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Life After Adarand: What Happened to the Metro Broadcasting Diversity Rationale for Affirmative Action in Telecommunications Ownership?

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LIFE AFTER *ADARAND*: WHAT HAPPENED TO THE *METRO BROADCASTING* DIVERSITY RATIONALE FOR AFFIRMATIVE ACTION IN TELECOMMUNICATIONS OWNERSHIP?

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The United States Supreme Court severely restricted affirmative action policies in Adarand Constructors, Inc. v. Pena. *In this opinion, a majority of the Court held that all state or federally mandated affirmative action programs are to be analyzed under strict scrutiny. This test requires affirmative action programs to meet a compelling governmental interest and be narrowly tailored.*

Adarand *raised issues concerning the validity of the Federal Communications Commission's affirmative action ownership policies. Previously, the Court in* Metro Broadcasting, Inc. v. FCC *found the FCC minority ownership policies constitutional under a lower (intermediate) standard of review. In* Adarand, *the Court specifically overruled the use of intermediate scrutiny in* Metro Broadcasting, *casting into doubt the FCC's affirmative action policies.* Adarand *suggests that past discrimination may be the only constitutionally viable basis for affirmative action programs. Because many FCC affirmative action programs are based on diversity, this ruling calls those programs into question.*

Many constitutional law scholars, civil rights advocates, and industry leaders have speculated about what, if anything, the FCC can do to deal with this complicated legal issue. This Article suggests a doctrinal and policy solution to this affirmative action dilemma. The Article identifies and describes the current status of each of the FCC's affirmative action programs; summarizes the current status of affirmative action law and how it generally applies to the FCC programs; and then suggests that the FCC conduct studies identifying instances of past (or present) discrimination that will help the FCC establish a compelling governmental interest, which may satisfy the first prong of the Supreme Court's currant affirmative action test.

INTRODUCTION

Since the late 1970s, the Federal Communications Commission (FCC) has had several programs in place to increase ownership of broadcast and other spectra by women and members of minority groups. These affirmative action programs have been justified on the grounds that, given the correlation between the racial and

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ethnic status of the broadcast owner and the station's programming, it is important to increase the number of minority- and women-owned broadcast stations. The Supreme Court agreed with this analysis for affirmative action programs in *Metro Broadcasting, Inc. v. FCC.*[1] Using the intermediate level of scrutiny, the Court found that two FCC affirmative action programs were constitutional. These programs were: (1) the distress sale policy, which created a market only of minorities for a station that was in jeopardy of losing its license; and (2) the comparative hearings policy, which gave prospective licensees a "plus" for being either a member of a racial minority group or a woman. All this changed, however, when the Supreme Court issued its decision in *Adarand Constructors, Inc. v. Pena*[2] holding that all government affirmative action programs would be analyzed under strict scrutiny and specifically overruling the intermediate standard of review used in *Metro Broadcasting.* The confluence of these decisions presents the FCC with complex choices for implementing any future affirmative action programs. These decisions raise the question of whether diversity, a long-held basis for many FCC rules regulating broadcast ownership, is still a sufficient basis for establishing affirmative action programs.

Historically, whites had a virtual monopoly on broadcast ownership.[3] There were no minority-owned radio stations until 1949 when the FCC awarded a license to radio station WERD and its owner, Jesse Blayton, in Atlanta.[4] There were no minority-owned TV stations until 1973, when the FCC awarded a license for WGPR-Detroit to a minority-owned business.[5] In 1978, when the FCC adopted its affirmative action policy, approximately .05%, or forty broadcast licenses, were held by minority-owned businesses.[6] In 1996, minority-owned businesses owned approximately 3.1% of broadcast properties, but this percentage decreased to 2.9% in 1998.[7] This decline is attributable to consolidation in the radio in-

1. 497 U.S. 547, 567–68 (1990).

2. 515 U.S. 200, 227 (1995).

3. *See, e.g.*, Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1707–91 (1993) (discussing historical examples of how whiteness evolved into property ownership, giving whites advantages over members of minority groups).

4. *See* Antoinette Cook Bush & Marc S. Martin, *The FCC's Minority Ownership Policies from Broadcasting to PCS*, 48 FED. COMM. L.J. 423, 424 (1996).

5. *See id.* at 424.

6. *See id.*

7. *See* National Telecommunications and Information Administration, United States Department of Commerce, *Minority Commercial Broadcast Ownershsip in the United States* (visited May 16, 2000) <http://www.ntia.doc.gov/opadhome/minown98/main.htm> (on

dustry, which pressured small broadcast stations to sell or expand their properties in order to become more competitive. The first woman broadcast owner, Marie Zimmerman, owned a radio station in Vinton, Iowa, in 1922.[8] Because of lack of funds and strong competition, she held the license for less than one year.[9] Only six radio stations owned by non-minority women have been recently identified.[10]

Given the new legal terrain for affirmative action programs enunciated by the Supreme Court in *Adarand* and the economic pressures on minority- and women-owned broadcasters to sell their stations to market consolidators, it is important for the FCC to do something to increase diversity of ownership of broadcast stations. The FCC is, however, in a difficult situation because establishing an affirmative action program creates legal and political risks (as will be seen below): since the Supreme Court decided *Adarand*, no department of the federal government has done a study justifying affirmative action programs. The different departments have engaged in internal reviews of their programs with members of a Justice Department Task Force.[11] The Justice Department issued a Public Notice[12] entitled *Proposed Reforms to Affirmative Action in Federal Procurement.*[13] These Reforms addressed more specifically the narrow tailoring prong of the *Adarand* test.[14]

The Justice Department issued an opinion stating that it was unnecessary to focus on the first part of the *Adarand* test dealing with compelling state interest because there was a wealth of support for finding a compelling state interest for affirmative action programs

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file with the *University of Michigan Journal of Law Reform*) (summarizing results of 1997–1998 ownership survey).

8. *See* Donna Halper, *Marie Zimmerman—Broadcasting's First Female Owner* (visited Feb. 27, 2000) <http://www.oldradio.com/archives/people/zimmerman.html> (on file with the *University of Michigan Journal of Law Reform*).

9. *See id.*

10. *See* Civil Rights Forum on Communications Policy, *When Being No. 1 Is Not Enough: The Impact of Advertising Practices on Minority-Owned & Minority-Formatted Broadcast Stations*, at 16 (Jan. 1999). Determining the number and identity of the female-owned stations is difficult because, although the National Telecommunications and Information Administration publishes an annual list of minority-owned stations, it does not do so for female-owned stations. *See id.* In addition, the FCC did not require broadcasters to report their gender or race until October 1998. *See id.*

11. *See generally* Proposed Reforms to Affirmative Action in Federal Procurement, 61 Fed. Reg. 26,042 (1996).

12. This proposal was designed to be a model for amending the affirmative action provisions of the Federal Acquisition Regulation and the Defense Federal Acquisition Regulation Supplement. *See id.*

13. *See id.*

14. *See id.* at 26,045–48.

in federal procurement. The Justice Department said the following:

> Based upon [a number of] congressional actions, the legislative history supporting them, and the evidence available to Congress, *this congressional judgment is credible and constitutionally defensible.* Indeed, the survey of currently available evidence conducted by the Justice Department since the *Adarand* decision, including the review of numerous specific studies of discrimination conducted by state and local governments throughout the nation, leads to the conclusion that, *in the absence of affirmative remedial efforts, federal contracting would unquestionably reflect the continuing impact of discrimination that has persisted over an extended period.* For purposes of these proposed reforms, therefore, the Justice Department takes as a constitutionally justified premise that *affirmative action in federal procurement is necessary, and that the federal government has a compelling interest* to act on that basis in the award of federal contracts.[15]

For the FCC, the *Adarand* decision presents a different and more complex situation because the FCC, unlike other federal agencies, does not have a wealth of findings of discrimination against its licensees. Historically, the FCC has rested its affirmative action programs almost solely on the grounds of broadcast and ownership diversity. In several recent cases, the Supreme Court suggested that this rationale may no longer be a compelling governmental interest.

This Article addresses what the FCC can do now to deal with these issues. In Part I, the Article explores the current and former FCC affirmative action programs. Parts II and III examine and analyze current and past Supreme Court and lower court cases dealing with the constitutionality of affirmative action programs. Part IV looks at the requirements for affirmative action programs for women. Finally, the Article concludes that performing a study demonstrating past discrimination[16] is the best way for the FCC to

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15. *Id.* (emphasis added).

16. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 479–80 (1989) (noting that Richmond introduced a statistical study program to adopt its set-aside ordinances, which indicated that while 50% of the city's population was black, only 0.67% of its prime construction contracts had been awarded to minority businesses in the last five years). The majority also noted, however, that the statistical study did not provide a strong basis for concluding that remedial action was required. *See id.* at 501.

satisfy the first prong of the *Adarand* test to establish a compelling governmental interest.

I. CURRENT AND FORMER FCC AFFIRMATIVE ACTION PROGRAMS

The FCC has employed affirmative action programs in three areas: (1) commercial broadcasting; (2) wireless spectrum-based services; and (3) cable. The FCC has justified all of these principally on the basis of diversity—either viewpoint diversity in the case of broadcast, and ownership diversity in the case of spectrum-based services. The wireless spectrum-based services programs have been justified by discrimination against minorities and women. Congressional action, judicial review, or FCC action have eliminated some of these programs. The only programs that are still technically in effect are the distress sale policy and the leased access minority programming rule; these programs are not currently in use and, after *Adarand*, their constitutionality is uncertain.

A. Use of Affirmative Action Programs in Commercial Broadcasting

1. Comparative Hearings—Since 1965 the FCC has stated that the primary objectives of comparative hearings for mutually-exclusive commercial broadcast license applications[17] were (1) maximizing diffusion and diversification of control of mass media communications; and (2) ensuring the "best practicable service to the public."[18] The FCC maintained that one of the most predictive factors in determining which applicant would provide the "best practicable service" was the integration of ownership into the day-to-day management of the station.[19] Despite recognizing that owner-managers were more responsive, the FCC initially refused to credit the minority ownership status of a license applicant under the integration criterion, based on the view that "the Communications Act, like the

17. When more than one individual or corporation applied for a license, the FCC held a hearing in order to consider who was best qualified to receive the license. The license applications were mutually exclusive in that only one individual could win the license for the given frequency. *See* Policy Statement on Comparative Hearings, 1 F.C.C.2d 393, 394 (1965).

18. *Id.* at 394.

19. *See id.* at 395–96. The FCC reasoned that it was desirable that the party legally responsible for the station also be responsible for day-to-day management, and that owner-managers would be more attuned and responsive to the listening needs of the local audience. *See id.*

Constitution, is color blind [and] . . . [minority] ownership must be shown on the record to result in some [independent] public interest benefit."[20] In response to the D.C. Circuit's decision in *TV 9, Inc. v. FCC*,[21] the FCC began considering ownership and participation in station management by members of minority groups as one of several factors in the comparative hearing proceedings. The FCC adopted the minority integration credit as an enhancement of the integration credit because it perceived "an extreme disparity between the representation of minorities in our population and in the broadcasting industry. . . ."[22]

Although women applicants for mutually-exclusive broadcast licenses did not initially receive enhancement credits for their gender status, the FCC's Review Board soon extended this enhancement to women.[23] The credit enhancement policy for gender

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20. Mid-Florida Television Corp., 33 F.C.C.2d 1, 17–18 (Rev. Bd. 1972), *review denied*, 37 F.C.C.2d 559 (1972), *rev'd sub nom.* TV 9, Inc. v. FCC, 495 F.2d 929 (D.C. Cir. 1973).

21. 495 F.2d 929 (D.C. Cir. 1973). In *TV 9*, an unsuccessful African American applicant for a radio license challenged the FCC's refusal to consider the minority ownership as an integration factor. *See id.* at 938 (finding that the racial identity of the African American prospective licensees was a relevant consideration in choosing between and among applicants); *see also* Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 F.C.C.2d 979, 983–84 (1978) [hereinafter 1978 Policy Statement].

22. 1978 Policy Statement, *supra* note 21, at 983–84.

23. *See* Gainesville Media, Inc., 70 F.C.C.2d 143, 149 (Rev. Bd. 1978). In *Gainesville*, the FCC initially stated:

> In our Decision we held that since there was no evidence in the record of the extent of female ownership in the mass media in Gainesville, we had no basis on which to conclude that such participation would achieve a public interest benefit. Upon further reflection, we now believe the better course is to consider female ownership and participation, despite the absence of record evidence regarding the ownership situations at other stations.

