Congressional Research Service, Minority Broadcast Station Ownership and Broadcast Programming: Is There a Nexus? 42 (June 29, 1988) (minority owners possess an interest in 13.3 percent of stations and a controlling interest in 3.5 percent of stations), and this shortfall may be traced in part to the discrimination and the patterns of exclusion that have widely affected our society. As a [**113] Nation we aspire to create a society untouched by that history of exclusion, and to ensure that equality defines all citizens' daily experience and opportunities as well as the protection afforded to them under law.

For these reasons, and despite the harms that may attend the Government's use of racial classifications, we have repeatedly recognized that the Government possesses a compelling interest in remedying the effects of identified race discrimination. We [***493] subject even racial classifications claimed to be remedial to strict scrutiny, however, to ensure that the Government in fact employs any race-conscious measures to further this remedial interest and employs them only when, and no more broadly than, the interest demands. See, e. g., Croson, supra, at 493-495, 498-502; Wygant v. Jackson Bd. of Ed., 476 U.S. 267 (1986) (plurality opinion). The FCC or Congress may yet conclude after suitable examination that narrowly tailored race-conscious measures are required to remedy discrimination that may be identified in the allocation of broadcasting licenses. Such measures are clearly within the Government's [**114] power.

Yet it is equally clear that the policies challenged in these cases were not designed as remedial measures and are in no sense narrowly tailored to remedy identified discrimination. The FCC appropriately concedes that its policies embodied no remedial purpose, Tr. of Oral Arg. 40-42, and has disclaimed the possibility that discrimination infected the allocation of licenses. The congressional action at most simply endorsed a policy designed to further the interest in achieving diverse programming. Even if the appropriations [*612] measure could transform the purpose of the challenged policies, its text reveals no remedial purpose, and the accompanying legislative material confirms that Congress acted upon the same diversity rationale that led the FCC to formulate the challenged policies. See S. Rep. No. 100-182, p. 76 (1987). The Court refers to the bare suggestion, contained in a Report addressing different legislation passed in 1982, that "past inequities" have led to "underrepresentation of minorities in the media of mass communications, as it has adversely affected their participation in other sectors of the economy as well." H. R. Conf. Rep. No. 97-765, p. 43 (1982); [**115] ante, at 566. This statement indicates nothing whatever about the purpose of the relevant appropriations measures, identifies no discrimination in the broadcasting industry, and would not sufficiently identify discrimination even if Congress were acting pursuant to its @ 5 powers. Cf. Fullilove, 448 U.S., at 456-467 (opinion of Burger, C. J.) (surveying identification of discrimination affecting contracting opportunities); id., at 502-506 (Powell, J., concurring). The Court evaluates the policies only as measures designed to increase programming diversity. Ante, at 566-568. I agree that the racial classifications cannot be upheld as remedial measures.

III

Under the appropriate standard, strict scrutiny, only a compelling interest may support the Government's use of racial classifications. Modern equal

protection doctrine has recognized only one such interest: remedying the effects of racial discrimination. The 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 [**116] racial classifications. The Court does not claim otherwise. Rather, it employs its novel standard and claims that this asserted interest need only be, and is, "important." [***494] This conclusion twice compounds the Court's initial error of reducing its level [*613] of scrutiny of a racial classification. First, it too casually extends the justifications that might support racial classifications, beyond that of remedying past discrimination. We have recognized that racial classifications are so harmful that "[u]nless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility." Croson, 488 U.S., at 493. As Chief Justice Burger warned in Fullilove: "The history of governmental tolerance of practices using racial or ethnic criteria for the purpose or with the effect of imposing an invidious discrimination must alert us to the deleterious effects of even benign racial or ethnic classifications when they stray from narrow remedial justifications." 448 U.S., at 486-487. Second, it has initiated this departure by endorsing an insubstantial [**117] interest, one that is certainly insufficiently weighty to justify tolerance of the Government's distinctions among citizens based on race and ethnicity. This endorsement trivializes the constitutional command to guard against such discrimination and has loosed a potentially farreaching principle disturbingly at odds with our traditional equal protection doctrine.

An interest capable of justifying race-conscious measures must be sufficiently specific and verifiable, such that it supports only limited and carefully defined uses of racial classifications. In Croson, we held that an interest in remedying societal discrimination cannot be considered compelling. See 488 U.S., at 505 (because the city of Richmond had presented no evidence of identified discrimination, it had "failed to demonstrate a compelling interest in apportioning public contracting opportunities on the basis of race"). We determined that a "generalized assertion" of past discrimination "has no logical stopping point" and would support unconstrained uses of race classifications. See id., at 498 (internal quotation marks omitted). In Wygant, we rejected [**118] the asserted interest in "providing minority role models for [a public school system's] minority students, as an attempt to alleviate [*614] the effects of societal discrimination," 476 U.S., at 274 (plurality opinion), because "[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy" and would allow "remedies that are ageless in their reach into the past, and timeless in their ability to affect the future." Id., at 276. Both cases condemned those interests because they would allow distribution of goods essentially according to the demographic representation of particular racial and ethnic groups. See Croson, supra, at 498, 505-506, 507; Wygant, 476 U.S., at 276 (plurality opinion).

The asserted interest in this case suffers from the same defects. The interest is certainly amorphous: The FCC and the majority of this Court understandably do not suggest how one would define or measure a particular viewpoint that might be associated with race, or even how one would assess the diversity of broadcast [***495] [**119] viewpoints. Like the vague assertion of societal discrimination, a claim of insufficiently diverse broadcasting viewpoints might be used to justify equally unconstrained racial preferences, linked to nothing other than proportional representation of

various races. And the interest would support indefinite use of racial classifications, employed first to obtain the appropriate mixture of racial views and then to ensure that the broadcasting spectrum continues to reflect that mixture. We cannot deem to be constitutionally adequate an interest that would support measures that amount to the core constitutional violation of "outright racial balancing." Croson, supra, at 507.

