matter of policy, such “paternalism”¹²⁵ is “as poisonous and pernicious as any other form of discrimination”¹²⁶ because it teaches whites “that because of chronic and apparently immutable handicaps, minorities cannot compete with them without their patronizing indulgence.”¹²⁷

Three of the Justices wrote separate dissents. Justice Stevens, joined by Justice Ginsburg, wrote both to criticize strict scrutiny generally and to criticize the majority’s rejection of *Metro Broadcasting*. As to the first issue, Justice Stevens wrote that discrimination against minorities differed from “benign” discrimination because the former type of discrimination is “an engine

121. *Id.* at 2117. Because the four dissenters endorsed this proposition, it is clear at least seven justices rejected Justice Scalia’s nearly total opposition to race-conscious policies. *See id.* at 192 (Stevens, J. dissenting)(endorsing “[r]emedial race-based preferences”); *id.* at 209 (Souter, J. dissenting)(explicitly endorsing proposition in opinion joined by Justices Ginsburg and Breyer); *but see supra* notes 122-123 and accompanying text (describing Justice Scalia’s position).

122. *Adarand*, 115 S. Ct. at 2118 (Scalia, J., concurring)(citing *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 520 (1989)(Scalia, J., concurring in judgment)).

123. *Adarand*, 115 S. Ct. at 2118.

124. *Id.* at 2119 (Thomas, J. concurring).

125. *Id.*

126. *Id.*

127. *Id.*

of oppression”¹²⁸ while the latter type of measure reflects “a desire to foster equality in society.”¹²⁹ Justice Stevens added that because the Court applies intermediate scrutiny to invidious gender discrimination,¹³⁰ the majority’s decision would “produce the anomalous result that the Government can more easily enact affirmative action programs to remedy discrimination against women than it can enact affirmative action programs to remedy discrimination against African-Americans—even though the primary purpose of the Equal Protection Clause was to end discrimination against the former slaves.”¹³¹

Justice Stevens also endorsed the *Metro Broadcasting* Court’s distinction between state and federal race-conscious measures, based on his interpretation of the Court’s precedent,¹³² state programs’ adverse impact on out-of-state residents with no political power,¹³³ and the Fourteenth Amendment’s purpose of transferring power from states to the federal government.¹³⁴

Justice Souter’s dissent (which was joined by Justices Ginsburg and Breyer) contended that the Court should not have addressed the question of whether strict scrutiny was appropriate, because the case was factually similar to the case of *Fullilove v. Klutznick*,¹³⁵ which upheld “a congressional spending program that, absent an administrative waiver, 10% of the federal funds granted for local public works projects must be used by the state or local grantee to procure services or supplies from businesses owned and controlled by members of statutorily identified minority groups.”¹³⁶ Justice Ginsburg (joined by Justice Breyer) wrote a separate dissent in order to applaud

128. *Id.* at 2120 (Stevens, J., dissenting).

129. *Id.*

130. *Id.* at 2122.

131. *Id.* (citing *Associated Gen. Contractors of Cal., Inc. v. San Francisco*, 813 F.2d 922 (9th Cir. 1987)(striking down racial preference under strict scrutiny while upholding gender preference under intermediate scrutiny)).

132. *Adarand*, 115 S. Ct. at 2123-25 (citations omitted).

133. *Id.* at 2125 (“in the state or local context, individuals who were unable to vote for the local representatives who enacted a race-conscious program may nevertheless feel the effects of that program.”).

134. *Id.* at 2126.

135. 448 U.S. 448 (1980). In fact, both Justice Stevens’ and Justice Souter’s opinion stated that *Fullilove* was on point. See *Adarand*, 115 S. Ct. at 2128 (Stevens, J. dissenting); *id.* at 2132 (Souter, J. dissenting).

136. *Fullilove*, 448 U.S. at 453 (Burger, J.)(citation omitted). By contrast, the majority declined to reach the application of *Fullilove* to the facts of *Adarand*, 115 S. Ct. at 2132 (Souter, J. dissenting)(criticizing majority’s refusal to compare *Fullilove* with case at hand).

the majority's apparent willingness to uphold remedial racial preferences under certain circumstances.¹³⁷