Id.

One month following the Review Board's decision in Gainesville, the Review Board offered the following rationale for extending enhancement credit to women:

> We hold that merit for female ownership and participation is warranted upon essentially the same basis as the merit given for black ownership and participation, but that it is a merit of lesser significance. . . . Women are a general population group which has suffered from a discriminatory attitude in various fields of activity, and one which, partly as a consequence, has certain separate needs and interests with respect to which the inclusion of women in broadcast ownership and operation can be of value. On the other hand, it is equally obvious that the need for diversity and sensitivity reflected in the structure of a broadcast station is not so pressing with respect to women as it is with respect to blacks—women have not been excluded from the mainstream of society as have black people.

Mid-Florida Television Corp., 70 F.C.C.2d 281, 326 (Rev. Bd. 1978), *set aside on other grounds*, 87 F.C.C.2d 203 (1981).

continued until 1992,[24] when the policy was struck as violative of the equal protection clause of the Fifth Amendment in *Lamprecht v. FCC*[25] by a three-judge panel led by then-Judge Clarence Thomas. The *Lamprecht* court reasoned that "any 'predictive judgments' concerning group behavior and the differences among different groups must at the very least be sustained by meaningful evidence" to withstand equal protection scrutiny.[26] The *Lamprecht* court found that the FCC's consideration of gender as a "plus factor" in comparative hearings was without any evidence that established a statistically meaningful link between woman ownership and the programming format of a station.[27]

In *Bechtel v. FCC*,[28] the D.C. Circuit invalidated the entire ownership integration credit criterion including the remaining race considerations. The court reasoned that the "policy of awarding preferences to applicants who intend to personally manage and operate a proposed station is 'particularly without foundation.'"[29] In 1994, the FCC stayed all ongoing comparative hearing cases pending resolution of the issues raised in *Bechtel*.[30] Against this backdrop, Congress, as part of the Balanced Budget

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24. The integration credit for gender had previously been invalidated by a panel of the D.C. Circuit in *Steele v. FCC*, 770 F.2d 1192 (D.C. Cir. 1985), on the basis that the FCC had no authority under the Communications Act to credit gender as an enhancement credit in the absence of record evidence that female ownership and management necessarily affected programming choices. A majority of the judges on the D.C. Circuit voted to rehear the case en banc and vacated the panel's opinion and judgment. *See* Steele v. FCC, No. 84-1776 (D.C. Cir. Oct. 31, 1985) (en banc). Prior to the rehearing, the FCC requested that the case be remanded to afford it an opportunity to seek comment and compile record evidence on the wisdom and effectiveness of its race and gender policies. The court remanded the case, and the FCC initiated a notice of inquiry on the subject. *See* Reexamination of the Commission's Comparative Licensing, Distress Sales, and Tax Certificate Policies Premised on Racial Ethnic or Gender Classifications, Notice of Inquiry, 1 F.C.C.R. 1315 (1986), *modified*, 2 F.C.C.R. 2377 (1987). After the inquiry was initiated, Congress essentially froze this inquiry through a rider to the Continuing Appropriations Act for Fiscal Year 1988, which ordered that

> none of the funds appropriated by 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 . . . to expand minority and women ownership of broadcasting licenses . . . other than to close [the pending reexamination] with a reinstatement of the prior policy.

Pub. L. No. 100-202, 101 Stat. 1329–31 (1987).

25. 958 F.2d 382 (D.C. Cir. 1992).

26. *Id.* at 393.

27. *See id.* at 393–98.

28. 10 F.3d 875 (D.C. Cir. 1993).

29. *Id.* at 887.

30. *See* FCC Freezes Comparative Hearings, 9 F.C.C.R. 1055 (1994), *modified*, 9 F.C.C.R. 6689 (1994), *further modified*, 10 F.C.C.R. 12,182 (1995).

Act of 1997, amended Section 309(j) of the Communications Act expressly to require that the FCC use competitive bidding procedures to resolve most initial licensing proceedings involving mutually-exclusive applications for commercial broadcast licenses.[31] The FCC has complied with the Congressional mandate.[32] In addition, the Telecommunications Act of 1996 eliminated comparative hearings for renewals of incumbent licensees.[33]

2. *Minority Tax Certificate Policy*—In 1978, the FCC implemented the minority tax certificate policy,[34] which provided incentives to owners of existing broadcast properties to sell their properties to minorities.[35] The tax certificate program allowed the seller to defer any gain realized on the sale if the property was sold to a minority purchaser, and the gain was rolled over into a qualified replacement broadcast property.

Like the minority integration credit in the comparative hearing context, the FCC based the tax certificate policy on the need to correct the extreme disparity between the proportion of minorities in the United States population and the number of minority

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31. *See* Pub. L. No. 105-33, § 3002, 111 Stat. 251, 258–59 (1997). In addition, the 1997 Budget Act added Section 309(l) of the Communications Act to provide that, with respect to competing applications for initial licenses for commercial radio and television stations filed with the FCC before July 1, 1997: (1) the FCC has authority to conduct a competitive bidding proceeding under Section 309(j) to award such licenses or permits; (2) that it must treat persons filing such applications as the only persons eligible to be qualified bidders; and (3) that, for a period of 180 days beginning on the date the 1997 Budget Act was enacted, the FCC must waive any provision of its regulations necessary to permit such persons to enter into an agreement to procure the removal of a conflict between their applications. *See* 47 U.S.C. § 309(j) (1994).

32. *In re* Implementation of Section 309(j) of the Communications Act—Competitive Bidding for Commercial Broadcast & Instructional Television Fixed Service Licenses, 16 Comm. Reg. (P&F) 462 (July 2, 1999).

33. Section 309(k)(4) provides that the FCC "shall not consider whether the public interest, convenience, and necessity might be served by the grant of a license to a person other than the renewal applicant." 47 U.S.C. § 309(k)(4) (1996).

34. The tax certificate program was never extended to women. *See* National Telecommunications & Information Admin., 69 F.C.C.2d 1591, 1593 n.9 (1978). The FCC explained the rationale for not extending the program to women:

> We have not concluded that the historical and contemporary disadvantagement [sic] suffered by women is of the same order, or has the same contemporary consequences, which would justify inclusion of a majority of the nation's population in a preferential category defined by the presence of "minority groups."

Id.; *see also* Wuenschel Broadcasting Co., 74 F.C.C.2d 389, 390–91 (1979) (refusing to include women in a program that expedites the processing of applications filed by minority applicants).

35. *See* 1978 Policy Statement, *supra* note 21, at 982–83; Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting, 92 F.C.C.2d 849, 849–63 (1982), *proceeding terminated*, 99 F.C.C.2d 1249 (1985).

owners of mass media facilities to promote viewpoint diversity. The FCC determined that this lack of minority ownership of mass media facilities was "detrimental not only to the minority audience but to all of the viewing and listening public."[36]

Congress repealed the tax certificate program for minorities in an appropriations rider to the Self Employed Persons Health Care Extension Act of 1995.[37] The legislative history of this rider demonstrates that Congress believed the certificate program constituted bad tax policy. For instance, Congress believed that the policy evolved far beyond what Congress originally contemplated, and that the FCC granted the certificates routinely for a wide range of communications properties.[38] Moreover, Congress found that the FCC had developed no standard for issuing the certificates and that grants "frequently resulted in only transitory minority ownership of broadcast properties"[39] thus frustrating the stated goal of encouraging minority ownership.[40] Congress also found that the tax certificate policy was not subject to systematic review by the IRS or any other governmental body to evaluate the cost to the government.[41] At least one senator believed there was no showing of "past (or current) discrimination" to justify the tax certificate program. Senator Bob Packwood, in describing the tax certificate program, posed the following question: "Do we want a Government policy . . . where there is no evidence of discrimination?"[42] In short, the tax certificate policy was eliminated because Congress believed that its disadvantages vastly outweighed its benefits.[43]

3. Distress Sale Policy—In 1978, the FCC implemented the distress sale policy, which allowed a broadcast licensee whose license had been designated for a revocation hearing to sell his station to a minority-controlled entity at seventy-five percent or less of the station's fair-market value. Underlying the distress sale policy was the dearth of minority ownership. The FCC observed:

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36. 1978 Policy Statement, *supra* note 21, at 980–81.

37. *See* Act of April 11, 1995, Pub. L. No. 104–7, § 2, 109 Stat. 93, 93–94.

38. *See* S. REP. No. 104-16, at 17 (1995), *reprinted in* 1995 U.S.C.C.A.N. 89, 98.

39. *Id.*

40. *See* Greg Forster, *Tax Breaks for Being Black*, WALL ST. J., Nov. 8, 1995, at A20. *But see* William Kennard, General Counsel, Federal Communications Commission, Statement Before U.S. Senate Committee on Finance (Mar. 7, 1995) *in* 1995 WL 93492 (F.D.C.H.); William Kennard, General Counsel, Federal Communications Commission, Statement Before U.S. House of Representatives Subcommittee, Oversight of the Committee on Ways and Means (Jan. 27, 1995) *in* 1995 WL 30799 (F.D.C.H.).

41. *See* S. REP. No. 104-16, *supra* note 38, at 17.

42. 141 CONG. REC. S4532, S4538 (daily ed. Mar. 24, 1995) (statement of Senator Packwood).

43. *See* S. REP. No. 104-16, *supra* note 38, at 17.

> Full minority participation in the ownership and management of broadcast facilities results in a more diverse selection of programming. In addition, an increase in ownership by minorities will inevitably enhance the diversity of control of a limited resource, the spectrum. And, of course, we have long been committed to the concept of diversity of control because diversification . . . is a public good in a free society, and is additionally desirable where a government licensing system limits access by the public to the use of radio and television facilities.[44]

The distress sale policy still exists but its constitutionality is in question since *Adarand.* This uncertainty arises because the FCC justified its distress sale policy principally on the ground that minority ownership would lead to a diversity of viewpoints. In *Adarand,* the Supreme Court overruled the use of the intermediate scrutiny standard of review in federal race-based affirmative action programs. Intermediate scrutiny was used in *Metro Broadcasting* to uphold the FCC's distress sale policy, which was based on viewpoint diversity. Some commentators have suggested that the FCC modify the distress sale policy to be race-neutral.[45]

4. Multiple Ownership Rules—Prior to the Telecommunications Act of 1996, the FCC's national television ownership rules limited a single owner to twelve stations with an aggregate national audience of no more than twenty-five percent.[46] A non-minority owner could take a *non-controlling interest* in an additional two minority-controlled stations, making for a TV ownership limit of fourteen stations, if the aggregate audience of all its stations did not exceed thirty percent. In contrast, a minority owner could acquire an additional two stations with an aggregate audience reach of up to thirty percent and was allowed to have a *controlling interest* in those stations, making for a TV minority ownership limit of fourteen stations. Diversity was a rationale for these ownership rules; the FCC stated that "our national multiple ownership rules may, in some circumstances, play a role in fostering minority ownership."[47]

The 1996 Telecommunications Act eliminated the numerical cap and raised the overall national television audience reach to

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44. 1978 Policy Statement, *supra* note 21, at 981.

45. *See, e.g.*, Michael E. Lewyn, *The Case for Color-Blind Distress Sales,* 19 HASTINGS COMM. & ENT. L.J. 31 (1996) (advocating the idea that making the distress sale policy race-neutral would allow it to survive a strict scrutiny review).

46. *See* 47 C.F.R. § 73.3555(e)(1)(ii)–(iii), (2), (3) (1995).

47. Report and Order, 100 F.C.C.2d 74, 94 (adopted Dec. 19, 1984).

thirty-five percent.[48] The FCC subsequently amended its rules to reflect the statutory change and effectively eliminated this differential treatment for minority-owned stations.[49]

Previously, the FCC's national radio ownership rules generally limited commercial radio ownership on a nationwide basis to no more than twenty AM stations and no more than twenty FM stations, but permitted minority-controlled licensees to own and control twenty-five AM and twenty-five FM stations nationwide.[50] The 1996 Telecommunications Act, however, directed the FCC to eliminate these national ownership restrictions,[51] including the minority-owner variation.[52]

B. Use of Affirmative Action Programs in Wireless Spectrum-Based Services

1. Random Selection: Lotteries—In 1982, Congress enacted Section 309(i) of the Communications Act to allow the FCC to select licensees by random selection.[53] Section 309(i) also required the FCC to establish incentives, rules, and procedures ensuring "significant preferences" for minority-controlled applicants in awarding licenses by lottery.[54] The FCC used this section to award wireless licenses for cellular, specialized mobile radio, and low-power TV. As part of the Omnibus Budget Reconciliation Act of 1993, Congress limited the use of random selections and in 1997 forbade them outright except for the award of licenses and permits for public, noncommercial television stations.[55]

The legislative history of Section 309(i), however, evidences Congress's awareness of the discrimination that affects minority entrepreneurs in the communications industry.[56] In addition to relying on the diversity rational, Congress noted that "the effects of past inequities stemming from racial and ethnic discrimination

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48. *See* Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(c)(1)(B), 110 Stat. 56, 111.