The asserted interest would justify discrimination against members of any group found to contribute to an insufficiently diverse broadcasting spectrum, including those groups currently favored. In Wygant, we rejected as insufficiently weighty the interest in achieving role models in public schools, in part because that rationale could as readily be used to limit the hiring of teachers who belonged to particular minority groups. See Wygant, supra, at 275-276 [**120] (plurality [*615] opinion). The FCC's claimed interest could similarly justify limitations on minority members' participation in broadcasting. It would be unwise to depend upon the Court's restriction of its holding to "benign" measures to forestall this result. Divorced from any remedial purpose and otherwise undefined, "benign" means only what shifting fashions and changing politics deem acceptable. Members of any racial or ethnic group, whether now preferred under the FCC's policies or not, may find themselves politically out of fashion and subject to disadvantageous but "benign" discrimination.

Under the majority's holding, the FCC may also advance its asserted interest in viewpoint diversity by identifying what constitutes a "black viewpoint," an "Asian viewpoint," an "Arab viewpoint," and so on; determining which viewpoints are underrepresented; and then using that determination to mandate particular programming or to deny licenses to those deemed by virtue of their race or ethnicity less likely to present the favored views. Indeed, the FCC has, if taken at its word, essentially pursued this course, albeit without making express its reasons for choosing to favor particular [**121] groups or for concluding that the broadcasting spectrum is insufficiently diverse. See Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 F. C. C. 2d 979 (1978) (1978 Policy Statement).

We should not accept as adequate for equal protection purposes an interest unrelated to race, yet capable of supporting measures so difficult to distinguish from proscribed discrimination. The remedial interest may support race classifications because that interest is necessarily related to past racial discrimination; yet the interest in diversity of viewpoints provides no legitimate, much less important, reason to employ race classifications apart

from generalizations impermissibly equating race with thoughts and behavior. And it will prove impossible to distinguish naked preferences for members of particular races from preferences for members of particular races because they possess certain valued [*616] views: No matter what its purpose, the Government will be able to claim that it [***496] has favored certain persons for their ability, stemming from race, to contribute distinctive views or perspectives.

Even considered as other than [**122] a justification for using race classifications, the asserted interest in viewpoint diversity falls short of being weighty enough. The Court has recognized an interest in obtaining diverse broadcasting viewpoints as a legitimate basis for the FCC, acting pursuant to its "public interest" statutory mandate, to adopt limited measures to increase

the number of competing licensees and to encourage licensees to present varied views on issues of public concern. See, e. g., FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775 (1978); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969); United States v. Storer Broadcasting Co., 351 U.S. 192 (1956); Associated Press v. United States, 326 U.S. 1 (1945); National Broadcasting Co. v. United States, 319 U.S. 190 (1943). We have also concluded that these measures do not run afoul of the First Amendment's usual prohibition of Government regulation of the marketplace of ideas, in part because First Amendment concerns support limited but inevitable Government [**123] regulation of the peculiarly constrained broadcasting spectrum. See, e. g., Red Lion, supra, at 389-390. But the conclusion that measures adopted to further the interest in diversity of broadcasting viewpoints are neither beyond the FCC's statutory authority nor contrary to the First Amendment hardly establishes the interest as important for equal protection purposes.

The FCC's extension of the asserted interest in diversity of views in these cases presents, at the very least, an unsettled First Amendment issue. The FCC has concluded that the American broadcasting public receives the incorrect mix of ideas and claims to have adopted the challenged policies to supplement programming content with a particular set of views. Although we have approved limited measures designed [*617] to increase information and views generally, the Court has never upheld a broadcasting measure designed to amplify a distinct set of views or the views of a particular class of speakers. Indeed, the Court has suggested that the First Amendment prohibits allocating licenses to further such ends. See National Broadcasting Co. v. United States, supra, at 226 [**124] ("But Congress did not authorize the Commission to choose among [license] applicants upon the basis of their political, economic or social views, or upon any other capricious basis. If it did, or if the Commission by these Regulations proposed a choice among applicants upon some such basis, the [First Amendment] issue before us would be wholly different"). Even if an interest is determined to be legitimate in one context, it does not suddenly become important enough to justify distinctions based on race.

IV

Our traditional equal protection doctrine requires, in addition to a

compelling state interest, that the Government's chosen means be necessary to accomplish, and narrowly tailored to further, the asserted interest. See Wygant, 476 U.S., at 274 [***497] (plurality opinion); Palmore v. Sidoti, 466 U.S. 429, 432-433 (1984). This element of strict scrutiny is designed to "ensur[e] that the means chosen 'fit' [the] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." Croson, 488 U.S., at 493 [**125] (opinion of O'CONNOR, J.). The chosen means, resting as they do on stereotyping and so indirectly furthering the asserted end, could not plausibly be deemed narrowly tailored. The Court instead finds the racial classifications to be "substantially related" to achieving the Government's interest, ante, at 569, a far less rigorous fit requirement. The FCC's policies fail even this requirement.