2. *Is the FCC's Current Policy Constitutional?*

None of the Justices' opinions in *Adarand* directly stated whether the distress sale policy upheld in *Metro Broadcasting* would survive strict scrutiny. Nevertheless, it seems unlikely that the Supreme Court would uphold that policy, for two reasons. First, four of the five Justices in the *Adarand* majority (O'Connor, Scalia, Kennedy, and Rehnquist) dissented in *Metro Broadcasting*.¹³⁸ Second, the fifth Justice in the *Adarand* majority, Justice Thomas, has fervently denounced race-conscious programs. For example, in *Adarand*, Justice Thomas wrote that "there is a moral and constitutional equivalence . . . between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality."¹³⁹ Justice Thomas has also sharply criticized racial preferences in other contexts. For example, Justice Thomas has rejected the Court's view that the Voting Rights Act¹⁴⁰ bars redistricting plans that "dilute" minority votes by minimizing their ability to elect representatives.¹⁴¹ Instead, Justice Thomas would limit the coverage of the Act to "state enactments that limit citizens' access to the ballot."¹⁴² Thus, Justice Thomas (unlike the majority of the Court) rejects the view that the Act may justify "remedial mechanisms that encourage[] federal courts to segregate voters into

137. *Id.* at 2135 (Ginsburg, J., dissenting). Justice Stevens and Justice Souter also made this point in their opinions. *See id.* at 2127 (Stevens, J., dissenting); *id.* at 2133 (Souter, J., dissenting).

138. *See Metro Broad., Inc. v. FCC*, 497 U.S. 547, 602 (1990).

139. *Adarand*, 115 S. Ct. at 2119 (Thomas, J. concurring).

140. 42 U.S.C. § 1973 (1994). This statute prohibits practices which abridge the right to vote on the basis of race. 42 U.S.C. § 1973(a). A violation may be established if a group's "members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b). The extent to which a group's members have been elected to office may be considered as a relevant factor, although a group's members need not be elected in numbers equal to their proportion in the population. *Id.*

141. *See Holder v. Hall*, 114 S. Ct. 2581, 2586 (1994)(reaffirming existence of dilution claims under Voting Rights Act, but rejecting claim at issue)(plurality opinion); *Hastert v. State Bd. of Elections*, 777 F. Supp. 634, 646 (N.D. Ill. 1991)(defining "vote dilution"). Although the *Holder* opinion was a plurality opinion, only Justice Scalia joined Justice Thomas' concurrence. *Id.* at 702. Thus, it appears that the majority of the Court supports the proposition that the Voting Rights Act bars vote dilution.

142. *Holder*, 114 S. Ct. at 2592 (Thomas, J. concurring).

racially designated districts to ensure minority electoral success.”¹⁴³ Given Justice Thomas’s hostility to race-conscious measures, it seems unlikely that the distress sale policy will survive strict scrutiny.

III

What Next for Distress Sales?

Since the FCC’s current policy will not survive strict scrutiny, the FCC now has at least two alternatives. First, the FCC could abolish distress sales altogether. Second, the FCC could enact a color-blind distress sale policy that allows licensees facing a renewal/revocation hearing to sell their stations for a discount price to any buyer (or at least, to any buyer controlled by a small business). This section of the article argues in favor of the latter alternative.¹⁴⁴

A. The Case for a Color-Blind Distress Sale Policy

The purposes of the FCC’s existing distress sale policy include (1) broadcast diversity,¹⁴⁵ (2) administrative economy,¹⁴⁶ and (3)

143. *Id.* However, the majority of the Court has been willing to strike down such districting plans on constitutional grounds. *See, e.g.,* *Miller v. Johnson*, 115 S. Ct. 2475 (1995); *Shaw v. Reno*, 509 U.S. 360 (1993). The Court has not required complete color-blindness, but has prohibited states from relying “on race in substantial disregard of customary and traditional districting practices.” *Miller*, 115 S. Ct. at 2497 (O’Connor, J. concurring).

144. A third option might be to enact a more narrowly tailored minorities-only distress sale policy: for example, one that allowed distress sales only to those minorities who had suffered discrimination from other broadcasters, or with a proven record of broadcasting minority-owned broadcasting. Even the existing distress sale policy has approved only three or four distress sales per year. *See Minority Ownership Notice*, *supra* note 28, at 2789 (noting only 42 distress sales were approved between 1978 and 1995). It logically follows that a distress sale policy narrower than the present policy would lead to so few distress sales that it would be functionally indistinguishable from abolition of the distress sale policy, and would have the same disadvantages as abolition.

