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THE OTHER DIGITAL DIVIDE: DISPARITY IN THE AUCTION OF WIRELESS TELECOMMUNICATIONS[+]

Leonard M. Baynes[++] *and C. Anthony Bush*[+++]

I. INTRODUCTION

For the past several years, the Commerce Department has published an annual survey entitled *Falling Through the Net,* which highlights the disparity between people of color and whites in access to computers and the Internet.[1] This disparity is known as the "Digital Divide."[2] This Article shows that another Digital Divide exists: members of minority groups who have participated in the Federal Communications Commission (FCC) auction of spectrum for wireless licenses have, on average, received fewer opportunities for spectrum ownership than members of non-minority groups, even in the advent of race-based bidding credits. This Article then argues that the divide is significant enough to justify affirmative action programs.

An equal opportunity to own the wireless spectrum is critical at this stage of its development because acquisition costs are becoming

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[+] Portions of this Article have been reprinted from Leonard M. Baynes, *Life After* Adarand: *What Happened to the* Metro Broadcasting *Diversity Rationale for Affirmative Action in Telecommunications Ownership?,* 33 MICH. J.L. REFORM 87 (1999/2000) and Leonard M. Baynes, *Paradoxes of Racial Stereotypes, Diversity and Past Discrimination in Establishing Affirmative Action in FCC Broadcast Licensing,* 52 ADMIN. L. REV. 979 (2000).

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1. *See* Nat'l Telecomm. & Info. Admin., U.S. Dep't of Commerce, *Americans in the Information Age Falling Through the Net, at* http://www.ntia.doc.gov/ntiahome/digital divide (last visited Sept. 26, 2002) (indexing the reports).

2. *Id. But see* Nat'l Telecomm. & Info. Admin., U.S. Dep't of Commerce, *A Nation Online: How Americans Are Expanding Their Use of the Internet* (2002), *available at* http://www.ntia.doc.gov/ntiahome/dn (last visited Feb. 9, 2003) (noting that computer and Internet access at schools and libraries has narrowed the digital divide).

prohibitive. The 1990s saw explosive growth in wireless communications, rising to 14.3 percent of the industry's 1997 revenues.[3] This boost was due to the steadily increasing subscribership for these services.[4] The wireless national penetration rate, as of June 1999, was nearly twenty-six percent of the population.[5] As of 2001, approximately 110 million Americans had wireless telephones.[6] It is expected that this segment of the telecommunications industry will continue to grow, especially with the advent of "always on" connections to the Internet.[7] In fact, with the introduction of certain rate plans, the industry is starting to see customers use wireless telecommunications as a substitute for – rather than a complement to – plain, old-fashioned wireline telephone service.[8]

On August 10, 1993, Congress authorized the FCC to grant spectrum licenses, including those for wireless telephone service, through a competitive bidding process.[9] Competitive bidding is expected to place

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3. *In re* Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, Fourth Report, 14 F.C.C.R. 10,145, 10,149 (June 24, 1999) [hereinafter Fourth Report]; *see also* Cellular Telecomm. & Internet Association, *CTIA's Semi-Annual Wireless Industry Survey Results: June 1985-June 2002*, *at* http://www.wow-com.com/pdf/june2002release.pdf (last visited Sept. 26, 2002) (finding estimated subscribers grew 13.7% per year from 1985 to 2002 and total six-month revenues rose to 22.6% per year in the same period). *See generally* Gordon Caplan, *When Standards Don't Match, Companies Pay*, NAT'L L.J., Apr. 20, 1998, at B10 ("From 1994 to 1997, the Federal Communications Commission auctioned over $12 billion worth of spectrum licenses, the great majority of which were geared toward companies proposing to offer PCS, primarily digital telephony services.").

4. Fourth Report, *supra* note 3, at 10,149.

5. *Id.* at 10,145.