[*618] 1

The FCC claims to advance its asserted interest in diverse viewpoints by singling out race and ethnicity as peculiarly linked to distinct views that

require enhancement. The FCC's choice to employ a racial criterion embodies the related notions that a particular and distinct viewpoint inheres in certain racial groups, and that a particular applicant, by virtue of race or ethnicity alone, is more valued than other applicants because "likely to provide [that] distinct perspective." Brief for FCC in No. 89-453, p. 17; see 1978 Policy Statement, 68 F. C. C. 2d, at 981 (policies seek "representation of minority viewpoints in programming"); Brief for FCC in No. 89-700, p. 20 (current ownership structure creates programming deficient in " minorities ['] [**126] . . . tastes and viewpoints"). The policies directly equate race with belief and behavior, for they establish race as a necessary and sufficient condition of securing the preference. The FCC's chosen means rest on the "premise that differences in race, or in the color of a person's skin, reflect real differences that are relevant to a person's right to share in the blessings of a free society. [T]hat premise is utterly irrational and repugnant to the principles of a free and democratic society." Wygant, supra, at 316 (STEVENS, J., dissenting) (internal quotation marks omitted; citation omitted). The policies impermissibly value individuals because they presume that persons think in a manner associated with their race. See Steele v. FCC, 248 U.S. App. D. C. 279, 285, 770 F. 2d 1192, 1198 (1985) (minority preference contrary to "one of our most cherished constitutional and societal principles . . . that an individual's tastes, beliefs, and abilities should be assessed on their own merits rather than by categorizing that individual as a member of a racial group presumed to think and behave in a particular [**127] way"), vacated, No. 84-1176 (Oct. 31, 1985), remanded (CADC, Oct. 9, 1986).

The FCC assumes a particularly strong correlation of race and behavior. The FCC justifies its conclusion that insufficiently [*619] diverse viewpoints are broadcast by reference to the percentage of minority owned stations. This assumption is correct only to the extent that minority owned stations provide the desired additional views, and that stations owned by individuals not favored by the preferences cannot, or at least do not, broadcast underrepresented

programming. Additionally, the FCC's focus on ownership to improve [***498] programming assumes that preferences linked to race are so strong that they will dictate the owner's behavior in operating the station, overcoming the owner's personal inclinations and regard for the market. This strong link between race and behavior, especially when mediated by market forces, is the assumption that Justice Powell rejected in his discussion of health care service in Bakke. See 438 U.S., at 310-311. In that case, the state medical school argued that it could prefer members of minority groups because they were more likely to [**128] serve communities particularly needing medical care. Justice Powell rejected this rationale, concluding that the assumption was unsupported and that such individual choices could not be presumed from ethnicity or race. Ibid.

The majority addresses this point by arguing that the equation of race with distinct views and behavior is not "impermissible" in this particular case. Ante, at 579. Apart from placing undue faith in the Government and courts' ability to distinguish "good" from "bad" stereotypes, this reasoning repudiates essential equal protection principles that prohibit racial generalizations. The Court embraces the FCC's reasoning that an applicant's race will likely indicate that the applicant possesses a distinct perspective, but notes that the correlation of race to behavior is "not a rigid assumption about how minority owners will behave in every case." Ibid. The corollary to this notion is plain: Individuals of unfavored racial and ethnic backgrounds are unlikely to possess the unique experiences and background that contribute to viewpoint diversity.

Both the reasoning and its corollary reveal but disregard what is objectionable about a stereotype: [**129] [*620] The racial generalization inevitably does not apply to certain individuals, and those persons may legitimately claim that they have been judged according to their race rather than upon a relevant criterion. See Los Angeles Dept. of Water and Power v. Manhart, 435 U.S. 702, 708 (1978) ("Even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply"). Similarly disturbing is the majority's reasoning that different treatment on the basis of race is permissible because efficacious "in the aggregate." Ante, at 579. In Wiesenfeld, we rejected similar reasoning: "Obviously, the notion that men are more likely than women to be the primary supporters of their spouses and children is not entirely without empirical support. But such a genderbased generalization cannot suffice to justify the denigration of the efforts of women who do work and whose earnings contribute significantly to their families' support." 420 U.S., at 645 (citation omitted). Similarly in this case, even if the Court's equation of race and programming viewpoint [**130] has some empirical basis, equal protection principles prohibit the Government from relying upon that basis to employ racial classifications. See Manhart, supra, at 709 ("Practices that classify employees in terms of religion, race, or sex tend to preserve traditional assumptions about groups rather than thoughtful scrutiny of individuals"). This reliance [***499] on the "aggregate" and on probabilities confirms that the Court has abandoned heightened scrutiny, which requires a direct rather than approximate fit of means to ends. We would not tolerate the Government's claim that hiring persons of a particular race leads to better service "in the aggregate," and we should not accept as legitimate the FCC's claim in this case that members of

certain races will provide superior programming, even if "in the aggregate." The Constitution's text, our cases, and our Nation's history foreclose such premises.

[*621] 2

Moreover, the FCC's selective focus on viewpoints associated with race illustrates a particular tailoring difficulty. The asserted interest is in advancing the Nation's different "social, political, esthetic, moral, and other ideas and experiences," [**131] Red Lion, 395 U.S., at 390, yet of all the varied traditions and ideas shared among our citizens, the FCC has sought to amplify only those particular views it identifies through the classifications most suspect under equal protection doctrine. Even if distinct views could be associated with particular ethnic and racial groups, focusing on this particular aspect of the Nation's views calls into question the Government's genuine commitment to its asserted interest. See Bakke, 438 U.S., at 314 (opinion of Powell, J.) (race-conscious measures might be employed to further diversity only if race were one of many aspects of background sought and considered relevant to achieving a diverse student body).