49. *See* Implementation of Sections 202(c)(1) and 202(e) of the Telecommunications Act of 1996, 11 F.C.C.R. 12374 (1996).

50. *See* 47 C.F.R. § 73.3555(e)(1)(i) (1995).

51. Local radio ownership restrictions remain under the new Act. *See* 47 U.S.C. § 153(b) (1996).

52. *See* Implementation of Sections 202(a) and 202(b)(1) of the Telecommunications Act of 1996, 11 F.C.C.R. 12368 (1996) (amending 47 C.F.R. § 73.3555 to eliminate national radio ownership rule as required by 1996 Act).

53. *See* 47 U.S.C. § 309(i) (Supp. III 1997).

54. *See* 47 U.S.C. § 309(i)(3)(A) (1994).

55. *See* Balanced Budget Act of 1997, Pub. L. No. 105-33, § 3002 (1) & (2), 111 Stat. 251 (1997).

56. *See* S. REP. No. 97-191 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2237, 2284–89.

have resulted in a severe under-representation of minorities in the media of mass communications, as it has adversely affected their participation in other sectors of the economy as well."[57] Congress concluded that adding race-based preferences to random selection procedures would remedy "the past economic disadvantage to minorities which has limited their entry into various sectors of the economy, including the media of mass communications . . . ."[58] Congress also observed that the preferences created in Section 309(i) were "narrowly-drawn" to promote diversity in mass communications.[59]

2. *Auctions and Bidding Credits*—Section 309(j) allowed the FCC to select licensees by auction. Section 309(j)(3)(B) instructed the FCC to establish competitive bidding procedures that would "promot[e] economic opportunity and competition and ensur[e] that new and innovative technologies are readily accessible to the American people . . . disseminating licenses among . . . *businesses owned by members of minority groups and women.*"[60] Again in Section 309(j)(4)(D), Congress required the FCC, in prescribing area designations and bandwidth assignments, to promote "economic opportunity for a wide variety of applicants, including small businesses . . . *and businesses owned by members of minority groups and women.*"[61] In creating these opportunities, Section 309(j)(4)(C)(ii) suggested that the FCC consider using "tax certificates, bidding preferences, and other procedures."[62] Before implementing this provision, the U.S. House of Representatives Subcommittee on Minority Enterprise, Finance & Urban Development held hearings, receiving testimony from several experts concerning the historical exclusion that minorities face in trying to enter the telecommunications industry.[63] The House of Representatives acknowledged that

> unlike mass media licenses, where diversity in ownership contributes to diversity of viewpoints, most of the licenses issued pursuant to the bidding authority in section 309(j) will be for services where the race or gender of the licensee will

57. *Id.* at 2287. *But see* H.R. CONF. REPORT 97-765 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2261 (indicating that its intent in implementing Section 309(I)(3)(A) is the fostering of diversity).

58. *Id.* at 2288.

59. *Id.*

60. 47 U.S.C. § 309(j)(3)(B) (1994) (emphasis added).

61. 47 U.S.C. § 309(j)(4)(C)(ii) (1994) (emphasis added).

62. 47 U.S.C. § 309(j)(4)(D) (1994).

63. *See* H.R. REP. No. 103-885, at 237 (1994).

> not affect the delivery of service to the public. Nevertheless, the Commission should adopt regulations pursuant to this section to ensure that businesses owned by members of minority groups and women are not in any way excluded from the competitive bidding process.[64]

In implementing Section 309(j) of the Communications Act, in 1994 the FCC promulgated rules[65] that gave a twenty-five percent "bidding credit" to minority-owned and women-owned businesses that partook in auctions.[66]

The bidding credits involved in the auctions were challenged in two cases. In *Graceba Total Communications, Inc. v. FCC*,[67] the non-minority complainant won two licenses to provide interactive video data services, but argued that the bidding credits given to minority-owned and women-owned businesses artificially inflated auction prices and resulted in the complainant's discrimination; he demanded a twenty-five percent reduction in the price of its licenses.[68]

While the complainant's petition was still pending, the Supreme Court decided *Adarand Constructors, Inc. v. Pena*,[69] holding that federal affirmative action programs are unconstitutional unless "they are narrowly tailored measures that further compelling governmental interests."[70] In *Graceba*, the D.C. Circuit Court did not rule on the constitutionality of the program, but remanded the case to the FCC because it was of the opinion that the resolution of many issues would benefit from the expertise of the agency.[71]

These bidding rules came under challenge again in *Omnipoint v. FCC*.[72] A non-minority licensee challenged the constitutionality of

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64. H.R. REP. No. 103-111, at 255 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 582.

65. For the entrepreneurs's block of the PCS auction, there were the following benefits:(1) a female or minority-owned applicant could have a single passive non-voting investor with an interest as large as 49.9% if the applicant held 50.1% interest; (2) a special exception that allowed an individual member of the control group of a minority-owned C block to apply even though the individual's other business properties would otherwise make the applicant too large for the entrepreneur's block; and (3) minority and female-owned businesses were to receive an additional fifteen percent bidding credit, tax certificates, and more favorable installment payment plans than other businesses. *See* Fifth Report and Order, 9 F.C.C.R. 5532, 5581–82, 5589 (1994).

66. *See* Fourth Report and Order, 9 F.C.C.R. 2330, 2336–39 (1994); 47 C.F.R. § 95.816(d)(1) (1996).

67. 115 F.3d 1038 (D.C. Cir. 1997).

68. *See id.*

69. 515 U.S. 200 (1995).

70. *See infra* Part II.D for a more detailed discussion of *Adarand*.

71. *See Graceba*, 115 F.3d at 1038.

72. 78 F.3d 620 (D.C. Cir. 1995).

the FCC's tiered bidding credits as violative of his equal protection rights. The Court issued a stay of the FCC's PCS block auction on the ground that the program did not meet the intermediate scrutiny standard. Shortly after this challenge was filed, the Supreme Court decided *Adarand*. The FCC stayed the auction rule provisions to evaluate them in light of *Adarand*. The FCC subsequently released its *Sixth Report and Order* which eliminated the tiered bidding credits for minorities and women and provided the same bidding credits and installment payments to all small businesses.[73] The D.C. Circuit Court held in *Omnipoint* that the FCC's actions in eliminating gender and racial tier bidding credits were not arbitrary and capricious.[74]

C. Use of Affirmative Action Programs in Cable

Although the *1978 Policy Statement* announced the minority tax certificate initiative in the broadcast area, the FCC noted that it "expected that in the future attention will also be directed toward[s] improving minority participation in such services as cable television . . . ."[75] Indeed, in the years that followed the *1978 Policy Statement*, the FCC used the tax certificate and distress sale policies to facilitate cable system sales to minority-owned entities.[76]

In the 1992 Cable Act, Congress required the FCC to prescribe rules establishing "reasonable limits on the number of cable subscribers a person is authorized to reach through cable systems owned by such person."[77] In 1993, the Commission adopted rules implementing this statutory provision by imposing a horizontal ownership limit prohibiting one entity from having an attributable interest in cable systems that in the aggregate reach more than thirty percent of the cable homes nationwide.[78] To promote pro-

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73. *See* 11 F.C.C.R. 136, 161 (1996)

74. *See Omnipoint*, 78 F.3d at 633.

75. 1978 Policy Statement, *supra* note 21, at 984.

76. *See* Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities, 10 F.C.C.R. 2788, 2789 & nn.7 & 8 (1995); Policy Statement on Minority Ownership of Cable Television Facilities, 52 Rad. Reg. 2d (P&F) 1469, 1471 (1982) (expanding Commission's tax certificate policy to include sales and exchanges of cable facilities in order to encourage minority ownership of cable facilities).

77. Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. § 533(f)(1)(A) (1992).

78. *See* Implementation of Section 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992, 8 F.C.C.R. 8565, 8577 (1993). In response to *Daniels Cablevision, Inc. v. United States*, 835 F. Supp. 1 (D.D.C. 1993), which held the statute unconstitutional, the FCC stayed its rule in light of the court's ruling.

gramming diversity as mandated by Congress, the FCC also adopted a rule permitting cable systems to reach thirty-five percent penetration, provided that the additional five percent are minority-controlled.[79] The FCC explained that this five-percent "minority bubble" was a "significant means of fostering the inclusion of a diversity of views in cable," as well as "encouraging MSO investment in minority-owned cable systems, which in turn will promote additional minority ownership of cable facilities and greater minority participation in the selection of programming."[80]

The FCC also adopted channel occupancy rules for cable television, referred to as "vertical integration," which included an increased allowance for carrying channels in which the operator has an attributable interest but that are minority-controlled.[81]

Section 612 of the 1934 Communications Act required cable systems to set aside a certain percentage of their channel capacity for commercial "leased access" by unaffiliated entities.[82] Section Nine of the 1992 Cable Act amended this provision by adding a new subsection (i) which permits cable operators to "use any such channel capacity for the provision of programming from a qualified minority programming source . . . whether or not such source is affiliated with the cable operator."[83]

The legislative history of the 1992 Cable Act indicates Congress believed that the purpose of the leased access provision was to promote diversity of program sources and to ensure access to a wide variety of viewpoints.[84] The 1992 Cable Act House Report states:

> [I]ncreasing the availability of minority programming sources . . . would contribute greatly to the diversity of programming available to cable viewers and will help to assure the widest possible diversity of information services to the public. New subsection 612(i) is intended to provide cable operators increased incentives to carry minority programming services and is consistent with FCC and Congressional objectives designed to increase the diversity

79. *See* Implementation of Sections 11 and 13 of the Cable Act, 8 F.C.C.R. at 8758 (*codified in* 47 C.F.R. 76.503(b)).

80. *Id.* at 8578–79.

81. *See id.* at 8596.

82. *See* 47 U.S.C. § 532 (1992).

83. 47 U.S.C. § 532(i)(1) (1992). A qualified minority programming source is defined as "a programming source which devotes substantially all of its programming to coverage of minority viewpoints, or to programming directed at members of minority groups, and which is over 50 percent minority-owned." 47 U.S.C. § 532(i)(2) (1992).

84. *See* S. REP NO. 102-92 (1991); H.R. REP. NO. 102-628, at 40 (1992).

of viewpoints by encouraging minority ownership of the communications media.[85]

II. CONSTITUTIONAL ANALYSIS OF AFFIRMATIVE ACTION PROGRAMS

Historically, affirmative action programs could be categorized in three ways: (1) programs designed to enhance diversity of voices and First Amendment participation such as those recognized in *Metro Broadcasting, Inc. v. FCC*;[86] (2) programs designed to encourage diversity to correct a racial or gender imbalance, for example, the program allowed in *Fullilove v. Klutznick*;[87] and (3) programs designed to remedy past discrimination—*United States v. Paradise*[88] presents an example of such a program.

A. Diversity of Voices

1. Metro Broadcasting, Inc. v. FCC—Under the Communications Act of 1934, the FCC was constitutionally permitted to regulate broadcasters in an effort to foster diversity of viewpoints.[89] The FCC used the diversity-of-viewpoints rationale as a basis for implementing programs to extend broadcast ownership opportunities to minority- and women-owned businesses. The FCC based its regulations on the ground that more diverse ownership (in terms of race and gender) would lead to more diverse perspectives.

Two of the FCC affirmative action rules were challenged in *Metro Broadcasting* as discriminatory to white applicants. The challenged policies involved (1) a program awarding an enhancement for minority ownership in comparative proceedings, and (2) the minority "distress sale" program, which permits a limited category of existing radio and television broadcast stations to be transferred only to minority-controlled firms.[90] In *Metro Broadcasting*, the Court used an

85. H.R. REP. NO. 102-628, at 122 (1992).

86. 497 U.S. 547 (1990).

87. 448 U.S. 448 (1980).

88. 480 U.S. 149 (1987).

89. *See generally* FCC v. National Citizens Comm. for Broad., 436 U.S. 775 (1978) (upholding the then-FCC rules, which required the divestiture of either a newspaper or broadcast station where they were owned by the same company in the same community when each was the sole newspaper or sole broadcast station in the area).