6. MICHAEL CALABRESE, BATTLE OVER THE AIRWAVES, PRINCIPLES FOR SPECTRUM POLICY REFORM 2 (Oct. 2001).

7. *Id.*

8. *See* Fourth Report, *supra* note 3, at 10,155-56. The widespread adoption of AT&T's "digital-one-rate" price plan has caused some of the most dramatic growth in this segment of the telecommunications industry. *Id.* at 10,155. The plans generally consist of bundles of large quantities of minutes for a fixed monthly rate with a low per-minute price – and sometimes no roaming charges. *Id.*

9. 47 U.S.C. § 309(j) (2000). Prior to the Act, the FCC granted licenses by comparative hearings or lotteries. Wireless Telecomm. Bureau, FCC, *The FCC Report to Congress on Spectrum Auctions*, 13 F.C.C.R. 9601, 9608-09 (Oct. 9, 1997). The comparative hearing was an administrative hearing in which the FCC would determine, on a qualitative basis, whether a broadcast applicant would serve the "public interest, convenience and necessity." 47 U.S.C. § 309(a) (1988). Some of the factors weighed by the FCC were (1) diversification of control; (2) full-time participation in station operation by owners; (3) proposed program service; (4) past service record; (5) efficient use of frequency; (6) character; (7) financial capability; and (8) minority ownership. Comparative hearings were slow; they caused a great deal of delay, and they were expensive. *FCC Report to Congress*, *supra*, at 9608-09. The D.C. Circuit Court of Appeals

billions of dollars in the federal treasury.[10] As a method of distributing licenses, competitive bidding has generally been favored over the previous methods of distribution because it is efficient and contributes to the reduction of the federal budget deficit.[11] While many consider competitive bidding to be a vast improvement over previous FCC distribution methods, others consider competitive bidding manifestly unfair because it creates an uneven playing field on which the person with the most money wins even though he or she is not necessarily the "most worthy."[12]

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ultimately found the comparative hearings to be arbitrary and capricious. In *Bechtel v. FCC*, the D.C. Circuit invalidated the entire ownership integration credit criteria including race and gender considerations. 10 F.3d 875, 878 (D.C. Cir. 1993). The court specifically stated that the "integration preference is peculiarly without foundation." *Id.* at 887. In 1994, the FCC stayed all ongoing comparative hearing cases pending resolution of the issues raised in *Bechtel*. Against this backdrop, as part of the 1993 Budget Act, Congress added 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. 47 U.S.C. § 309(j) (2000). In addition, the Telecommunications Act of 1996 eliminated comparative hearings for renewals of incumbent licensees. 47 U.S.C. § 309(k) (2000) (specifically providing that the FCC "shall not consider whether public interest, convenience, and necessity might be served by the grant of a license to a person other than the renewal applicant").

Prior to the enactment of section 309(j), Congress authorized the FCC to award licenses by lottery. 47 U.S.C. § 309(i) (2000). Lotteries allowed the FCC to handle large volumes of applications much more quickly and shielded the FCC from allegations of improperly granting licenses on political or other grounds. It was thought that lotteries were an unsatisfactory method of awarding the licenses because of the manner in which the FCC arbitrarily exercised its public interest mandate. In addition, lotteries allowed for speculators with no intent to build a network to acquire licenses through lotteries and to turn around and sell the licenses to the highest bidders. *FCC Report to Congress*, *supra*, at 9609.

10. FCC Wireless Telecommunications Bureau, News Release, *FCC Hits $20 Billion Mark in Total Auction Revenues* (1996), *available at* http://www.fcc.gov/Bureaus/Wireless/News_Releases/1996/nrwl6015.txt (noting that since 1996, six FCC auctions raised $20 billion in total auction revenues). In fact, the three-month auction of ninety-nine PCS licenses ending on March 13, 1995 raised more than $7.7 billion and was recognized by the Guiness Book of World Records as raising the most revenue in history. *See* FCC Wireless Communications Bureau, News Release, *FCC Grants 99 Licenses For Broadband Personal Communications Services in Major Trading Areas* (1996), *available at* http://www.fcc.gov/Bureaus/Wireless/News_Releases/1995/nrwl5009.txt.

11. *See* Ian Ayres & Peter Cramton, *Deficit Reduction Through Diversity: How Affirmative Action at the FCC Increased Auction Competition*, 48 STAN. L. REV. 761, 763 (1996) (stating that "bidding preferences increased the government's revenue by more than 12 percent - an increase in total revenues of nearly $ 45 million").

12. *See* JERRY KANG, COMMUNICATIONS LAW AND POLICY 129 n.3 (2001); Kurt Wimmer & Lee Tiedrich, *Competitive Bidding and Personal Communications Services: A New Paradign for FCC Licensing*, 3 COMM. LAW CONSPECTUS 17 (1994); *American Telecoms. Spectrum Rush*, THE ECONOMIST, Feb. 14, 1998, at 63 (noting "monopolists are

The FCC awards licenses for use of the public spectrum, which is owned by the American people. The FCC provides the licensees with the right to use the spectrum for a period of time. Once the licenses are awarded, the license holders are fiduciaries in public trust of the spectrum.[13] As a result of these public interest obligations, any distribution procedure must be carefully scrutinized to ensure that it is fair and that many have a chance to participate.