Our equal protection doctrine governing intermediate review indicates that the Government may not use race and ethnicity as "a 'proxy for other, more germane bases of classification.'" Hogan, 458 U.S., at 726, quoting Craig v. Boren, 429 U.S. 190, 198 (1976). The FCC has used race as a proxy for whatever views it believes to be underrepresented in the broadcasting [**132] spectrum. This reflexive or unthinking use of a suspect classification is the hallmark of an unconstitutional policy. See, e. g., Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142, 151-152 (1980); Craig, supra, at 198-199; Wiesenfeld,

supra, at 643-645. The ill fit of means to ends is manifest. The policy is overinclusive: Many members of a particular racial or ethnic group will have no interest in advancing the views the FCC believes to be underrepresented, or will find them utterly foreign. The policy is underinclusive: It awards no preference to disfavored individuals who may be particularly well versed in and committed to presenting those views. The FCC has failed to implement a case-by-case determination, and that failure is particularly unjustified [*622] when individualized hearings already occur, as in the comparative licensing process. See Orr v. Orr, 440 U.S. 268, 281 (1979). Even in the remedial context, we have required that the Government adopt means to ensure that the award of a particular preference advances the asserted interest. [**133] In Fullilove, even reviewing an exercise of @ 5 powers, the Court upheld the challenged set-aside only because it contained a waiver provision [***500] that ensured that the program served its remedial function in particular cases. See Fullilove, 448 U.S., at 487-488 (opinion of Burger, C. J.); see also Croson, 488 U.S., at 488-489 (opinion of O'CONNOR, J.).

Moreover, the FCC's programs cannot survive even intermediate scrutiny because race-neutral and untried means of directly accomplishing the governmental interest are readily available. The FCC could directly advance its interest by requiring licensees to provide programming that the FCC believes

would add to diversity. The interest the FCC asserts is in programming diversity, yet in adopting the challenged policies, the FCC expressly disclaimed having attempted any direct efforts to achieve its asserted goal. See 1978 Policy Statement, 68 F. C. C. 2d, at 981; ante, at 584-585, n. 36. The Court suggests that administrative convenience excuses this failure, ibid., yet intermediate scrutiny bars the Government from [**134] relying upon that excuse to avoid measures that directly further the asserted interest. See, e. g., Orr v. Orr, supra, at 281; Craig v. Boren, supra, at 198. The FCC and the Court suggest that First Amendment interests in some manner should exempt the FCC from employing this direct, race-neutral means to achieve its asserted interest. They essentially argue that we may bend our equal protection principles to avoid more readily apparent harm to our First Amendment values. But the FCC cannot have it both ways: Either the First Amendment bars the FCC from seeking to accomplish indirectly what it may not accomplish directly; or the FCC may pursue the goal, but must do so in a manner that comports with equal protection principles. And if the [*623] FCC can direct programming in any fashion, it must employ that direct means before resorting to indirect race-conscious means.

Other race-neutral means also exist, and all are at least as direct as the FCC's racial classifications. The FCC could evaluate applicants upon their ability to provide, and commitment to offer, whatever programming the FCC believes would [**135] reflect underrepresented viewpoints. If the FCC truly seeks diverse programming rather than allocation of goods to persons of particular racial backgrounds, it has little excuse to look to racial background rather than programming to further the programming interest. Additionally, if the FCC believes that certain persons by virtue of their unique experiences will contribute as owners to more diverse broadcasting, the FCC could simply favor applicants whose particular background indicates that they will add to the diversity of programming, rather than rely solely upon suspect classifications. Also, race-neutral means exist to allow access to the broadcasting industry for those persons excluded for financial and related reasons. The Court reasons that various minority preferences, including those reflected in the distress

sale, overcome barriers of information, experience, and financing that inhibit minority ownership. Ante, at 593-594. Race-neutral financial and informational measures most directly reduce financial and informational barriers.

The FCC could develop an effective [***501] ascertainment policy, one guaranteeing programming that reflects underrepresented viewpoints. [**136] The Court's discussion of alternatives nearly exclusively focuses on the FCC's ascertainment policy. Ante, at 585-589. Yet that policy applied only to existing licensees, addressed not viewpoints but issues of concern to often relatively homogeneous local communities, and, by the FCC's own admission, was toothless and ineffective. According to the FCC, the ascertainment policies altered programming little more than the market already did, and provided "no guarantee that once a concern is ascertained by [*624] formal or informal means, programming responsive to that concern will be presented." Commercial TV Stations, 98 F. C. C. 2d 1076, 1098 (1984), reconsideration denied, 104 F. C. C.

2d 358 (1986), remanded on other grounds sub nom. Action for Children's Television v. FCC, 261 U.S. App. D. C. 253, 821 F. 2d 741 (1987); see also 98 F. C. C. 2d, at 1098-1101. Unsurprisingly, the FCC has concluded that this limited ascertainment policy has not proved to be effective, and has eliminated it throughout most media. See id., at 1097-1101; [**137] id., at 1099, and nn. 78-80 (surveying proceedings abandoning ascertainment requirements).

The FCC has posited a relative absence of " minority viewpoints," yet it has never suggested what those views might be or what other viewpoints might be absent from the broadcasting spectrum. It has never identified any particular deficiency in programming diversity that should be the subject of greater programming or that *necessitates* racial classifications.