90. *See Metro Broad.*, 547 U.S. at 557.

intermediate level of scrutiny to analyze the FCC's affirmative action programs. The Court specifically held that

> benign race-conscious measures mandated by Congress—even if those measures are not "remedial" in the sense of being designed to compensate victims of past governmental or societal discrimination—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.[91]

The Court noted that the FCC policies did not serve solely as a remedy for past discrimination,[92] but concluded that they served an "important governmental objective" of "enhancing broadcast diversity."[93] The Supreme Court determined that there may be important differences between the broadcasting practices of minority owners and those of their non-minority counterparts. The Court discussed evidence suggesting that an owner's minority status "does appear to have specific impact on the presentation of minority images in local news [in that] minority-owned stations tend to devote more news time to topics of minority interest and to avoid racial and ethnic stereotypes in portraying minorities."[94] The Court upheld the FCC's policies.

The Supreme Court in *Adarand* overruled the intermediate standard of review used in *Metro Broadcasting*, thus requiring that the FCC's affirmative action programs meet the strict scrutiny

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91. *Id.* at 564–65.

92. *See id.* at 566.

93. *Id.* at 567. Similarly, in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), Justice Powell stated that an affirmative action plan that took the racial diversity of the students into account would be constitutionally permissible under certain circumstances. *See id.* at 311–14. In his view, having a diverse student body would lead to a robust exchange of ideas in the classroom. *See id.* In *Bakke*, a white student rejected by the University of California Medical School sued alleging discrimination. *Id.* at 277. The University of California used a quota system and reserved a certain number of seats for students of color. *See id.* at 275. The Supreme Court had a divided judgment with four justices willing to use a less stringent standard of review for racial classifications "designed to further remedial purposes." *Id.* at 359 (Brennan, White, Marshall, and Blackmun, JJ., concurring in judgment in part and dissenting in part). Four justices thought that the case should be affirmed on statutory grounds. *See id.* at 411–12, 421 (Stevens, J., joined by Burger, C.J., Stewart, and Rehnquist, JJ.). Justice Powell wrote the concurring opinion that provided the Court with a five-person majority, explaining that "[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination," but he considered diversity an important governmental interest to uphold in higher education. *Id.* at 291. *But see* Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996) (holding that race may not be used as a basis for school admissions even to correct racial imbalance).

94. *Metro Broad.*, 497 U.S. at 581.

standard. Because the Court did not decide whether diversity is a compelling governmental interest under the strict scrutiny test, there is some uncertainty concerning whether the FCC's programs would be constitutional under this new test.

B. Diversity Designed to Correct Racial or Gender Imbalance

1. Fullilove v. Klutznick[95]—*Fullilove* presented a facial constitutional challenge to a Public Works Employment Act requirement that ten percent of federal funds granted for public works be set aside for minority-owned businesses.[96] The Act authorized a four billion dollar appropriation for federal grants to state and local governments for use in public works projects.[97] The primary purpose of the Act was to provide a quick boost to the national economy during the recession. [98] *Fullilove* failed to produce a majority opinion. Chief Justice Burger noted that although a "program that employs racial or ethnic criteria . . . calls for close examination," the Court was at the same time "bound to approach [its] task with appropriate deference to the 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 the Fourteenth Amendment."[99] The Chief Justice, in an opinion joined by Justices White and Powell, observed that "[a]ny preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees."[100] He employed a two-part test which asked first, "whether the *objectives* of [the] legislation are within the power of Congress," and second, whether the limited use of racial and ethnic criteria, in the context presented, is a "constitutionally permissible *means* for achieving the congressional objectives and does not violate the equal protection component of the Due Process Clause of the Fifth Amendment."[101]

Upholding the ten percent set-aside program, Chief Justice Burger wrote that because of its unique powers, "Congress not only

95. 448 U.S. 448 (1980).
96. *See id.* at 453–54.
97. *See id.* at 453.
98. *See id.* at 457.
99. *Id.* at 472.
100. *Id.* at 491.
101. *Id.* at 473.

may induce voluntary action to assure compliance with existing federal statutory or constitutional antidiscrimination provisions, but also, where Congress has authority to declare certain conduct unlawful, it may, as here, authorize and induce state action to avoid such conduct."[102]

C. Past Discrimination

1. United States v. Paradise[103]—In 1972, the United States District Court for the Middle District of Alabama found that the Alabama Department of Public Safety had systematically excluded blacks as state troopers and imposed a hiring quota requiring the department to refrain from engaging in discrimination in its employment and promotion practices.[104] By 1979, no blacks had risen to the upper ranks of the department.[105] In 1983, eleven years after the district court's initial ruling, the department had failed to develop promotion procedures that did not have an adverse impact on blacks; as a consequence, the district court ordered that at least fifty percent of those promoted must be black as long as qualified black candidates were available.[106] This quota would last until the department implemented an acceptable promotion procedure.[107]

The Supreme Court found that there was a compelling governmental interest for this quota because it was designed to remedy past and present discrimination by the department[108] The Court found that it was necessary to have the quota because blacks were injured by the department's delay in developing an acceptable promotion procedure and "that white troopers promoted since

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102. *Id.* at 483–84. Justice Powell wrote separately to express his view that the plurality opinion employed "strict judicial scrutiny." *Id.* at 496. Justice Stewart and then-Justice Rehnquist dissented, arguing that the Constitution required the federal government to meet the same strict standard as the states when enacting racial qualifications and that the program before the Court failed that standard. *See id.* at 523.

103. 480 U.S. 149 (1987).

104. *See id.* at 154.

105. *See id.* at 159.

106. *See id.* at 160, 163.

107. *See id.* at 163.

108. *See id.* at 167. In addition, the Court found that the quota was "narrowly tailored to accomplish its purposes—to remedy past discrimination and eliminate its lingering effects." *Id.* at 171. In determining whether the quota was narrowly tailored, the Court evaluated the following factors: (1) the necessity for the relief and the efficacy of alternative remedies; (2) the flexibility and duration of the relief, including the availability of waiver provisions; (3) the relationship of the numerical goals to the relevant labor market; and (4) the impact of the relief on the rights of third parties. *See id.*

1972 were the specific beneficiaries of *an official policy which systematically excluded all blacks.*"[109] The Court found that the quota was flexible because it could be waived if no qualified black candidates were available, it applied only when the Department needed to make promotions, and it endured only until the Department developed a promotion procedure that did not have a discriminatory impact on blacks.[110] The fifty percent quota lasted only until blacks composed twenty-five percent of upper ranks such as corporal or sergeant and was constitutionally permissible because it addressed the department's delay in developing nondiscriminatory promotion procedures.[111] The Court also found that the quota did not impose an unacceptable burden on white applicants because it was temporary and extremely limited, applying only to promotions to corporal and not other upper ranks. Moreover, the burden imposed, like a hiring goal, was diffuse.[112]

D. The Supreme Court Modifies Its Affirmative Action Jurisprudence

In *Croson* and *Adarand*, the Supreme Court elevated the standard of review for all affirmative action programs to that of strict scrutiny. This standard of review makes it much harder for the government to establish an affirmative action plan.

1. City of Richmond v. J.A. Croson Co.[113]—The City of Richmond adopted a minority business utilization plan[114] requiring prime contractors awarded city construction contracts to subcontract at least thirty percent of the dollar amount of each contract to one or more minority business enterprises. Using the strict scrutiny standard, the Supreme Court invalidated the city's plan. Racial classifications are constitutional under this standard only if they:

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109. *Id.* at 170 (*citing* Paradise v. Prescott, 767 F.2d 1514, 1533, n. 16 (1985)).

110. *See* United States v. Paradise, 480 U.S. at 178.

111. *See id.* at 179, 185.

112. *See id.* at 182–83.

113. 488 U.S. 469 (1989).

114. The plan defined "minority business enterprise" as "[a] business at least fifty-one (51) percent of which is owned and controlled . . . by minority group members." *Id.* at 478 (citing Richmond, Va., Ordinance No. 83-69-59 (Apr. 11, 1983), codified in RICHMOND, VA., CITY CODE § 12-156(a) (1985)). Minority group members were defined as "[c]itizens of the United States who are Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts." *Id.* There was "no geographic limit to the Plan; an otherwise qualified [minority business enterprise] from anywhere in the United States could avail itself of the [thirty percent] set-aside." *Id.*

(1) further a compelling governmental interest; and (2) are narrowly tailored.

The Court distinguished the facts of *Croson* from *Fullilove*. The Court stated that Congress, unlike any state or political subdivision, has the specific constitutional mandate to enforce the dictates of the Fourteenth Amendment.[115] The power to "'enforce' may at times also include the power to define situations which *Congress* determines threaten principles of equality and to adopt prophylactic rules to deal with those situations."[116] The Court noted that just because "Congress may identify and redress the effects of society-wide discrimination does not mean that, *a fortiori*, the States and their political subdivisions are free to decide that such remedies are appropriate."[117] The Court stated: "To hold otherwise would be to cede control . . . to the 50 state legislatures . . . and insulate any [state] racial classification from judicial scrutiny . . . ."[118]

The Court found that there was no compelling governmental interest because the City of Richmond presented only generalized assertions of past discrimination. To establish a compelling governmental interest, there needed to be a prima facie showing of prior or present discrimination. The discrimination could either be by the governmental actor or by its "passive complicity" in the discrimination of others. The Court reasoned that "any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax [dollars] of all citizens, do not serve to finance the evil of private prejudice."[119] However, the discrimination had to be more than a mere allegation of societal discrimination. A gross statistical disparity between utilized minority business enterprises and those available may constitute an inference of a pattern or practice of discrimination.[120]

The Court noted that it was almost impossible to assess whether the City of Richmond's affirmative action plan was narrowly tailored because it was not linked to identified discrimination in any way. Nonetheless, the Court observed that there did not appear to be any consideration of the use of race-neutral means to increase minority business participation in city contracting. The Court noted that many of the barriers to minority participation (for example, lack of capital or failure to meet bonding requirements) relied on by the city appeared to be race-neutral.

115. *See id.* at 487–88.
116. *Id.* at 490 (citing Katzenbach v. Morgan, 384 U.S. 641, 651 (1966)).
117. *Id.* at 490.
118. *Id.*
119. *Id.* at 492.
120. *See id.* at 503.

The Court suggested "a race-neutral program of city financing for small firms would, *a fortiori*, lead to greater minority participation."[121] The Court also criticized the thirty percent quota as overly rigid and unrealistic because it assumed that minorities would choose a particular trade in "lockstep proportion to their representation in the local population."[122] In addition, under the plan there was no inquiry whether the particular minority business receiving the preference suffered from the effects of past discrimination by the city or prime contractors.[123] The Court also noted that "a successful black, Hispanic, or Oriental entrepreneur *from anywhere in the country* enjoys an absolute preference over other citizens based solely on their race."[124]

2. Adarand Constructors, Inc. v. Pena[125]—In *Adarand*, the Supreme Court extended the Croson strict scrutiny standard of review to federal affirmative action programs.[126] Therefore, all racial classifications (regardless of whether they are instituted by a federal, state, or local government and regardless of whether they are instituted for a malevolent or a benign purpose) must be analyzed by a reviewing court under strict scrutiny.[127] Such classifications are constitutional only if they: (1) further a compelling governmental interest; and (2) are narrowly tailored.

3. The Supreme Court's Rationale for Adarand*: The Search for Congruence*—The *Adarand* Court sought to find "congruence" between all standards of review that the Court had previously employed for race-based legislation or regulations. The Court sought "congruence" because, even if the law was designed with the best of intentions, the Supreme Court believed that voluntary race-based

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121. *See id.* at 507.

122. *Id.*

123. *See id.* at 508.

124. *Id.* (emphasis added).

125. 515 U.S. 200, 205 (1995). Petitioner Adarand Constructors, Inc. claimed that the federal government's practice of giving general contractors on government projects a financial incentive to hire subcontractors controlled by "socially and economically disadvantaged individuals," and in particular the government's use of race-based presumptions in identifying such individuals violated the equal protection component of the Fifth Amendment's Due Process Clause. *See id.*

126. Four Justices—Ginsburg, Souter, Breyer, and Stevens—dissented. These dissenting justices would have upheld the *Adarand* affirmative action program and would have employed an intermediate level of scrutiny for government-sanctioned affirmative action programs similar to those in question in *Adarand.* Justices Scalia and Thomas concurred in the decision, but evinced an abhorrence for affirmative action programs of any kind. Even in the case of past discrimination, Justice Scalia would limit a remedy only to those who could show that they were actually discriminated against.