Congress recognized that fairness was an integral part of the competitive bidding procedures. In the Communications Act, Congress required the FCC to "ensure that . . . businesses owned by members of minority groups . . . are given the opportunity to participate in the provision of spectrum-based services, and, for such purposes, consider the use of tax certificates, bidding [credits], and other procedures."[14] The FCC originally proposed that an aggregate bidding credit of twenty-five percent[15] be given to minority-owned businesses[16] that participated in the C and F block auctions.[17] Under this plan, if a minority-owned business

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always likely to be able to bid more than a new entrant in order to maintain their monopoly").

13. *See* FCC v. League of Women Voters of Cal., 468 U.S. 364, 378 (1984).

14. 47 U.S.C. § 309(j)(4)(D) (2000).

15. These firms would have received a ten percent bidding credit for being small and a fifteen percent bidding credit for being minority owned.

16. Minority-owned businesses were eligible for these credits under two options. Under the first option, the gross revenues and total assets of certain investors were not to be counted toward the financial caps of gross revenues of $125 million in each of the last two years and total assets of less than $500 million, so long as the applicant had a control group consisting of one or more designated entities or individuals that: (1) controlled the applicant; (2) held at least 25% of the equity; and (3) for corporations, held at least 50.1% of the voting stock. Under the second option, minority-owned firms were able to sell up to 49.9% of their equity to a single investor including 25% of the voting rights, without the gross revenues and total assets of such investor being attributable to the minority-owned applicant, so long as the control group: (1) controlled the applicant; (2) held 50.1% of the equity; and (3) in the case of corporate applicants, held at least 50.1% of the voting stock.

17. The FCC has had several programs in place to try to increase ownership of broadcast and other spectrum by women and minorities. These affirmative action programs were often justified on the grounds that, at least in the broadcast area, people of color and women were more likely to offer different programming than stations owned by members of the majority. The Supreme Court agreed with this analysis for affirmative action programs in telecommunications ownership in *Metro Broadcasting, Inc. v FCC*, 497 U.S. 547, 567-68 (1990). In *Metro Broadcasting*, the Supreme Court, under an intermediate level of scrutiny, found constitutional two FCC affirmative programs: (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) additional consideration for minority-owned businesses, which gave prospective licensees a "plus" during the comparative hearings proceedings. *See id.* at 552. The Supreme Court's decision in *Adarand Constructors, Inc. v. Pena* brought into question the constitutionality of these programs when the Supreme Court held that all government affirmative action programs would be analyzed under the

bid $1.25 million for a license and a majority-owned business bid $1.24 million for the same license, the FCC would award the minority-owned business the license, although the FCC would only receive $1 million for the license.[18] In addition, the FCC planned to propose additional benefits including reduced up-front payments and installment payments for acquiring the license.[19]

The FCC, however, eliminated all race-based considerations in awarding wireless licenses after the Supreme Court issued its decision in *Adarand Constructors, Inc. v. Pena*,[20] which held that all race-based government programs were subject to strict scrutiny.[21] To survive strict scrutiny, government programs must serve a compelling state interest and offer a narrowly tailored remedy.[22] The FCC decided to eliminate all race-based considerations because it lacked a record establishing a compelling governmental interest.[23] In addition, the FCC's decision was predicated on a political climate adverse to affirmative action programs.

In the absence of race-based programs, the FCC's reliance on a competitive bidding process to distribute wireless licenses raises the issue of whether it can achieve its public interest mandate of ensuring that licenses are awarded on a nondiscriminatory basis to members of minority groups. This Article explores this question by employing the

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strict scrutiny test. 515 U.S. 200, 227 (1995). The *Adarand* Court overruled the standard of review used in *Metro Broadcasting*, raising the question of whether the FCC's programs were still good law and bringing additional complexity to this already difficult area of the law. *Id.*

18. The $1.25 million bid would be the sum of the 25% credit and the $1 million bid by the minority-owned business.

19. *See generally FCC Report to Congress*, *supra* note 9, at 9631-33. The installment payment program would allow the licensee to pay for the costs of its license over the license term. The FCC would assume that bidders able to raise the upfront payments "were financially sound and able to provide services." *Id.* at 9631. Some of the C-Block wireless winners ran into financial difficulty in paying the installment payments. *Id.* at 9632. As a result, the FCC decided not to offer the installment payment programs in any subsequent auctions.