The FCC has never attempted to assess what alternatives to racial classifications might prove effective. The 1978 Policy Statement referred to only two alternatives that the Commission had undertaken: a minority hiring policy and the ascertainment policy. 68 F. C. C. 2d, at 979-980. Relying on ownership statistics and cursory evaluations of what viewpoints the broadcasting spectrum contained, the FCC asserted that insufficient programming diversity existed and that racial classifications were necessary. Id., at 980-981. Not until 1986 did the FCC attempt to determine the nature of the viewpoints that might be underrepresented or to determine [**138] whether effective race-neutral measures might achieve the FCC's asserted interest. See, e. g., Notice of Inquiry on Racial, Ethnic, or Gender Classifications, 1 F. C. C. Rcd 1315 (1986), modified, 2 F. C. C. Rcd 2377 (1987). The FCC solicited comment about a range of potential race-neutral alternatives: It asked what race-neutral means might effectively increase program diversity, [*625] whether it should require an individualized showing of ability to contribute to program diversity, whether it should allow nonminority members to demonstrate their ability to contribute to diverse programming, and whether it should select applicants based on demonstrated commitment to particular issues rather than according to race. See 1 F. C. C. Rcd, at 1318. It was this inquiry, of course, that the congressional appropriations measures halted. See Continuing Appropriations Act for Fiscal Year 1988, Pub. L. 100-202, 101 Stat. 1329. Thus the record is clear: The FCC has never determined that it has any need to resort to racial classifications to achieve its asserted interest, [***502] and it has employed [**139] race-conscious means before adopting readily available race-neutral, alternative means.

The FCC seeks to avoid the tailoring difficulties by focusing on minority ownership rather than the asserted interest in diversity of broadcast viewpoints. The Constitution clearly prohibits allocating valuable goods such as broadcast licenses simply on the basis of race. See Bakke, 438 U.S., at 307 (opinion of Powell, J.). Yet the FCC refers to the lack of minority ownership of stations to support the existence of a lack of diversity of viewpoints, and has fitted its programs to increase ownership. See 1978 Policy Statement, *supra*; Commission Policy Regarding Advancement of Minority Ownership in Broadcasting, 92 F. C. C. 2d 849 (1982). This repeated focus on ownership supports the inference that the FCC seeks to allocate licenses based on race, an impermissible end, rather than to increase diversity of viewpoints, the asserted

interest. And this justification that links the use of race preferences to minority ownership rather than to diversity of viewpoints ensures that the FCC's programs, like that at issue in Croson, "cannot [**140] be said to be narrowly tailored to any goal, except perhaps outright racial balancing." Croson, 488 U.S., at 507.

[*626] 3

Even apart from these tailoring defects in the FCC's policies, one particular flaw underscores the Government's ill fit of means to ends. The FCC's policies assume, and rely upon, the existence of a tightly bound "nexus" between the owners' race and the resulting programming. The Court's lengthy discussion of this issue, ante, at 569-579, purports to establish only that some relation exists between owners' race and programming: i. e., that the FCC's choice to focus on allocation of licenses is rationally related to the asserted end. The Court understandably makes no stronger claims, because the evidence provides no support and because the requisite deference would so obviously abandon heightened scrutiny. For argument's sake, we can grant that the Court's review of congressional hearings and social science studies establishes the existence of some rational nexus. But even assuming that to be true, the Court's discussion does not begin to establish that the programs are directly and substantially related to the interest [**141] in diverse programming. That equal protection issue turns on the degree owners' race is related to programming, rather than whether any relation exists. 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, that the policies rest instead upon illegitimate stereotypes, and that individualized determinations must replace the FCC's use of race as a proxy for the desired programming.□

Three difficulties suggest that the nexus between owners' race and programming is considerably less than substantial. First, the market shapes programming to a tremendous extent. Members of minority groups who own licenses might be thought, like other owners, to seek to broadcast programs that will attract and retain audiences, rather than programs [***503] that reflect the owner's tastes and preferences. See Winter Park Communications, Inc. v. FCC, 277 U.S. App. D. C. 134, 145-148, 873 F. 2d 347, 358-361 (1989) (case below) (Williams, [*627] J., concurring in part and dissenting in part) (surveying evidence suggesting programming geared to [**142] audience taste). Second, station owners have only limited control over the content of programming. The distress sale presents a particularly acute difficulty of this sort. Unlike the comparative licensing program, the distress sale policy provides preferences to minority owners who neither intend nor desire to

manage the station in any respect. See ante, at 557-558; Commission Policy Regarding Advancement of Minority Ownership in Broadcasting, supra. Whatever distinct programming may attend the race of an owner actively involved in managing the station, an absentee owner would have far less effect on programming.

Third, the FCC had absolutely no factual basis for the nexus when it adopted the policies and has since established none to support its existence. Until the mid-1970's, the FCC believed that its public interest mandate and 1965 Policy Statement precluded it from awarding preference based on race and ethnicity, and instead required applicants to demonstrate particular entitlement to an advantage in a comparative hearing. Policy Statement on Comparative Broadcast Hearings, 1 F. C. C. 2d 393 (1965). See, e. g., Mid-Florida Television Corp., 33 F. C. C. 2d 1 [**143] (Rev. Bd.), review denied, 37 F. C. C. 2d 559 (1972), rev'd, TV 9, Inc. v. FCC, 161 U.S. App. D. C. 349, 495 F. 2d 929 (1973), cert. denied, 419 U.S. 986 (1974). The Court of Appeals for the District of Columbia Circuit rejected the FCC's position on statutory grounds. See TV 9, 161 U.S. App. D. C., at 356-358, 495 F. 2d, at 936-938. The court rejected the FCC's arguments that "the Communications Act, like the Constitution, is color-blind," and that a race preference was incompatible with the FCC's governing statute. Ibid. Instead, based on nothing other than its conception of the public interest, that court required that an applicant's membership in a minority group be presumed to lead to greater diversity of programming. Id., at 357-358, 495 F. 2d, at 937-938; [*628] see Garrett v. FCC, 168 U.S. App. D. C. 266, 272-273, 513 F. 2d 1056, 1062-1063 (1975). Principally relying on the panel's presumed nexus between race and programming, [**144] the FCC in its 1978 Policy Statement acquiesced and established the policies challenged in these cases. See 1978 Policy Statement, supra, at 981-982. In the mid-1980's, the FCC, prompted by this Court's decisions indicating that a factual predicate must be established to support use of race classifications, unanimously sought to examine whether, and to what extent, any nexus existed between an owner's race and programming. See Notice of Inquiry on Racial, Ethnic, or Gender Classifications, 1 F. C. C. Rcd 1315 (1986), modified, 2 F. C. C. Rcd 2377 (1987). As the Chairman of the FCC explained to Congress:

"To the extent that heightened scrutiny requires certain factual predicates, we discovered that notwithstanding our statements in the past regarding the assumed nexus between minority or female ownership and program diversity, a factual predicate has never been established. [***504] "For example, the Commission has at no time has examined whether there is a nexus between a broadcast owner's race or gender and program diversity, either on a case-by-case basis or generically. We had no [**145] reason to, because the court in TV 9 told us we could, indeed must, assume such a nexus." Minority -Owned Broadcast Stations, Hearing on H. R. 5373 before the Subcommittee on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce, 99th Cong., 2d Sess., 16 (1986).

Through the appropriations measures, Congress barred the FCC's attempt to initiate that examination. See Continuing Appropriations Act for Fiscal Year 1988, 101 Stat. 1329-31.

Even apart from the limited nature of the Court's claims, little can be discerned from the congressional action. First, the Court's survey does not purport to establish that the [*629] FCC or Congress has identified any

particular deficiency in the viewpoints contained in the broadcast spectrum.

Second, no degree of congressional endorsement may transform the equation of race with behavior and thoughts into a permissible basis of governmental action. Even the most express and lavishly documented congressional declaration that members of certain races will as owners produce distinct and superior programming would not allow the Government to employ such reasoning to allocate benefits and burdens among [**146] citizens on that basis. Third, we should hesitate before accepting as definitive any declaration regarding even the existence of a nexus. The two legislative reports that claim some nexus to exist refer to sources that provide no support for the proposition. See S. Rep. No. 100-182, p. 76 (1987); H. R. Conf. Rep. No. 97-765 p. 43 (1982). Congress, through appropriations measures, sought to foreclose examination of an issue that the FCC believed to be entirely unresolved. See Continuing Appropriations Act for Fiscal Year 1988, supra. Especially where Congress rejects the considered judgment of the executive officials possessing particular expertise regarding the matter in issue, courts are hardly bound to accept the congressional declaration. See, e. g., Rostker v. Goldberg, 453 U.S. 57, 83-85 (1981) (WHITE, J., dissenting). Additionally, the FCC created the challenged policies. Congress has, through the appropriations process, frozen those policies in place by preventing the FCC from reexamining or altering them. That congressional action does not amount to an endorsement of the reasoning and empirical claims originally asserted and [**147] then abandoned by the FCC, and does not reflect the same considered judgment embodied in measures crafted through the legislative process and subject to the hearings and deliberation accompanying substantive legislation. Cf. TVA v. Hill, 437 U.S. 153 (1978); Andrus v. Sierra Club, 442 U.S. 347, 359-361 (1979).

[*630] 4

Finally, the Government cannot employ race classifications that unduly burden individuals who are not members of the favored racial and ethnic groups. See, e. g., Wygant, 476 U.S., at 280-281 (plurality opinion). The [***505] challenged policies fail this independent requirement, as well as the other constitutional requirements. The comparative licensing and distress sale programs provide the eventual licensee with an exceptionally valuable property and with a rare and unique opportunity to serve the local community. The distress sale imposes a particularly significant burden. The FCC has at base created a specialized market reserved exclusively for minority controlled applicants. There is no more rigid quota than a 100% set-aside. This fact is not altered [**148] by the observation, see ante, at 598-599, that the FCC and the seller have some discretion over whether stations may be sold through the distress program. For the would-be purchaser or person who seeks to compete for the station, that opportunity depends entirely upon race or ethnicity. The Court's argument that the distress sale allocates only a small percentage of all license sales, ante, at 599, also misses the mark. This argument readily supports complete preferences and avoids scrutiny of particular programs: It is no response to a person denied admission at one school, or discharged from one job, solely on the basis of race, that other schools or employers do not discriminate.

The comparative licensing program, too, imposes a significant burden. The Court's emphasis on the multifactor process should not be confused with the claim that the preference is in some sense a minor one. It is not. The basic nonrace criteria are not difficult to meet, and, given the sums at stake,

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applicants have every incentive to structure their ownership arrangement to prevail in the comparative process. Applicants cannot alter their race, of course, and race is clearly the dispositive [**149] factor in a substantial percentage of comparative proceedings. Petitioner Metro asserts that [*631] race is overwhelmingly the dispositive factor. In reply, the FCC admits that it has not assessed the operation of its own program, Brief for FCC in No. 89-453, p. 39, and the Court notes only that " minority ownership does not guarantee that an applicant will prevail." Ante, at 597-598, n. 50.

In sum, the FCC has not met its burden even under the Court's test that approves of racial classifications that are substantially related to an important governmental objective. Of course, the programs even more clearly fail the strict scrutiny that should be applied. The Court has determined, in essence, that Congress and all federal agencies are exempted, to some ill-defined but significant degree, from the Constitution's equal protection requirements. This break with our precedents greatly undermines equal protection guarantees and permits distinctions among citizens based on race and ethnicity which the Constitution clearly forbids. I respectfully dissent.