145. *See Metro Broad., Inc. v. FCC*, 497 U.S. 547, 579 (1990); Fifth Report and Order, Implementation of Section 309(j) of the Communications Act-Competitive Bidding, 9 FCC Rcd. 5532, 5576 (1994)(purpose of distress sale policy is to “encourage minority ownership of broadcast facilities” which in turn “would result in a more diverse selection of programming and would inevitably enhance the diversity of control of a valuable resource, the electromagnetic spectrum”); *Policy Statement*, *supra* note 38, at 981 (“minority participation in the ownership and management of broadcast facilities results in a more diverse selection of programming”).

146. *Stereo Broadcasters, Inc. v. FCC*, 652 F.2d 1026, 1029 (D.C. Cir. 1981). *See also In re New South Broad., Inc.*, 6 FCC Rcd. 5047, 5048 (1991)(referring to “the distress sale policy’s goal of avoiding protracted hearings”); *Policy Statement*, *supra* note 38, at 983 (distress sale policy justified by “avoidance of time consuming and expensive hearings”).

expediting the licensing of qualified broadcasters.¹⁴⁷ Each of these goals will be enhanced by a color-blind distress sale policy.

1. Distress Sales and Diversity

A color-blind distress sale policy will increase broadcast diversity by (a) increasing station ownership by small businesses generally, and (b) increasing ownership by minorities¹⁴⁸ in particular. Each issue will be addressed in turn.

a. Small Businesses and Diversity

In *Metro Broadcasting*, the Court upheld the distress sale policy and other minority preferences because “expanded minority ownership of broadcast outlets will, in the aggregate, result in greater broadcast diversity.”¹⁴⁹ A color-blind distress sale policy will also increase broadcast diversity by allowing smaller broadcasters to purchase broadcast stations.

Under the distress sale policy, a station’s selling price “must not exceed 75 percent of fair market value.”¹⁵⁰ Thus, smaller businesses who ordinarily could not afford to purchase stations could afford to do so under the distress sale policy. For example, enterprises organized by small religious or ideological “splinter groups,” or by supporters of an unusual broadcast format, might be able to purchase a station if station prices were reduced.

The FCC and several Supreme Court Justices have implicitly endorsed the idea that small business ownership of broadcast stations can increase broadcast diversity, by proposing measures to make broadcast stations more affordable for smaller businesses. Justice O’Connor’s *Metro Broadcasting* dissent (which was joined by the

147. See *Black Television Workshop of Los Angeles, Inc.*, 6 FCC Rcd. 381, 382 (1991) (noting distress sale “would expedite the inauguration of a new, noncommercial, educational UHF television service in Los Angeles, one of the nation’s most densely populated areas.”); *Faith Center, Inc.*, 99 F.C.C.2d 1164, 1170 (1984) (distress sale would end seller’s tenure “and provide residents of the station’s service area with a new licensee whose qualifications are not in doubt”), *aff’d*, 3 FCC Rcd. 868 (1988), *rev’d*, *Shurberg Broad. of Hartford, Inc., v. FCC*, 876 F.2d 902 (D.C. Cir. 1989), *rev’d*, *Metro Broad. v. FCC*, 497 U.S. 547 (1990).

148. The discussion below should not be construed as a suggestion that a color-blind distress sale policy would increase minority ownership more than would a distress sale policy requiring all “distress buyers” to be minority-controlled. Instead, I contend that a color-blind distress sale policy would result in more minority ownership than would abolition of the distress sale policy.

149. *Metro Broad.*, 497 U.S. at 579. See also *supra* note 145 (citing cases discussing link between distress sale policy and broadcast diversity).

150. *Metro Broad.*, 497 U.S. at 558.

other three dissenting Justices)¹⁵¹ suggested that instead of creating race-specific programs, the FCC should have considered “race-neutral means . . . to allow access to the broadcasting industry for those persons excluded for financial and related reasons.”¹⁵²

Similarly, a 1992 FCC order amended the FCC’s national ownership rules to permit a single entity to hold an attributable interest in up to 18 AM and 18 FM radio stations, and “to hold a non-controlling attributable interest in an additional three stations in each service if the stations are controlled by minorities or small businesses.”¹⁵³ In 1994, the FCC again altered its ownership caps by raising to five the number of small business-controlled stations in which a broadcaster could own a non-controlling interest without violating the FCC’s national ownership rules.¹⁵⁴

Moreover, the FCC has explicitly stated that a link exists between small business station ownership and broadcast diversity. In its 1994 decision, the FCC stated that its small business-related ownership rules “will enhance diversity in the radio industry by providing greater opportunities for minority and *small business* broadcasters.”¹⁵⁵ Even if a revised distress sale policy does not explicitly require that buyers be small businesses, small businesses are more likely to buy stations in distress sales than under other circumstances because small businesses by definition have less money¹⁵⁶ and are therefore benefitted by any measures that make stations more affordable.