20. 515 U.S. 200 (1985); *see also FCC Report to Congress*, *supra* note 9, at 9646; Leonard M. Baynes, *Life After* Adarand: *What Happened to the* Metro Broadcasting *Diversity Rationale for Affirmative Action in Telecommunications Ownership?*, 33 MICH. J.L. REFORM 87, 108 (1999/2000); Leonard M. Baynes, *Paradoxes of Racial Stereotypes, Diversity and Past Discrimination in Establishing Affirmative Action in FCC Broadcast Licensing*, 52 ADMIN. L. REV. 979, 988-991 (2000).

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

22. *Id.*

23. *FCC Report to Congress*, *supra* note 9, at 9646.

affirmative action tests that the Supreme Court outlined in *Adarand* and *City of Richmond v. J.A. Croson Co.*[24]

Since the Supreme Court issued the *Adarand* decision, no department of the federal government has performed a study to justify affirmative action programs. The Justice Department, however, has reviewed numerous studies by state and local governments of discrimination in procurement.[25] As a result, the Justice Department issued a public notice entitled *Proposed Reforms to Affirmative Action in Federal Procurement.*[26] These reforms addressed more specifically the second part of the *Adarand* test, which deals with narrow tailoring.[27]

The Justice Department was of the opinion that it was unnecessary to focus on the first part of the *Adarand* test, which requires a compelling governmental interest, because a wealth of evidence of past discrimination existed to support affirmative action programs in federal procurement.[28] The Justice Department specifically stated:

> 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.[29]

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24. 488 U.S. 469 (1989) (holding that the City of Richmond's affirmative action program, which aimed to increase the number of minority contractors, was unconstitutional under strict scrutiny).

25. *See* Proposed Reforms to Affirmative Action in Federal Procurement, 61 Fed. Reg. 26,042, 26,042 (May 23, 1996).

26. *Id.* 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.*

27. *Id.*

28. *Id.*

29. *Id.* (emphasis added).

Unlike the field of government contracting, FCC wireless licensing does not have a long history of discrimination or a wealth of information documenting discrimination against minority licensees. In fact, this Article is the first to use the analysis of *Croson* and *Adarand* in the area of wireless auctions to determine whether a compelling interest exists. In Section Two, the authors examine the statutory and regulatory affirmative action programs at the FCC. Section Three provides a brief history of affirmative action jurisprudence. In Section Four, the authors argue that there is discrimination in wireless licensing on two bases: 1) the nexus between the FCC's actions in distributing licenses by competitive bidding and capital market discrimination, and 2) the disparity in utilization ratios between minority and non-minority applicants for each of the auctions. The authors believe, however, that the specific requirements of a utilization ratio create additional complexity and problems in performing the calculations in this industry. Finally, this Article concludes that there is capital market discrimination against minority-owned telecommunications businesses and that these minority-owned businesses are constitutionally underutilized, which presents a compelling governmental interest for establishing affirmative action programs in wireless competitive bidding.

II. FCC AFFIRMATIVE ACTION PROGRAMS

The FCC has justified previous affirmative action programs on the basis of encouraging present and future diversity – "viewpoint diversity in the case of broadcast and ownership diversity in the case of spectrum-based services."[30] The programs for spectrum-based services have only recently pointed to past discrimination against minorities as their justification.[31] Most of these programs have been eliminated by congressional action, judicial review, or FCC action.[32]

Section 309(j) of the Communications Act allows the FCC to select licensees by competitive bidding.[33] Section 309(j)(3)(B) instructs the

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30. Baynes, *Life After* Adarand, *supra* note 20, at 91.

31. *See generally* S. REP. NO. 99-191, 1982 U.S.C.C.A.N. 2237, 2284-89 (detailing the legislative history of § 309(i) dealing with distribution of licenses by lottery and noting past discrimination against minority entrepreneurs); *see also Adarand*, 515 U.S. at 205-10; *Croson*, 488 U.S. at 477-80.