127. *Adarand*, 515 U.S. at 227.

affirmative action plans tended to stereotype and stigmatize their beneficiaries.

Historically, the Court had employed an intermediate standard of review for those cases that involved affirmative action plans sponsored by the federal government.[128] In *Fullilove*, the Court upheld Congress's inclusion of a ten percent set-aside for minority-owned businesses. The Court called its test a "searching examination."[129] The Court employed a two-part test which asked first "whether the *objectives* of this legislation are within the power of Congress," and second, "whether the limited use of racial and ethnic criteria, in the context presented, is a constitutionally permissible *means* for achieving the congressional objectives."[130] The rationale for this lowered standard was that Section Five[131] of the Fourteenth Amendment[132] to the Constitution empowers Congress to enforce the Fourteenth Amendment by appropriate legislation.

In *Adarand*, the Court held that "to the extent (if any) that *Fullilove* held federal racial classifications to be subject to a less rigorous standard, it is no longer controlling."[133] But the Court reserved judgment on whether the program upheld in *Fullilove* would survive strict scrutiny.[134]

The Court also overruled the intermediate standard of review used in *Metro Broadcasting*.[135] The Court stated that to the extent *Metro Broadcasting* was inconsistent with *Adarand*'s holding, it was overruled.[136] The Court reasoned that *Metro Broadcasting* departed from prior cases in two respects: first, it turned its back on *Croson*'s explanation as to why strict scrutiny of all government racial classifications is essential;[137] and second, *Metro Broadcasting* rejected

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128. *See* Fullilove v. Klutznick, 448 U.S. 448 (1980).

129. *Id.* at 491.

130. *Id.* at 473.

131. Section Five specifically provides: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

132. The Fourteenth Amendment otherwise provides that

> [n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id. at § 1.

133. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 235 (1995).

134. *See id.*

135. Metro Broad., Inc. v. FCC, 497 U.S. 547 (1990).

136. *See Adarand*, 515 U.S. at 227.

137. In *Croson*, the court stated:

congruence between the standards applicable to federal and state racial classifications. In addition *Adarand* stated that *Metro Broadcasting* undermined two other constitutional standards—"skepticism of all racial classifications and consistency of treatment irrespective of the race of the burdened or benefited group."[138]

Justice O'Connor's *Adarand* opinion attempted to dispel the earlier notion that strict scrutiny is "strict in theory but fatal in fact."[139] She noted that race discrimination still occurs, and continued "[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it."[140]

She also noted that "[w]hen race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the 'narrow tailoring' test this Court has set out in previous cases."[141] Justice O'Connor supported the constitutionality of race-based remedies in eliminating discrimination by citing to *Paradise*.[142]

The Court remanded *Adarand* for further consideration of the principles it announced in the opinion. The Court noted that the court of appeals "did not decide the question whether the interests served by the use of subcontractor compensation clauses are properly described as 'compelling.' "[143] The court of appeals also did not address the issue of narrow tailoring in terms of strict scrutiny cases, by asking, for example, whether there was any consideration of the use of race-neutral means to increase minority business participation or whether the program was appropriately limited so

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> Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are "benign" or "remedial" and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to "smoke out" illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen "fit" this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.
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> City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989).

138. *Adarand*, 515 U.S. at 226–27.
139. Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring).
140. *Adarand*, 515 U.S. at 237.
141. *Id.*
142. *See id.* (citing United States v. Paradise, 480 U.S. 149 (1987)).
143. *Adarand*, 515 U.S. at 237.

that it "will not last longer than the discriminatory effects it is designed to eliminate."[144]

E. Adarand *on Remand*

1. Strict Scrutiny—On remand, the district court's decision was the first case analyzing a federal affirmative action program under strict scrutiny. The district court granted Adarand's motion for summary judgment and denied that of the defendants.[145] The court also issued an injunction enjoining the defendants from administering, enforcing, soliciting bids for, or allocating any funds under the programs.[146] The injunction effectively precluded the implementation of statutes and regulations that grant presumptive eligibility for government preference in contracting on the basis of race.

The district court stated that the Supreme Court "did not give any meaning to the phrase 'compelling interest' either by definition or illustration." The court also noted that there appeared to be "only one compelling interest recognized by the Supreme Court to justify racial classifications, namely remedying past wrongs."[147]

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144. *Id.* at 238 (quoting Fullilove v. Klutznick, 448 U.S. 448, 513 (1980) (Powell, J. concurring)).

145. *See* Adarand Constructors, Inc. v. Pena, 965 F. Supp. 1556 (D. Colo. 1997), *vacated on appeal sub nom.* Adarand v. Slater, 169 F.3d 1292, 1295 (10th Cir. 1999). On remand, the district court judge chided the Supreme Court for remanding the case without giving the lower court more direction. Senior District Court Judge Kane stated:

> The prudence of remanding this case to the trial court is difficult to perceive. Both parties have stipulated to the absence of any dispute of material fact . . . and the "unresolved questions" posed by Justice O'Connor . . . concern only issues of statutory construction relating to "the details of the complex regulatory regimes" and a number of "apparent discrepanc[ies]" the Court found in the application of the statutes and regulations involved.

Id. at 1558.

The district court further noted that the decision to require strict scrutiny "alters the playing field in some important respects." *Id.* (quoting Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995)). The district court was of the opinion that "it is equally true that the higher courts are better equipped to decide as a matter of law whether, under the proper interpretation, the statutes involved can be described as in furtherance of a compelling interest and narrowly tailored to meet that interest." *Id.*

146. *Id.* at 1584.

147. *See id.* at 1570 (citing City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (plurality opinion)) ("'[u]nless [racial classifications] are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility.'"). "However, '[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy.'" *Id.* (quoting *Croson*, 488 U.S. at 497).

2. Congress's Power to Legislate National Problems—The district court noted that the Supreme Court's *Adarand* opinion also lacked clarity as to Congress's role in legislating solutions to national problems. The parties differed on Congress's power to legislate regarding the national problem of discrimination. The plaintiff argued that Congress needed to make particularized findings of discrimination in Colorado, whereas the defendant believed that Congress could make national legislation for national problems. The district court stated that

> [t]he diametric arguments of the parties concerning what constitutes a compelling governmental interest for Congress and the evidence required to establish such interest are not surprising. They reflect the majority's failure in *Adarand III* to define the parameters of Congress' powers under § 5 of the Fourteenth Amendment "to enforce, by appropriate legislation, the provisions of this article."[148]

The district court noted that the Supreme Court sidestepped the issue of Congress's acknowledged unique Section Five powers because addressing it would have opened a Pandora's box and this discussion would have significantly weakened the notion of congruence. As a result, the district court believed that Justice O'Connor's assertion in *Croson* that Congress has the ability under Section Five to recognize and address racial discrimination was undisturbed.

Despite the uncertainty of whether courts should defer to Congress's Section Five authority, the *Adarand* district court held that Congress did not need to make particularized findings of discrimination in the highway industry in Colorado:[149]

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148. *Id.* at 1572 (citing U.S. CONST. amend. XIV, § 5).

149. *Id.* The district court cited for authority two statements from Justice O'Connor in *Croson*, in which she stated that other government entities might have to show more than Congress before undertaking race-conscious measures: "The degree of specificity required in the findings of discrimination and the breadth of the discretion in the choice of remedies may vary with the nature and authority of the governmental body." *Id.* (citing *Croson*, 488 U.S. at 489 (citations omitted).

The *Adarand* district court also relied on *Oregon v. Mitchell*, 400 U.S. 112 (1970), in which the Court recognized Congress's authority to legislate nationwide remedies for nationwide problems. *Mitchell* held that when Congress deemed certain circumstances were national problems, Congress could apply federal law. *See id.* at 133–34. In *Mitchell*, the congressional enactment prohibited the use of literacy tests. This legislation was designed to be a protective barrier preventing racial harm, namely the exclusion of African Americans from voting.

The *Adarand* district court noted that the racial classifications in *Adarand* were distinguishable from the racial classifications in *Mitchell*; the *Adarand* statute was designed to indirectly lower racial barriers by using financial incentives to encourage prime contractors

> [T]he requisite particularized findings of discrimination to support a compelling governmental interest for Congress' action in implementing the [program] under a strict scrutiny standard of review would include findings of discriminatory barriers facing [disadvantaged businesses] in federal construction contracting nationwide, rather than in a single state, whether such actions were as a result of intentional acts of the federal government or "*passive complicity in the acts of discrimination by the private sector.*"[150]

The *Adarand* district court held that nothing in *Adarand* (or any other Supreme Court decision) required a court to ignore Congress's ability to address nationwide problems even under a strict scrutiny standard of review.[151] The district court noted that a court that did otherwise would be placing Congress "on the same constitutional plane as a city council."[152]

F. Issues Unresolved by the Adarand *Decisions*

1. Is Diversity Ever a Compelling State Interest?—

a. Adarand *Supreme Court Decision*—The Supreme Court clearly indicated that past discrimination would be a compelling state interest for an affirmative action plan. But the Court, through two omissions in its discussion, left open the question whether there is any other basis for establishing an affirmative action plan, namely non-remedial objectives such as diversity. First, the *Adarand* Court, in overruling the intermediate scrutiny standard of review used in *Metro Broadcasting*, failed to discuss whether the diversity rationale of *Metro Broadcasting* was still permissible.[153] This omission may not be a harbinger of the Court's acceptance of the diversity rationale, because Justice O'Connor (who authored the *Adarand* majority opinion) vigorously dissented in *Metro Broadcasting*, stating that the diversity rationale for the FCC's affirmative action programs would be unconstitutional under either an intermediate or a

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to hire subcontractor firms owned by members of minority groups. In contrast, the *Mitchell* statute directly prohibited the use of racial barriers at their source by proscribing the use of literacy tests. Nonetheless, the *Adarand* district court held that Congress need only make national findings of past discrimination. *See Adarand*, 965 F. Supp. at 1573.

150. *Id.* at 1573 (emphasis added) (citing *Croson*, 488 U.S. at 519).

151. *See id.*

152. *Id.*

153. *See* Adarand Contractors, Inc. v. Pena, 515 U.S. 200 (1995).

strict scrutiny standard of review.[154] In Croson, for example, Justice O'Connor stated that affirmative action must be "strictly reserved for remedial settings,"[155] yet in *Wygant v. Jackson Board of Education*[156] she agreed with Justice Powell's view in *Regents of University of California v. Bakke*[157] that fostering racial and ethnic diversity in higher education is a compelling interest. *Adarand* gave the Supreme Court the opportunity to criticize the diversity rationale, but it did not. Why not? Possibly because the issue of diversity as a compelling state interest was not before the Court. It is possible that Justice O'Connor's five to four *Adarand* majority was tenuous, and would not withstand an attack on the diversity rationale.

Second, the Supreme Court overruled the standard of review used by several of its prior precedents, namely *Fullilove* and *Metro Broadcasting*, but the Court did not criticize the diversity rationale articulated by Justice Powell in his concurring opinion in *Bakke*. Justice Powell's concurring opinion gave the court a five to four majority in overturning the affirmative action plan for student admissions at the Medical School of the University of California at Davis, yet a five to four majority favored affirmative action plans in some circumstances. In his opinion, Justice Powell stated that an affirmative action plan that took the diversity of the students into account would be constitutionally permissible.[158] In his view, having a diverse student body would lead to a robust exchange of ideas in the classroom.

By not specifically overruling the diversity rationale for affirmative action programs that were evident in at least two past Supreme Court opinions, yet specifically overruling the standard of review used in *Metro Broadcasting*, the Court left open the possibility that diversity—at least in some manifestation—might still be a sufficient ground for an affirmative action program.

*b. Lower Court Federal Court Decisions: Post-*Adarand—Although the U.S. Supreme Court has not provided much guidance on whether diversity is still an acceptable compelling governmental interest for affirmative action programs, several circuits have rendered opinions on this issue. The Fifth and D.C. Circuits have held that only past discrimination is a compelling governmental interest

154. *See* Metro Broad., Inc. v. FCC, 497 U.S. 547, 602–31 (1990) (O'Connor, J., dissenting).

155. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989).

156. 476 U.S. 267, 286 (1986).

157. 438 U.S. 265 (1978). The *Adarand* Court said that there was no opinion of the Court in *Bakke*. *See Adarand*, 515 U.S. at 218. *But see* Hopwood v. Texas, 78 F.3d 932, 942 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996) (discussed *infra* Part II.F.2.a).