JUSTICE KENNEDY, with whom JUSTICE SCALIA joins, dissenting.

Almost 100 years ago in Plessy v. Ferguson, 163 U.S. 537 (1896), [**150] this Court upheld a government-sponsored race-conscious measure, a Louisiana law that required "equal but separate accommodations" for "white" and "colored" railroad passengers. The [***506] Court asked whether the measures were "reasonable," and it stated that "[i]n determining the question of reasonableness, [the legislature] is at liberty to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort." Id., at 550. The Plessy Court concluded that the "race-conscious measures" it reviewed were reasonable because they served the governmental interest of increasing the riding pleasure of railroad passengers. The fundamental errors in Plessy, its standard of review and its validation of rank racial insult by the State, distorted the law for six decades before the Court announced its apparent demise in Brown v. Board of Education, 347 U.S. 483 (1954). [*632] Plessy's standard of review and its explication have disturbing parallels to today's majority opinion that should warn us something is amiss here.

Today the Court grants Congress [**151] latitude to employ "benign race-conscious measures . . . [that] are not . . . designed to compensate victims of past governmental or societal discrimination," but that "serve important governmental objectives . . . and are substantially related to achievement of those objectives." Ante, at 564-565. The interest the Court accepts to uphold the race-conscious measures of the Federal Communications Commission (Commission or FCC) is "broadcast diversity." Furthering that interest, we are told, is worth the cost of discriminating among citizens on the basis of race because it will increase the listening pleasure of media audiences. In upholding this preference, the majority exhumes Plessy's deferential approach to racial classifications. The Court abandons even the broad societal remedial justification for racial preferences once advocated by

JUSTICE MARSHALL, e. g., Regents of University of California v. Bakke, 438 U.S. 265, 396 (1978) (separate opinion), and now will allow the use of racial classifications by Congress untied to any goal of addressing the effects of past race discrimination. All that need be shown under the new approach,

[**152] which until now only JUSTICE STEVENS had advanced, Richmond v. J. A. Croson Co., 488 U.S. 469, 511 (1989) (opinion concurring in part and concurring in judgment); Wygant v. Jackson Board of Education, 476 U.S. 267, 313 (1986) (dissenting opinion), is that the future effect of discriminating among citizens on the basis of race will advance some "important" governmental interest.

Once the Government takes the step, which itself should be forbidden, of enacting into law the stereotypical assumption that the race of owners is linked to broadcast content, it follows a path that becomes ever more tortuous. It must decide which races to favor. While the Court repeatedly refers to the preferences as favoring " minorities, " ante, at 554, and [*633] purports to evaluate the burdens imposed on "nonminorities," ante, at 596, it must be emphasized that the discriminatory policies upheld today operate to exclude the many racial and ethnic minorities that have not made the Commission's list. The enumeration of the races to be protected is borrowed from a remedial statute, but since the remedial rationale must [**153] be [***507] disavowed in order to sustain the policy, the race classifications bear scant relation to the asserted governmental interest. The Court's reasoning provides little justification for welcoming the return of racial classifications to our Nation's laws. n1

----------Footnotes----------

n1 The Court fails to address the difficulties, both practical and constitutional, with the task of defining members of racial groups that its decision will require. The Commission, for example, has found it necessary to trace an applicant's family history to 1492 to conclude that the applicant was "Hispanic" for purposes of a minority tax certificate policy. See Storer Broadcasting Co., 87 F. C. C. 2d 190 (1981). I agree that "the very attempt to define with precision a beneficiary's qualifying racial characteristics is repugnant to our constitutional ideals." Fullilove v. Klutznick, 448 U.S. 448, 534, n. 5 (1980) (STEVENS, J., dissenting); see id., at 531-532 (Stewart, J., dissenting). "If the National Government is to make a serious effort to define racial classes by criteria that can be administered objectively, it must study precedents such as the First Regulation to the Reichs Citizenship Law of November 14, 1935, translated in 4 Nazi Conspiracy and Aggression, Document No. 1417-PS, pp. 8-9 (1946)." Id., at 534, n. 5. Other examples are available. See Population Registration Act No. 30 of 1950, Statutes of the Republic of South Africa 71 (1985).

----------End Footnotes----------

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I cannot agree with the Court that the Constitution permits the Government to discriminate among its citizens on the basis of race in order to serve interests

so trivial as "broadcast diversity." In abandoning strict scrutiny to endorse this interest the Court turns back the clock on the level of scrutiny applicable to federal race-conscious measures. Even strict scrutiny may not have sufficed to invalidate early race-based laws of most doubtful validity, as we learned in Korematsu v. United States, 323 U.S. 214 (1944). But the relaxed standard of review embraced today would validate that case, and any number of future racial classifications the [*634] Government may find useful. Strict scrutiny is the surest test the Court has yet devised for holding true to the constitutional command of racial equality. Under our modern precedents, as JUSTICE O'CONNOR

explains, strict scrutiny must be applied to this statute. The approach taken to congressional measures under @ 5 of the Fourteenth Amendment in Fullilove v. Klutznick, 448 U.S. 448 (1980), even assuming its validity, see Croson, supra, at 518 [**155] (opinion of KENNEDY, J.), is not applicable to this case.