151. *Id.* at 602 (O’Connor, J., dissenting).

152. *Id.* at 623.

153. Revision of Radio Rules and Policies, 7 FCC Rcd. 6387, 6388 (1992)[hereinafter *Revision I*](emphasis added). An “attributable” interest means an ownership interest significant enough to be counted against the FCC’s ownership caps. For example, ownership interests amounting to 5% or more of a corporate broadcast licensee are generally “attributable.” See 47 C.F.R. § 73.3555 n.2(a) (1995). I also note, however, that the issue of national radio ownership caps is moot, because such caps were abolished by the Telecommunications Act of 1996. See Telecommunications Act of 1996 § 202(a), Pub. L. No. 104-104, 110 Stat 56, 110 (1996).

154. Revision of Radio Rules and Policies, 9 FCC Rcd. 7183, 7184 (1994)[hereinafter *Revision II*]. A “small business” under these rules is one with annual revenues of less than \$500,000 and assets of less than \$1,000,000, including all affiliated entities under common control. *Id.* at 7190 n. 56 (citing *Revision I*, *supra* note 153, at 6391).

155. *Revision II*, *supra* note 154, at 7194 (emphasis added).

156. See *id.* at 7190 n. 56 (citing *Revision I*, *supra* note 153, at 6391 (defining “small business” as one with annual revenues of less than \$500,000 and assets of less than \$1,000,000, including all affiliated entities under common control). See also *supra* note 154.

b. Small Businesses, Minorities, and Diversity

Any policy that benefits small businesses by reducing station prices will also disproportionately benefit minorities because minority broadcast enterprises tend to be small businesses with fewer resources than other broadcast licensees. In *Metro Broadcasting*, the Court noted that the FCC has “identified as key factors hampering the growth of minority ownership a lack of adequate financing [as well as inexperience and lack of information about license availability] Congress and the FCC therefore found a need for the minority distress sale policy, which helps to overcome the problem of inadequate access to capital by lowering the sale price.”¹⁵⁷ Similarly, Justice O’Connor’s dissent did not question the majority’s view that “barriers of information, experience, and financing . . . inhibit minority ownership,”¹⁵⁸ but responded that “[r]ace-neutral financial and informational measures most directly reduce financial and informational barriers.”¹⁵⁹ Thus, both the majority and the dissent appeared to endorse the proposition that minorities suffer from inadequate access to capital, and would therefore benefit from any policy that makes broadcast stations more affordable.

Similarly, the FCC itself has repeatedly emphasized that minority broadcasters are needier than other broadcasters. For example, in a recent *Notice of Proposed Rulemaking*,¹⁶⁰ the FCC pointed out that “women and minorities face economic disadvantages when they attempt to enter the mass media industry”¹⁶¹ and sought comment on the possible remedies for such disadvantages.¹⁶² The FCC added that “minority broadcasters’ initial entry in the industry is often achieved through acquisition of less costly stations.”¹⁶³ Thus, the FCC, like the courts, has recognized that minority broadcasters generally have fewer

157. *Metro Broad.*, 497 U.S. at 593. See also Bush & Martin, *supra* note 30, at 429 (noting auctions of communications facilities generally disadvantage minorities because minorities lack significant access to capital); *id.* at 444 n.121 (noting most minority-owned businesses will qualify as small businesses under FCC rules favoring small businesses).

158. *Metro Broad.*, 497 U.S. at 623 (O’Connor, J. dissenting).

159. *Id.*

160. Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities, *Notice of Proposed Rulemaking*, 10 FCC Rcd. 2788 (1995).

161. *Id.* at 2790.

162. For example, the FCC proposed to allow existing broadcasters to assist minority applicants, and sought comment on modifications to its ownership attribution rules. *Id.*

163. *Id.* at 2796.

assets than white broadcasters.¹⁶⁴ Because minority broadcasters are generally less wealthy than white broadcasters, any measure that makes broadcast stations more affordable (such as a color-blind distress sale policy) would also increase minority ownership, and might therefore increase broadcast diversity as well.