32. *See* Baynes, *Life After* Adarand, *supra* note 20, at 91. "The only programs that still are technically in effect are the distress sale policy and the leased access minority programming rule. . . ." *Id.* Post-*Adarand*, the constitutionality of these programs is uncertain, and they are not currently being used by the FCC. *Id.*

33. 47 U.S.C. § 309(j) (2000). The history of Congress's approval of licensing by lottery is also relevant to FCC affirmative action. In 1981, Congress enacted section 309(i)

FCC to establish competitive bidding procedures that "promot[e] economic opportunity and competition and ensur[e] that new and innovative technologies are readily accessible to the American people . . . by disseminating licenses among . . . *businesses owned by members of minority groups and women.*"[34] Again in section 309(j)(4)(C)(ii), Congress requires 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.*"[35] In creating these opportunities, section 309(j)(4)(D) suggests that the FCC consider using "tax certificates, bidding preferences, and other procedures."[36]

While considering these provisions, the House Subcommittee on Minority Enterprise, Finance, and Urban Development held hearings and heard testimony from several experts concerning the historical

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of the Communications Act to allow the FCC to select licensees by lottery. 47 U.S.C. § 309(i) (2000). 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. 47 U.S.C. § 309(i)(3)(A) (2000); *see also* Random Selection Procedures for Mass Media Services, Preferences, 47 C.F.R. § 1.1622 (2001). 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 to "applications accepted for filing" by the FCC before July 26, 1993, and section 309(i) required an FCC determination that the use of the communications spectrum is not to be distributed by auction. 47 U.S.C. § 309(i)(5)(B) (2000). In 1997, Congress enacted legislation that caused section 309(i) to expire on July 1, 1997 except for the award of licenses and permits for public, noncommercial television stations. *See* Balanced Budget Act of 1997, Pub. L. No. 105-33, § 3002(a)(2)(B), 111 Stat. 251, 260 (1997).

The legislative history of section 309(i), however, evidences Congress's awareness of the discrimination that affects minority entrepreneurs in the communications industry. *See* S. REP. NO. 97-191, at 40-46 (1981), *reprinted in* 1982 U.S.C.C.A.N. 2237, 2284-90. In addition to relying on the diversity rational, Congress specifically noted that "the effects of past inequities stemming from racial and ethnic discrimination have resulted in a severe underrepresentation of minorities in the media of mass communications, as it has adversely affected their participation in other sectors of the economy as well." *Id.* at 43, 1982 U.S.C.C.A.N. at 2287. *But see* H.R. CONF. REP. NO. 97-765, at 23 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2261, 2267 (indicating that Congress's intent in implementing section 309(i)(3)(A) was to foster diversity). 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." S. REP. NO. 97-191, at 44 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2237, 2288. Congress also observed that the preferences created in section 309(i) were "narrowly-drawn" to promote diversity in mass communications. *Id.*

34. 47 U.S.C. § 309(j)(3)(B)(2000) (emphasis added).

35. *Id.* § 309(j)(4)(C)(ii)(2000) (emphasis added).

36. *Id.* § 309(j)(4)(D)(2000).

exclusion that minorities have faced in trying to enter the telecommunications industry.[37] The House of Representatives also acknowledged that bidding credits were not necessarily connected to diversity of viewpoints:

> [U]nlike mass media licenses, where diversity in ownership contributes to diversity of viewpoints, most of the licenses issued pursuant to the bidding authority contained in section 309(j) will be for services where the race or gender of the licensee will 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.[38]

In 1994, in implementing section 309(j) of the Communications Act, the FCC promulgated rules[39] that gave a twenty-five percent "bidding credit" to businesses owned by minorities and women who partook in auctions.[40] The bidding credits involved in the auctions were challenged in two cases. In *Graceba Total Communications, Inc. v. FCC*,[41] a non-minority complainant won two licenses to provide interactive video data services but argued that the bidding credits given to members of minority groups and women artificially inflated auction prices and resulted in discrimination against the complainant; thus, he demanded a twenty-five percent reduction in the price of his licenses.[42] While complainant's petition was still pending before the FCC, the Supreme Court decided *Adarand Constructors, Inc. v. Pena*,[43] holding that federal affirmative action programs are unconstitutional unless "they are narrowly tailored

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37. *See* H. REP. NO. 103-885, at 237-38 (1995).