As to other exercises of congressional power, our cases following Bolling v. Sharpe, 347 U.S. 497 (1954), such as Weinberger v. Wiesenfeld, 420 U.S. 636, 638, n. 2 (1975), until they were in effect overruled today, had held that the Congress is constrained in its actions by the same standard applicable to the States: strict scrutiny of all racial classifications. The majority cannot achieve its goal of upholding the quotas here under the rigor of this standard, and so must devise an intermediate test. JUSTICE O'CONNOR demonstrates that this statute could not survive even intermediate scrutiny as it had been understood until today. The majority simply says otherwise, providing little reasoning or real attention to past cases in its opinion of 50 pages.

The Court insists that the programs under review are "benign." JUSTICE STEVENS agrees. "[T]he reason for the classification -- the recognized interest in broadcast diversity -- is [***508] clearly identified and does not imply any judgment concerning the abilities of owners of different races or the merits [**156] of different kinds of programming. Neither the favored nor the disfavored class is stigmatized in any way." Ante, at 601 (STEVENS, J., concurring). n2 A fundamental error [*635] of the Plessy Court was its similar confidence in its ability to identify "benign" discrimination: "We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it." 163 U.S., at 551. Although the majority is "confident" that it can determine when racial discrimination is benign, ante, at 564-565, n. 12, it offers no explanation as to how it will do so.

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n2 JUSTICE STEVENS' assertion that the FCC policy "does not imply any judgment concerning . . . the merits of different kinds of programming," ante, at 601, is curious. If this policy, which is explicitly aimed at the ultimate goal of altering programming content, does not "imply any judgment concerning . . . the merits of different kinds of programming," then it is difficult to see how the FCC's policy serves any governmental interest, let alone substantially

furthers an important one.

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The Court also justifies its result on the ground that "Congress and the Commission have determined that there may be important differences between the broadcasting practices of minority owners and those of their nonminority counterparts." Ante, at 580. The Court is all too correct that the type of reasoning employed by the Commission and Congress is not novel. Policies of racial separation and preference are almost always justified as benign, even when it is clear to any sensible observer that they are not. The following statement, for example, would fit well among those offered to uphold the Commission's racial preference policy: "The policy is not based on any concept

of superiority or inferiority, but merely on the fact that people differ, particularly in their group associations, loyalties, cultures, outlook, modes of life and standards of development." See South Africa and the Rule of Law 37 (1968) (official publication of the South African Government).

The history of governmental reliance on race demonstrates that racial policies defended as benign often are not seen that way by the individuals affected by them. Today's dismissive statements aside, a plan of the type [**158] sustained here may impose "stigma on its supposed beneficiaries," Croson, 488 U.S., at 516-517 [*636] (opinion of STEVENS, J.), and "foster intolerance and antagonism against the entire membership of the favored classes," Fullilove, 448 U.S., at 547 (STEVENS, J., dissenting). Although the majority disclaims it, the FCC policy seems based on the demeaning notion that members of the defined racial groups ascribe to certain " minority views" that must be different from those of other citizens. Special preferences also can foster the view that members of the favored groups are inherently less able to compete on their own. And, rightly or wrongly, special preference programs often are perceived as targets [***509] for exploitation by opportunists who seek to take advantage of monetary rewards without advancing the stated policy of minority inclusion. n3

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n3 The record in one of these two cases indicates that Astroline Communications Company, the beneficiary of the distress sale policy in this case, had a total capitalization of approximately $ 24,000,000. Its sole minority principal was a Hispanic-American who held 21% of Astroline's overall equity and 71% of its voting equity. His total cash contribution was $ 210. See App. in No. 89-700, pp 68-69.

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The perceptions of the excluded class must also be weighed, with attention to the cardinal rule that our Constitution protects each citizen as an individual,

not as a member of a group. There is the danger that the "stereotypical thinking" that prompts policies such as the FCC rules here "stigmatizes the disadvantaged class with the unproven charge of past racial discrimination." Croson, 488 U.S., at 516 (opinion of STEVENS, J.). Whether or not such programs can be described as "remedial," the message conveyed is that it is acceptable to harm a member of the group excluded from the benefit or privilege. If this is to be considered acceptable under the Constitution, there are various possible explanations. One is that the group disadvantaged by the preference should feel no stigma at all, because racial preferences address not the evil of intentional discrimination but the continuing unconscious use of stereotypes that disadvantage [*637] minority groups. But this is not a proposition that the many citizens, who to their knowledge "have never discriminated against anyone on the basis of race," ibid., will find easy to accept.

Another explanation [**160] might be that the stigma imposed upon the excluded class should be overlooked, either because past wrongs are so grievous that the disfavored class must bear collective blame, or because individual harms are simply irrelevant in the face of efforts to compensate for racial inequalities. But these are not premises that the Court even appears willing

to address in its analysis. Until the Court is candid about the existence of stigma imposed by racial preferences on both affected classes, candid about the "animosity and discontent" they create, Fullilove, supra, at 532-533 (STEVENS, J., dissenting), and open about defending a theory that explains why the cost of this stigma is worth bearing and why it can consist with the Constitution, no basis can be shown for today's casual abandonment of strict scrutiny.

Though the racial composition of this Nation is far more diverse than the first Justice Harlan foresaw, his warning in dissent is now all the more apposite: "The destinies of the two races, in this country, are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate [**161] to be planted under the sanction of law." Plessy, 163 U.S., at 560 (dissenting opinion). Perhaps the Court can succeed in its assumed role of case-by-case arbiter of when it is desirable and benign for the Government to disfavor some citizens and favor others based on the color of their skin. Perhaps the tolerance and decency to which our people aspire will let the disfavored rise above hostility and the favored [***510] escape condescension. But history suggests much peril in this enterprise, and so the Constitution forbids us to undertake it. I regret that after a [*638] century of judicial opinions we interpret the Constitution to do no more than move us from "separate but equal" to "unequal but benign."