2. Administrative Economy

The FCC has noted that by reducing the number of contested renewal and revocation proceedings, the distress sale policy has reduced the FCC's workload and conserved the time and money of all litigants (including the FCC).¹⁶⁵ Because renewal and revocation proceedings frequently last for years, the benefits of the distress sale policy are considerable. For example, in *Sea Island Broadcasting Corporation of South Carolina* ("Sea Island")¹⁶⁶ the FCC designated a revocation proceeding for hearing in 1973,¹⁶⁷ and did not terminate its hearing until January 1975.¹⁶⁸ The ALJ issued a decision in May 1975¹⁶⁹ and the full Commission did not issue a decision until July 1976.¹⁷⁰ By the time the case reached the full Commission, seven lawyers were involved.¹⁷¹ Renewal cases are sometimes even more time-consuming.¹⁷² Thus, the distress sale policy has already saved both the Commission and individual broadcasters thousands of person hours.

It logically follows that by increasing the number of distress sales, a color-blind distress sale policy will reduce the amount of time and resources spent on renewal and revocation cases. By contrast, if the

164. See also Financial Qualifications Standards, 72 F.C.C.2d 784, 784 (1979)(noting stringent financial qualifications rule for would-be broadcasters "conflicts with Commission policies favoring minority ownership and diversity because its stringency may inhibit potential applicants from seeking broadcast licenses.").

165. See, e.g., *Policy Statement*, *supra* note 38, at 983 (explaining distress sale policy leads to "avoidance of time consuming and expensive license revocation proceedings"). See also *Stereo Broadcasters, Inc. v. FCC*, 652 F.2d 1026, 1029 (D.C. Cir. 1981)(noting administrative economy is one benefit from policy). See also *New South Broad., Inc.*, 6 FCC Rcd. 5047, 5048 (1991)(referring to "the distress sale policy's goal of avoiding protracted hearings").

166. 60 F.C.C.2d 146 (1976).

167. *Id.* at 146.

168. *Id.* at 147.

169. *Id.*

170. *Id.* at 146.

171. *Id.*

172. See, e.g., *Pressley v. FCC*, 437 F.2d 716, 718 n.2 (D.C. Cir. 1970)(affirming renewal of station's license where petition to deny renewal application filed in 1965, five years before decision).

distress sale policy were abolished, every licensee whose license is challenged by the Commission would be forced to choose between surrendering its license without compensation and dragging the Commission through years of hearings.

3. *Better Broadcasters*

Where the FCC has decided to hold a hearing on license renewal or revocation, an incumbent licensee may retain its license and continue broadcasting until the proceeding has been terminated.¹⁷³ By contrast, a distress sale ends an unqualified licensee's tenure and substitutes a qualified licensee, without forcing the public to wait for a hearing before an administrative law judge and an appeal to the full FCC. For example, in the decision upheld by *Metro Broadcasting*, the FCC noted that the distress sale at issue would "swiftly end [the seller's] tenure as a licensee of [the] station and provide residents of the station's service area with a new licensee whose qualifications are not in doubt."¹⁷⁴

By contrast, where a license is revoked because no distress sale occurs, the FCC will typically force the licensee's station to cease broadcasting.¹⁷⁵ Such curtailment of service, although occasionally necessary, should be avoided if at all possible, because the courts have held that "a curtailment of service . . . unless outweighed by other factors, is not in the public interest."¹⁷⁶ By increasing the number of distress sales, a color-blind distress sale policy would increase the number of qualified licensees, reduce the number of unqualified licensees, and (by reducing the number of license revocations) increase Commission compliance with the policy against curtailment of service.

173. See, e.g., *Trinity Broad. of Florida, Inc.*, 10 FCC Rcd. 12020, 12020 (A.L.J. 1995) (noting station owned by disqualified licensee still operating at time of decision, more than a year after close of hearing).

174. *Faith Center, Inc.*, 99 F.C.C.2d 1164, 1170 (1984), *aff'd*, 3 FCC Rcd. 868 (1988), *rev'd*, *Shurberg Broad. of Hartford, Inc. v. FCC*, 876 F.2d 902 (D.C. Cir. 1989), *rev'd*, *Metro Broad. v. FCC*, 497 U.S. 547 (1990). See also *Black Television Workshop of L.A., Inc.*, 6 FCC Rcd. 381, 382 (1991) (noting distress sale would "expedite the inauguration of a new, noncommercial . . . UHF television service").