158. *See Bakke*, 438 U.S. at 311–12.

under *Adarand*.[159] In contrast, the Seventh Circuit has upheld the constitutionality of giving employment preferences to minorities in certain circumstances other than remedying past discrimination.[160]

2. Diversity Versus Past Discrimination—Several lower courts, in addition to the *Adarand* district court,[161] have taken a very narrow and limited view of what constitutes a compelling governmental interest.

a. Fifth Circuit—In *Hopwood v. Texas*,[162] several white students who were denied admission to the University of Texas School of Law sued alleging discrimination. The Fifth Circuit struck down as unconstitutional the affirmative action admissions program for blacks and Mexican Americans established by the University of Texas School of Law. In a very narrow reading of *Adarand* and *Croson*, the Fifth Circuit held that "non-remedial state interests will *never* justify racial classification."[163] It concluded that the classification of persons on the basis of race for purposes of diversity frustrates, rather than facilitates, equal protection goals. The Fifth Circuit believed that *Metro Broadcasting* was not binding precedent because the case applied an intermediate scrutiny standard overruled in *Adarand*. The court summarized its reading of precedent by concluding that "there has been no indication from the Supreme Court, other than Justice Powell's lonely opinion in *Bakke*, that the state's interest in diversity constitutes a compelling justification for governmental race-based discrimination."[164]

The Fifth Circuit concluded that the University of Texas School of Law had failed to show a compelling state interest in remedying the present effects of past discrimination sufficient to maintain the use of race in its admissions system.[165]

b. D.C. Circuit—In *Lutheran Church-Missouri Synod v. FCC*,[166] the church, as holder of licenses for two radio stations, appealed an

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159. *See Hopwood*, 78 F.3d 932 (1996); Lutheran Church-Missouri Synod v. FCC, 141 F.3d 344 (D.C. Cir. 1998).

160. *See* Wittmer v. Peters, 87 F.3d 916 (7th Cir. 1996), *cert. denied*, 519 U.S. 1111 (1997).

161. *See* Adarand Constructors, Inc. v. Pena, 965 F. Supp. 1556 (D. Colo. 1997), *vacated on appeal sub nom.* Adarand v. Slater, 169 F.3d 1292, 1295 (10th Cir. 1999).

162. 78 F.3d 932 (5th Cir. 1996).

163. *Id.* at 944 (emphasis added).

164. *Id.* at 945.

165. *See id.* at 955; *see also* Police Ass'n v. City of New Orleans, 100 F.3d 1159, 1168–69 (5th Cir. 1996) (reaffirming the Fifth Circuit's decision in *Hopwood* by rejecting the city's racial diversity rationale and holding that an affirmative action program must be narrowly tailored to remedy specific evidence of past discrimination; because the city produced no evidence that its affirmative action program was designed to remedy "past discrimination," the Fifth Circuit found it unconstitutional).

166. 141 F.3d 344 (D.C. Cir. 1998).

order of the FCC that found that the church violated the FCC's equal employment opportunity regulations through the use of religious hiring preferences and inadequate minority recruiting. The D.C. Circuit Court of Appeals held that (1) the church had standing to raise an equal protection challenge to the equal employment opportunity program; (2) the equal employment opportunity regulations were subject to strict scrutiny review; and (3) the FCC's stated justification for these regulations, such as fostering "diverse" programming content, did not rise to the level of a "compelling" governmental interest.[167] As a consequence, the court held that the regulations violated equal protection and were unconstitutional.[168]

c. Seventh Circuit—In *Wittmer v. Peters*,[169] white correctional officers were unsuccessful in their application for lieutenants' positions in a "boot camp" for young criminals. They brought suit alleging that the state's affirmative action program, through which one black correctional officer was promoted to lieutenant, violated the whites' equal protection rights. The state argued that a black lieutenant was needed because the black inmates, who constituted sixty-eight percent of the boot camp population, would be "*unlikely* to play the correctional game of brutal drill sergeant and brutalized recruit" if black officers were not in authority at the camp.[170] The state presented expert evidence that the camp would not succeed in its mission of "pacification and reformation" of young criminals if a black male had not been appointed to one of the lieutenant slots.[171]

In a decision written by Chief Judge Posner, the court observed that the Supreme Court has held that discrimination in favor of a minority group is sometimes permissible to rectify past discrimination against that group, but has not yet resolved whether there are any permissible bases *other than* a remedial one that will withstand "strict scrutiny."[172] The Seventh Circuit stated that it is clear, however, that no race-conscious allocation of burdens or benefits can survive strict scrutiny unless

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167. *See id.* at 350–55.

168. *See id.* at 356. The court also noted "[w]e doubt . . . that the Constitution permits the government to take account of racially based differences, much less encourage them. One might well think such approach antithetical to our democracy . . . . Indeed, it's danger is poignantly illustrated by this case." *Id.* at 355.

169. 87 F.3d 916 (7th Cir. 1996).

170. *Id.* at 920 (emphasis added).

171. *Id.*

172. *Id.* at 918 (emphasis added).

> the defendants show that they are motivated by a truly powerful and worthy concern and that the racial measure that they have adopted is a plainly apt response to that concern. They must show that they had to do something and had no alternative to what they did. The concern and the response, moreover, must be substantiated and not merely asserted.[173]

The Seventh Circuit concluded that "rectification of past discrimination is not the only setting in which government officials can lawfully take race into account in making decisions," and observed that other cases have singled out law-enforcement and correctional settings as the clearest cases in which departures from race neutrality may be permissible.[174] The Court upheld the race-conscious hiring and concluded that the state had presented ample evidence that its boot camp correctional program simply would not succeed without an additional black lieutenant. The race-conscious program upheld in this case was limited to the hiring of a single officer—a very targeted and limited response to the specific operational problem identified by the state.[175]

3. Diversity Conclusion—The Supreme Court left a very small door open concerning whether diversity could ever be a compelling governmental interest. It would be prudent for the FCC in devising a race-based affirmative action program not to rely solely on diversity, especially considering that Justice O'Connor has clearly indicated her disapproval in her *Metro Broadcasting* dissent. She may rule against any FCC race-based program relying solely on diversity as its compelling governmental interest.

Since *Adarand*, very few circuit courts have dealt with the issue of whether diversity is a compelling governmental interest for the purposes of establishing an affirmative action program. In *Hopwood*, the Fifth Circuit took a hard line and stated that past discrimination is the only constitutionally sufficient compelling governmental interest in establishing an affirmative action program. In addition, in *Lutheran Church*, the D.C. Circuit held that only past discrimination was a compelling governmental interest. In contrast, in *Wittmer*, the Seventh Circuit allowed diversity to be a compelling governmental interest. However, *Wittmer* is factually distinguishable because it involves a criminal justice setting, which

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173. *Id.*

174. *Id.* at 919.

175. *See id.* at 921; *see also* Erwin v. Daley, 92 F.3d 521, 528 (7th Cir. 1996) (citing *Wittmer* for the proposition that rectification of past discrimination is not the sole basis upon which government officials can lawfully take race into account in making decisions).

at least one Supreme Court justice, who opposes affirmative action programs, was of the opinion[176] would be a permissible arena for some race-conscious governmental action.

III. IF PAST DISCRIMINATION IS THE ONLY PERMISSIBLE COMPELLING GOVERNMENTAL INTEREST, WHAT HAS TO BE ESTABLISHED ON THE FEDERAL LEVEL?

A. The Adarand *and* Croson *Supreme Court Decisions*

Adarand did not clearly state what would have to be established to show past discrimination on the national level. The most important case showing what must be demonstrated to establish past discrimination is *City of Richmond v. J.A. Croson Co.*,[177] but that case dealt with the affirmative action plan of a city as opposed to one developed by an independent agency of the federal government.

The *Croson* Court was particularly concerned that there were insufficient findings of past discrimination in the City of Richmond as opposed to the rest of the country. The *Croson* Court was also concerned that the statistical evidence used by the City of Richmond to establish discrimination was too broad. It compared the number of minority-owned firms that were awarded contracts to the percentage of minorities in the City of Richmond's population. The Court held that constitutionally permissible statistical evidence of discrimination would compare those minority-owned firms that were utilized by the City of Richmond as compared to those that were available in the City of Richmond to perform that type of work.

Justice O'Connor suggested in *Adarand* that the "past discrimination" need not be caused directly by the government actor. She stated that government is not disqualified from acting in response to the practice and "lingering effects" of racial discrimination against minority groups.[178] She cited *Paradise* as an example of a "compelling interest" to remedy discrimination; but

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176. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 521 (1989) (Scalia, J., concurring) (stating that "only a social emergency rising to the level of imminent danger to life and limb—for example, a prison race riot, requiring temporary segregation of inmates" can justify a deviation from our color-blind Constitution).

177. *See id. passim.* This is the most important case on this topic because it is the only affirmative action case decided by the Supreme Court indicating how a government entity may make a claim for past discrimination.

178. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995).

Paradise involved pervasive and blatant discrimination by the State of Alabama.[179]

The *Adarand* decision does not tell us how these unanswered questions play out on the federal level. Specifically, can the FCC make national findings as opposed to specific geographical ones? What constitutes past discrimination?

*B. Lower Court Decisions—Post-*Adarand

In *Adarand* on remand, the district court judge stated that the "past discrimination" necessary for establishing a compelling governmental interest could include passive complicity by the government actor in discrimination by the private sector. The judge, in fact, found that there was a compelling government interest present. The examples cited by the district court judge were "deficiencies in working capital, inability to meet bonding requirements, disabilities caused by an inadequate 'track record,' lack of awareness of bidding opportunities, unfamiliarity with bidding procedures, preselection before the formal advertising process, and the exercise of discretion by government procurement officers to disfavor minority businesses."[180]

1. What Constitutes Past Discrimination?—

a. Third, Ninth, and Tenth Circuits: "Passive Participation in System of Racial Exclusion"—In *Contractors Association of Eastern Pennsylvania v. Philadelphia*,[181] the Third Circuit found unconstitutional the provisions of a Philadelphia ordinance creating a set-aside for black subcontractors on city public works contracts. The court stated that the city could have taken steps to remedy past discrimination by prime contractors against black subcontractors if the city was a "'passive participant' in a system of racial exclusion."[182] The Third Circuit stated that, to constitute "passive complicity," the city had to play a "role" in private

179. *See id.*

180. Adarand Constructors, Inc. v. Pena, 965 F. Supp. 1556, 1576 (D. Colo. 1997), *vacated on appeal sub nom.* Adarand v. Slater, 169 F.3d 1292, 1295 (10th Cir. 1999) (citing Fullilove v. Klutznick, 448 U.S. 448 (1980) (quoting U.S. Commission on Civil Rights, "Minorities and Women as Government Contractors," 16–28, 86–88 (1975))). The district court did not fully articulate its grounds for holding that the government's affirmative action program was remedying past discrimination by the private sector.

181. 91 F.3d 586 (3d Cir. 1996), *cert. denied*, 519 U.S. 1113 (1997).

182. *Id.* at 599 (citing *Croson*, 488 U.S. at 492) (finding insufficient evidence of discrimination was presented).

discrimination.[183] The court also suggested that the city could remedy discrimination by a local trade association if the city had "passively participated" in the private discrimination.[184]

In contrast, the Tenth Circuit stated in *Concrete Works of Colorado v. City of Denver* that, "[a]lthough we do not read *Croson* as requiring the municipality to identify an exact linkage between its award of public contracts and private discrimination, such evidence would at least enhance the municipality's factual predicate for a race- and gender-conscious program."[185] Similarly, the Ninth Circuit stated in *Coral Const. Co. v. King County* that "[m]ere infusion of tax dollars into a discriminatory industry may be sufficient governmental involvement" to constitute "passive complicity."[186]

b. Fifth Circuit: Past Discrimination by Specific Governmental Actor—In *Hopwood v. Texas*,[187] the Fifth Circuit narrowed the notion of "past discrimination" that is needed to establish an affirmative action program. The Fifth Circuit held that the district court erred in allowing the discrimination by the public educational institutions in the State of Texas to constitute the "past discrimination" necessary in establishing an affirmative action program.[188] The court concluded that even a showing of "past discrimination" by the University of Texas was inappropriate because the law school operated separately within the system—maintaining its own admissions program and hiring its own faculty.[189] For the law school to establish an affirmative action program in admissions, it had to show that it was designed to address "past wrongs at that school."[190] Although the record contained allegations of discrimination by the Texas educational school system, the court looked upon the issue

183. *See id.*

184. *See id.* The court also held that the city did not "passively participate" in such discrimination because it did not award contracts through trade association membership. The court found it unnecessary to decide whether the city's statistical evidence provided a strong basis of discrimination because it found that the set-aside was not "narrowly tailored." *See id.* at 602, 605.

185. Concrete Works of Colo. v. City of Denver, 36 F.3d 1513 (10th Cir. 1994).

186. Coral Const. Co. v. King County, 941 F.2d 910, 916 (9th Cir. 1991).

187. 78 F.3d 932 (5th Cir. 1996).

188. *See id.* at 954.

189. *See id.* at 951.

190. *See id.* at 952. In addition, the court found the evidence presented by the law school of its "bad reputation" in the minority communities and its perception as "hostile" as insufficient "present effects of past discrimination" so as to justify the affirmative action program. The court held this opinion because the "bad reputation" and "hostile" environment could not be traced to actions of the law school. In addition, the law school's actual past discriminatory actions were too remote in time, having ended in the 1960s. Because the court found the admissions policy failed the "compelling interest" prong of the strict scrutiny test, it concluded that it did not have to examine whether it was "narrowly tailored" to advance the government's interest. *Id.* at 953, 955.

of past discrimination very narrowly and would only consider discrimination by the specific governmental actor—the University of Texas School of Law—to satisfy the compelling governmental interest requirement.

2. *Conclusion: Past Discrimination for Race-Based Affirmative Action Plans*—The FCC can adopt race-based affirmative action programs based on passive complicity in the discrimination of others. Courts either have suggested in dicta or have held that "passive complicity" in another's discrimination would constitute a compelling governmental interest. These cases have involved affirmative action plans dealing with commerce or business, for example construction contracts.

The Fifth Circuit in *Hopwood* limited the notion of "past discrimination" that would satisfy a compelling governmental interest to that of the specific governmental actor. But the *Hopwood* decision is contrary to the Supreme Court's pronouncements in both *Croson* and *Adarand* in which the Court indicated a willingness to consider "passive complicity" by the government actor in the discrimination as a compelling governmental interest. The Fifth Circuit said that it limited the "past discrimination" to the law school because "when one state actor begins to justify racial preferences based upon the actions of other state agencies, the remedial actor's competence to determine the existence and scope of the harm—and the appropriate reach of the remedy—is called into question."[191]

The *Hopwood* court went on to say

> [e]ven if, *arguendo*, the state [not the law school] is the proper government unit to scrutinize, the law school's admissions program would [still] not withstand [the court's] review. For the admissions [process] to pass constitutional [review], the State of Texas, through its legislature, would have to find that past segregation has present effects; it would have to determine the magnitude of those present effects; and it would need to limit carefully the "plus" given to applicants to remedy that harm.[192]

Hopwood can be distinguished from cases involving contractors. In *Hopwood*, the law school played no role in the discrimination that occurred in its feeder pool of schools—colleges and universities, secondary and elementary schools. In contrast, in the case of

191. Hopwood v. Texas, 78 F.3d 932, 951 (5th Cir. 1996).
192. *Id.*

contractors, the government may be involved indirectly in the discrimination by the private sector because the government is paying public money to contractors who select subcontractors. In the case of the FCC, private parties sell or transfer FCC licenses, and the agency analyzes, approves, or disapproves the transaction. Discrimination in the sale or transfer process may provide complicity by the governmental agency which approved the deal and established the broad procedures for the transaction.

The FCC can develop an affirmative action plan based on "passive complicity" in the discrimination by others. Any affirmative action plan developed for minority-owned businesses would presumably attempt to remedy discrimination by the capital markets, advertisers, suppliers, brokers, other FCC licensees, and customers of minority-owned or women-owned broadcasters. Unlike the *Hopwood* affirmative action plan, any FCC plan would not be attempting to remedy the discrimination by another governmental agency. As such, any FCC plan and any FCC investigation into "past discrimination" can examine discrimination by other actors in the telecommunications market.

3. What Type of Statistical Evidence Needs to Be Presented?—For a race-based affirmative action program to be upheld, there has to be a "strong basis in evidence" to support the conclusion that remedial action is necessary.[193] A government can "justify affirmative action by demonstrating 'gross statistical disparities' between the proportion of minorities hired . . . and the proportion of minorities willing and able to do the work."[194] "Anecdotal evidence may also be used to document discrimination, especially if buttressed by relevant statistical evidence."[195] Utilization ratios of eighty percent or greater, which are close to full minority participation, are not, standing alone, considered an indication of discrimination.[196]

Other factors need to be held constant when making the statistical analysis. For instance, in *Engineering Contractors Association v. Metropolitan Dade County*, the Eleventh Circuit held that the statistical evidence presented by the county was insufficient to justify the race-, ethnicity-, and gender-based affirmative action plans because the statistical disparities could be explained without reference to

193. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 500 (1989) (quoting Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 277 (1986)).

194. Ensley Branch NAACP v. Seibels, 31 F.3d 1548, 1565 (11th Cir. 1994).

195. *Id.*

196. *See* Engineering Contractors Ass'n v. Metropolitan Dade County, 122 F.3d 895, 914 (11th Cir. 1997) (citing as analogous authority EEOC disparate impact guidelines, 29 C.F.R. § 1607.4D).

discriminatory practices.[197] The court said that the statistical disparity in contract dollars could be explained by the fact that minority- and woman-owned firms tend to be smaller, and as such won smaller contracts.[198] While the court did not discount the anecdotal evidence of discrimination, it held that such discrimination alone could not prove discriminatory practices.[199]

IV. AFFIRMATIVE ACTION PROGRAMS FOR WOMEN

Government statutes and regulations that discriminate against women have been historically scrutinized by courts under an intermediate standard of review.[200] Under this standard of review, a court will find these statutes or regulations constitutionally valid if they are substantially related to an important governmental interest.[201]

A. Sixth Circuit—Strict Scrutiny for Gender-Based Affirmative Action Programs

The Sixth Circuit has held that all government affirmative action programs—whether race or gender based—are to be evaluated under the strict scrutiny standard of review.[202] Gender-based affirmative action programs in the Sixth Circuit have to serve a compelling governmental interest and have to be narrowly tailored to withstand judicial review.[203] These opinions are of questionable

197. *See id.* at 924.

198. *See id.* at 916–17.

199. *See id.* at 924–26.

200. *See generally* United States v. Virginia, 518 U.S. 515, 531–33 (1996) [hereinafter *VMI*] (citing J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 136–37, n.6 (1994); Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982)); Reed v. Reed, 404 U.S. 71, 76 (1971)).

201. *See VMI*, 518 U.S. at 533.

202. *See* Brunet v. City of Columbus, 1 F.3d 390 (6th Cir. 1993); Conlin v. Blanchard, 890 F.2d 811 (6th Cir. 1989). In *Conlin*, white males sued the State of Michigan because several women were promoted to positions for which white men had applied and were rejected. The white men claimed that the women received the positions because of the operation of the Michigan affirmative action plan. The Michigan plan stated that the effectiveness of an equal opportunity program can be measured by the representation of all segments of the population in all grade levels in all departments in all areas.

203. *See Conlin*, 890 F.2d at 816. The Sixth Circuit remanded the case because the district court did not address the issue of whether sufficient evidence of past discrimination was introduced or whether the program was narrowly tailored. *See also Brunet*, 1 F.3d at 409. (using the strict scrutiny standard of review, the Sixth Circuit held that the evidence of past

constitutional soundness, but must be considered in crafting a national program.

B. Other Circuits—Intermediate Scrutiny for Gender-Based Affirmative Action Programs

The following discussion examines how the other circuit courts still employ the intermediate level of scrutiny in analyzing gender-based affirmative action programs.

1. D.C. Circuit: Insufficient Evidence to Support Link Between Women Ownership and Diversity Under Intermediate Scrutiny—In *Lamprecht v. FCC*,[204] the D.C. Circuit invalidated, as unconstitutional, the FCC program which considered a woman's gender a plus factor in a comparative hearing for a broadcast license. This decision was pre-*Adarand* and used the *Metro Broadcasting* intermediate scrutiny analysis. The *Lamprecht* court accepted that diversity was an "important" objective within the government's prerogative.[205] The question the court decided was whether the government's methods were "substantially related" to the goal that it hoped to achieve.[206] The rationale for the FCC program was grounded in diversity and the belief that having more women owners would lead to more diverse broadcasting formats. The court held that the FCC did not establish that its program was "substantially related" to increasing the diversity of broadcast formats.[207] The court based its decision on the statistical data presented which showed that then-existing women broadcast owners had formats similar to those of male owners.[208] In contrast, the broadcast formats for minority-owned businesses, the court noted, did vary significantly from those of white broadcasters.[209]

2. Eleventh Circuit: Societal Discrimination Against Women Is Sufficient to Establish "Past Discrimination"—In *Ensley Branch NAACP v. Seibels*,[210] the Eleventh Circuit observed that under the intermediate scrutiny test, the government interest prong can be satisfied by a

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gender discrimination presented was too remote—happened prior to 1975—or had already been remedied by the affirmative action plan.

204 958 F.2d 382 (D.C. Cir. 1992).

205. *Id.* at 391.

206. *See id.*

207. *See id.* at 399.

208. *See id.* at 398.

209. *See id.*

210. 31 F.3d 1548, 1565 (11th Cir. 1994).

showing of "societal discrimination" in the relevant economic sector.[211] "[I]ntermediate scrutiny does not require any showing of governmental involvement . . . in the discrimination [that] it seeks to remedy."[212] The Eleventh Circuit was of the opinion that "[t]he principal purpose of intermediate scrutiny is not so much to make sure that gender-based classifications are used only as a 'last resort,' as it is to ensure that gender classifications are based on reasoned analysis rather than archaic stereotypes."[213]

In *Ensley* no evidence was presented that the gender-based affirmative action plan was adopted because of "archaic and overbroad assumptions about the relative needs and capacities of the sexes."[214] As a result the court decided that "the 'important government interest' inquiry turns on whether there is evidence of past discrimination in the economic sphere at which the affirmative action program is directed."[215] The court found that substantial anecdotal and statistical evidence of past discrimination against women was presented, demonstrating an important governmental interest: eradicating gender discrimination against women in public employment.[216]

The court found that the affirmative action plan in question was not substantially related to the goal of eliminating gender discrimination. The court found that the affirmative action plan perpetuated gender discrimination because it allowed the City of Birmingham to continue to use biased exams for hiring and promotion coupled with an affirmative action plan. The plan was potentially indefinite in duration, which according to the court would "foster the misguided belief that women cannot compete on their own."[217]

The court believed that the goal of eliminating gender discrimination required, at a minimum, the development of gender-neutral selection procedures—possibly used in conjunction with an affirmative action program designed to remedy discrimination against women.[218] The court remanded the case to the district court, instructing it to (1) set prompt deadlines for the

211. *Id.* at 1580.

212. *Id.* at 1581 (quoting Coral Constr. Co. v. King County, 941 F.2d 910, 932 (9th Cir. 1991).

213. *Ensley*, at 1581 (citation omitted) (citing Hayes v. North State Law Enforcement Officers Ass'n, 10 F.3d 207, 217 (4th Cir. 1993) and Contractors Ass'n v. City of Philadelphia, 6 F.3d 990, 1010 (3d Cir. 1993)).

214. *Id.* (quoting Roberts v. United States Jaycees, 468 U.S. 609, 625 (1984)).

215. *Id.*

216. *See id.*

217. *Id.* at 1582.