175. See, e.g., *Sea Island Broad. Corp. of S.C.*, 60 F.C.C.2d 146, 157 (1976) (allowing licensee whose license had been revoked to continue broadcasting until October 1, 1976, several months after decision).

176. *Hall v. FCC*, 237 F.2d 567, 577 (D.C. Cir. 1956).

B. Arguments Against Distress Sales

It could be argued that despite its apparent benefits, the distress sale policy should be abolished because it (1) does little to further broadcast diversity, and (2) reduces deterrence of licensee misconduct by allowing unqualified licensees to sell their stations at a discount rather than surrendering them for nothing.¹⁷⁷

1. Distress Sales and Diversity

It could be argued that *Lamprecht v. FCC*¹⁷⁸ undercuts the “diversity justification” for distress sales to nonminorities. In *Lamprecht*, the D.C. Circuit held that the FCC’s policy of awarding preferences to females in comparative proceedings violated males’ equal protection rights. In support of this proposition, the court stated that relevant data “fail[ed] to establish any statistically meaningful link between ownership by women and programming of any particular kind . . . [and that] the government has failed to show that its sex-preference policy is substantially related to achieving diversity on the airwaves.”¹⁷⁹ It could therefore be argued that just as a station owner’s gender is unrelated to broadcast diversity, her economic status is also unrelated to broadcast diversity.

This argument takes *Lamprecht* out of context. *Lamprecht* involves gender discrimination which (unlike a gender-blind, color-blind distress sale policy) is subject to heightened constitutional scrutiny.¹⁸⁰ Under the intermediate scrutiny standard applicable to gender discrimination, a party

seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an “exceedingly persuasive justification” for the classification. The burden is met only by showing at least that the classification serves “important governmental objectives” and that the discriminatory means employed are “substantially related to achievement of those objectives.”¹⁸¹

By contrast, classifications not involving fundamental rights or “suspect classifications” such as race or gender are constitutional as

177. See Sewell, *supra* note 5, at 347 (stating policy’s “benefits are at the expense of lessening deterrence to wrongdoing because, absent the policy . . . the licensee could lose its operating authority outright.”).

178. 958 F.2d 383 (D.C. Cir. 1992).

179. *Id.* at 398.

180. *Id.* at 391 (citations omitted).

181. *Id.* (citing *California v. Westcott*, 443 U.S. 76, 85 (1979)).

long as they "bear some rational relationship to a legitimate state purpose."¹⁸²

Moreover, the FCC has continued to endorse ownership preferences for small businesses after *Lamprecht*.¹⁸³ Thus, even recent FCC precedent supports the view that small business ownership is relevant to broadcast diversity. Indeed, to the extent that smaller broadcasters are more likely to support programming with narrow appeal than larger ones, stations run by small businesses may air more diverse programming than larger enterprises run by women or minorities.

2. Distress Sales and Licensee Wrongdoing

It could also be argued that the distress sale policy "lessen[s] deterrence to wrongdoing because, absent the policy . . . the licensee could lose its operating authority outright."¹⁸⁴ This argument is unpersuasive for two reasons. First, even a successful "distress seller" can "only recoup a distress-sale price for the station"¹⁸⁵ (i.e., 75% or less of fair market value).¹⁸⁶ Thus, a licensee may be deterred from misconduct by the prospect of losing 25% of its station's value. Second, it is possible that even under a color-blind distress sale policy, a licensee would be unable to obtain a "distress buyer." This possibility alone may deter licensee misconduct.

IV Conclusion

The FCC's current, minority-oriented distress sale policy will probably not survive the strict scrutiny mandated by *Adarand*. Thus, the FCC has two significant alternatives: it can eliminate the distress sale policy altogether, or it can make that policy color-blind. The latter option will increase broadcast diversity, conserve public and private resources, and reduce the number of unqualified licensees, and therefore should be adopted.

182. *Dallas v. Stanglin*, 490 U.S. 19, 23 (1989)(citing *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 44 (1973)).

183. The FCC's 1992 order promoting small business station ownership was issued on September 4, 1992, more than six months after *Lamprecht* was decided on February 19, 1992. See *Revision I*, *supra* note 153, at 6387; *Lamprecht*, 958 F.2d at 382. Moreover, another FCC order promoting small business station ownership was issued in 1994. See *Revision II*, *supra* note 154, at 7183.

184. Sewell, *supra* note 5, at 347.

185. *Id.*

186. *Id.*