218. *See id.*

development of gender-neutral selection procedures; and (2) stop using any affirmative "goals" or quotas for women appointments unless further affirmative action is needed to eradicate lingering effects of discrimination against women. Because gender goals need only be "substantially related" (rather than "narrowly tailored") to their goal, any affirmative action plan need not tie gender goals to the proportion of qualified women applicants.[219]

3. How Much Evidence of "Past Discrimination" Needs to Be Established Under Intermediate Scrutiny?—In *Engineering Contractors Association v. Metropolitan Dade County*,[220] the Eleventh Circuit observed that "a gender-conscious affirmative action program can rest safely on something less than the 'strong basis in evidence' required to bear the weight of a race- or ethnicity-conscious program."[221] Quoting the Third Circuit, the court stated that a "[local government] must be able to rely on less evidence in enacting a gender preference"[222] than a racial one. To do otherwise, according to the court, would eviscerate the difference between strict and intermediate scrutiny.[223]

The Eleventh Circuit held that the evidence of "past discrimination" presented to justify gender-conscious affirmative action programs must be "probative" and "sufficient."[224] The court acknowledged that the " 'sufficient probative evidence' standard . . . cannot be measured or described with scientific precision."[225] Because the evidence of gender disparity presented to the district court was mixed, the circuit court held that "the district court did not clearly err in finding that the County had failed to present sufficient probative evidence in support" of its gender-conscious affirmative action program.[226]

4. Conclusion: Gender-Based Affirmative Action Programs—This area of the law is complex and muddled. In the recent *VMI* decision, the Supreme Court seems to have elevated the standard of review in gender discrimination cases. Most circuit courts employ intermediate scrutiny for gender discrimination. The Sixth Circuit is the sole circuit that uses strict scrutiny to evaluate gender-based affirmative action programs. The FCC is a national agency whose

219. *See id.* at 1581–82.
220. 122 F.3d 895 (11th Cir. 1997).
221. *Id.* at 909.
222. *Id.* (quoting Contractors Ass'n v. City of Philadelphia, 6 F.3d 990, 1010 (3d Cir. 1993)).
223. *See Engineering Contractors Ass'n*, 122 F.3d at 908.
224. *Id.* at 909.
225. *Id.* at 910.
226. *Id.*

rules and regulations can be challenged anywhere. Therefore, in crafting any gender-based affirmative action programs and in establishing the proper factual foundation of "past discrimination," the FCC has to be mindful of whether it would pass muster in the Sixth Circuit.

The FCC could also treat the Sixth Circuit ruling as wrong and continue to justify gender-based affirmative action programs under the intermediate scrutiny standard. Given the D.C. Circuit holding in *Lamprecht*, the FCC could analyze whether evidence currently supports a diversity of programming rationale for women. If the circuit courts follow intermediate scrutiny, the FCC can also rely on past discrimination against women owners in the telecommunications industry. Evidence of this discrimination must be "sufficiently probative" and can be in the nature of societal discrimination in the relevant economic sector (telecommunications).

CONCLUSION: NAVIGATING *ADARAND'S* UNRESOLVED ISSUES

Even though the Supreme Court's decision in *Adarand* has left many issues unresolved, the FCC still can successfully navigate through this uncertainty. The FCC has relied primarily on diversity of voices and viewpoints, diversity of ownership, or evidence of industry barriers to justify its affirmative action programs. This justification has now entered the realm of constitutional uncertainty in light of *Adarand*. *Adarand* overruled the standard of review—intermediate scrutiny—used to analyze race-based affirmative action programs in *Metro Broadcasting*. The Supreme Court has not addressed whether diversity would be a compelling governmental interest under strict scrutiny. Justice O'Connor's dissent in *Metro Broadcasting* (indicating that she would hold the FCC affirmative action program unconstitutional under strict scrutiny) might be a harbinger of the Court's future direction in this area. Post-*Adarand*, only one circuit court has found diversity to be a compelling governmental interest. The Supreme Court and the circuit courts have found a compelling governmental interest to exist for those affirmative action programs designed to remedy past discrimination.

Given this legal landscape, the FCC should retain its diversity rationale[227] as a justification for any affirmative action programs that

227. This strategy will allow the FCC to retain a two-pronged litigation strategy that (1) presumes the diversity of *Metro Broadcasting* is still a compelling governmental interest; and

it creates, but combine that diversity rationale with evidence of discrimination. This can be done by showing several things: (1) minority- and women-owned telecommunications businesses in pursuit of licenses are more likely to be discriminated against by bankers, venture capitalists, and others; (2) minority- and women-owned businesses are more likely to have a different customer base or broadcasting format; and (3) this different customer base and broadcasting format causes these businesses to be discriminated against by others.

For race-based affirmative action programs, the FCC has to identify and establish that discrimination exists. The discrimination has to be specified; it cannot be merely the identification of societal discrimination. It can be discrimination by the FCC against women and minority licensees. It can be discrimination by the private sector including: FCC licensees, suppliers, lenders, brokers, advertisers,[228] and customers of telecommunications minority-owned businesses. It can be argued that the FCC is a "passive participant" in the discrimination by others if a connection is shown between the private sector's discrimination and the FCC's policies. There is a connection between the FCC policies encouraging diverse formats and the discrimination that those diverse formats may face by advertisers. There is also a connection between financial requirements and the discrimination that potential licensees face from financial institutions in receiving a loan.

The FCC's "passive participation" in discrimination is analogous to that of a city in hiring contractors. A city uses its tax dollars to construct something. In *Croson*, the Court stated that a city could develop programs to make sure that its tax dollars were not being used in a discriminatory way. Similarly, the FCC licenses and allocates the radio spectrum to licensees. The FCC is the public trustee over a limited resource, the spectrum. If the FCC discovers that it is licensing to an industry that discriminates against minority-owned and women-owned businesses, it can take steps to remedy this discrimination.

Pursuant to Section Five of the Fourteenth Amendment, Congress has the power to remedy discrimination. In *Fullilove*, the Court found the race-conscious statute authorizing an affirmative action plan constitutional. The Court relied on Section Five and deferred to Congress. Given the *Adarand* holding requiring federal race-conscious programs to be evaluated under strict scrutiny, Sec-

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(2) assuming *arguendo* that diversity is not sufficient, presumes that minority-owned telecommunications businesses encounter discrimination.

228. *See* Civil Rights Forum on Communications Policy, *supra* note 10, *passim.*

tion Five deference is now uncertain.[229] Although the district court on remand in *Adarand* used Section Five as the basis for permitting Congress to adopt affirmative action plans with findings less detailed than a city council, no circuit court has yet addressed this issue.

The FCC is a government agency created by the Congress[230] and derives its powers from acts of Congress.[231] In the area of affirmative action, those acts principally have relied on viewpoint diversity, ownership diversity, and to a lesser extent barriers to entry. These acts do not provide sufficient findings of past or present discrimination to justify an affirmative action program under *Adarand.* In addition, at least one senator spoke out against affirmative action programs in the area of telecommunications ownership, in repealing the tax certificate program on the ground that there was no evidence of discrimination against minority-owned businesses.[232] The FCC needs to make detailed findings of past (or present) discrimination against minority-owned and women-owned businesses.

Whether regional findings of discrimination have to be made is also a question left unresolved by *Adarand.* In *Croson,* the Supreme Court invalidated an affirmative action plan instituted by the City of Richmond. The Court criticized the city's plan as too broad, because it did not limit the coverage to those discriminated against in the city. The Court held that the city must compare minority contractors available in the relevant market—the City of Richmond—to those who won contracts. As a consequence of the Court's holding, states and municipalities would have to perform studies to examine discrimination solely in their region. The *Adarand* Supreme Court decision did not address the question of whether regional findings of discrimination would have to be shown by the federal government. On

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229. Two weeks after *Adarand* was announced, the Supreme Court refused to accord deference to the Justice Department's interpretation of the Voting Rights Act and struck down Georgia's congressional redistricting plan under a strict scrutiny analysis. In *Miller v. Johnson,* 515 U.S. 900 (1995), the Court pointed to *Adarand* as indicative of its "presumptive skepticism of all racial classifications." *Id.* at 922. The Court refused to accept on its face the Justice Department's argument that the proposed redistricting plan was necessary to comply with the Voting Rights Act, noting that it refused to "surrender[] to the Executive Branch [its] role in enforcing the constitutional limits on raced-based official action." *Id.* The Court went on to reject the plan as incompatible with the Congressional intent behind the Act. *See id.* at 925–26.

230. *See* Communications Act of 1934, ch. 652, 48 Stat. 1068.

231. *See* Metro Broad., Inc. v. FCC, 497 U.S. 547, 563, 572–79 (1990) (agencies do not have the "institutional competence" and explicit "constitutional authority" that Congress possesses, so FCC affirmative action programs—although established by the FCC on its own—were considered mandated by Congress through subsequent Congressional action).

232. *See supra* note 42 and accompanying text.

remand, the district court held that Congress addresses national problems and therefore it is not required to make regional findings. The FCC can argue that it is a national agency that distributes licenses throughout the country. The FCC does award some licenses to serve local or regional areas, but anyone—nationwide—can compete for those licenses. Thus, the FCC can argue that the appropriate availability pool is nationwide. The telecommunications industry is not like the market for contractors, which is more likely to be local or regional—the telecommunications market is national in scope.

For gender-based affirmative action programs, there is also a great deal of uncertainty regarding the appropriate standard of review. Government statutes and regulations that discriminate against women have historically been scrutinized by courts under an intermediate standard of review.[233] Under this standard of review, a court will find these statutes or regulations constitutionally valid if they are substantially related to an important governmental interest.

Whether the Supreme Court will continue to follow this standard is unclear. In *United States v. Virginia*,[234] the Court held that "[p]arties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action."[235] That phrase permeates the Court's opinion and seems to suggest a more intense scrutiny than do customary descriptions of intermediate scrutiny.[236] Nevertheless the Court expressly disclaimed "equating gender classifications, for all purposes, to classifications based on race or national origin."[237]

The constitutionality of an affirmative action program for women would also presumably be reviewed under whatever standard of review that the Court uses for gender discrimination against women. The Sixth Circuit has held that gender-based affirmative action plans are to be analyzed under strict scrutiny. Other circuits have continued to analyze these cases under intermediate scrutiny. Those courts have held that all that needed to be shown to satisfy a gender-based affirmative action plan was "societal discrimination." The Supreme Court has not addressed this issue.

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233. *See generally* Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982); Frontiero v. Richardson, 411 U.S. 677, 682–83 (1973); Reed v. Reed, 404 U.S. 71 (1971).

234. 518 U.S. 515 (1996).

235. *Id.* at 531 (citing JEB v. Alabama *ex rel.* T.B., 511 U.S. 127, 136–37 (1994); *Mississippi Univ. for Women*, 458 U.S. at 724)).

236. *See id.* at 567–76 (Scalia, J., dissenting) (suggesting that the majority had effectively adopted a form of strict scrutiny for gender classifications).

237. *Id.* at 532.

But even under intermediate scrutiny, the FCC's gender-based affirmative action program, in the broadcast area, was found unconstitutional by the D.C. Circuit Court in *Lamprecht.* The court held that the FCC did not establish that its program to increase the number of women owners was "substantially related" to increasing the diversity of broadcast formats.

The Supreme Court has been clear that past discrimination (either by the governmental actor or by the governmental actor's "past complicity" in the discrimination of others) would be sufficient to establish a race-based program. As such, the FCC could use that as the basis for its gender-based programs. The FCC should investigate whether women-owned telecommunications businesses are more likely to be discriminated against by customers, suppliers, and others. Such studies must address utilization ratios and anecdotal evidence.[238] However, anecdotal evidence alone does not prove discriminatory practices.[239] Studies also have to take into account that minority- or women-owned firms are more likely to be small and that may explain some of the disparity.[240]

The FCC could perform these studies as part of its Market Barrier Entry proceedings. In a report titled *In the Matter of Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses,* the commentators, responding to a Notice of Inquiry, identified the following as barriers to entry to firms owned by minorities and women: cost of capital, unfavorable credit terms, and lack of transferable telecommunications employment-related opportunities.[241] In the report, the FCC stated that it was commencing a comprehensive study to further examine the role of small businesses and businesses owned by minorities and women in the telecommunications industry, and the impact on the FCC's policies on access to the industry for such businesses. In the report, the FCC said that the study would be conducted by an external contractor focusing on broadcast and wireless services. In the wireless context, the Report indicated that it would focus on licensing by auction and by other previously used methods. The Report also stated that the study would analyze the utilization and availability rates of small businesses, minority-owned businesses, and women-owned businesses. The FCC stated that these studies would assist it in reporting to Congress on the implementation of Section 257[242]

238. *See* notes 177–79 and accompanying text.

239. Engineering Contractors Ass'n v. Metro Dade County, 122 F.3d 895, 926 (11th Cir. 1997).

240. *See id.*

241. 11 F.C.C.R. 6280 (1996).

242. 47 U.S.C. § 257(c) (Supp. 1995–1998).

as to eliminating market barriers and Section 309(j)[243] as to evaluating the efficacy of auctions. Such studies may help determine whether any discrimination is occurring against minority- and women-owned businesses. The outcome of these studies may go a long way to determining whether there is a compelling governmental interest that will assist the FCC in crafting a narrowly tailored affirmative action program.

243. 47 U.S.C.§ 309(j)(12)(D)(ii)–(iv) (1994).