38. H.R. REP. NO. 103-111, at 255 (1993).

39. For the entrepreneur's block of the PCS auction, the following benefits existed: (1) a woman 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 allowed for an individual member of the control group of a minority-owned C-block applicant even though the individual's other business properties would otherwise make the applicant too large for the entrepreneur's block; and (3) minority and women-owned businesses were to receive an additional fifteen percent bidding credit, tax certificates, and more favorable installment payment plans than other businesses. *Fifth Report and Order*, 9 F.C.C.R. 5532, ¶¶ 130-47 (1994).

40. *In re* Implementation of Section 309(j) of the Communications Act – Competitive Bidding, Fourth Report and Order, 9 F.C.C.R. 2330, 2336-39 (1994); Competitive Bidding Procedures, 47 C.F.R. § 95.816(d)(1) (1996).

41. 115 F.3d 1038 (D.C. Cir. 1997).

42. *Id.* at 1039-40.

43. 515 U.S. 200 (1995); *see also Graceba*, 115 F.3d at 1039-40.

measures that further compelling governmental interests."[44] In *Graceba*, the D.C. Circuit refused to rule on the constitutionality of the program but remanded the case to the FCC because the expertise of the agency would be beneficial to resolving many issues.[45]

These bidding rules were also at issue in *Omnipoint Corp. v. FCC*.[46] A non-minority licensee challenged the constitutionality of the FCC's tiered bidding credits and claimed that they violated equal protection.[47] Shortly after this challenge was filed, the Supreme Court decided *Adarand*,[48] and the FCC stayed the auction rule provisions to evaluate them in light of the decision.[49] The FCC subsequently released its *Sixth Report and Order*, which eliminated tiered bidding credits for minorities and women and provided the same bidding credits and installment payments to all small businesses.[50] The Circuit Court held that the FCC's actions in eliminating gender and racial tier-bidding credits were not arbitrary and capricious.[51]

III. THE CONSTITUTIONAL BASES FOR AFFIRMATIVE ACTION PROGRAMS

The law applicable to affirmative action programs is very complicated and has varied over the past few years as the Justices on the Supreme Court have changed. The Court has employed two distinct types of judicial review of race-based affirmative action programs and has justified these programs on three distinct grounds: (1) diversity of voices; (2) diversity designed to correct racial imbalance; and (3) remedy for past discrimination. Although race-based affirmative action programs were first analyzed under an intermediate level of scrutiny,[52] in *Adarand*, the Supreme Court made strict scrutiny the sole standard of review.[53] Under that standard of review, remedying past or present discrimination may be the only compelling governmental interest that justifies

44. *Adarand*, 515 U.S. at 227; *see also Graceba*, 115 F.3d at 1040.
45. *Graceba*, 115 F.3d at 1041-42.
46. 78 F.3d 620, 625-26 (D.C. Cir. 1996).
47. *Id.* at 627.
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.* at 632-33.
52. Baynes, *Life After* Adarand, *supra* note 20, at 96.
53. *See id.*

affirmative action programs.[54] What follows is a brief history of the Supreme Court's affirmative action jurisprudence.

A. Diversity of Voices: Metro Broadcasting, Inc. v. FCC[55]

In the past, the FCC has been constitutionally permitted to regulate broadcasters in an effort to foster diversity of viewpoints.[56] The FCC used this diversity-of-viewpoints rationale as a basis for implementing programs to extend broadcast ownership opportunities to members of minority groups and women.[57] In deciding this policy, the FCC reasoned that more diverse ownership, in terms of race and gender, would lead to more diverse perspectives.[58] In *Metro Broadcasting*, however, two FCC affirmative action rules were challenged as discriminatory to non-minority 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 permit[ted] a limited category of existing radio and television broadcast stations to be transferred only to minority-controlled firms."[59]

In *Metro Broadcasting*, the Court used an intermediate level of scrutiny in analyzing the FCC's affirmative action programs.[60] The *Metro Broadcasting* Court specifically held:

> [B]enign 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 the Congress and are substantially related to achievement of those objectives.[61]

The *Metro Broadcasting* Court noted that the FCC policies served no remedial objective addressing past discrimination[62] but concluded that

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54. *See id.* (questioning the constitutionality, post-*Adarand*, of programs intended to promote diversity of ownership).

55. 497 U.S. 547 (1990).

56. *See* FCC v. Nat'l Citizens Comm. for Broadcasting, 436 U.S. 775, 798-802 (1978) (sanctioning then-existing FCC rules requiring the divestiture of either a newspaper or broadcast station where they were owned by the same company in the same community).

57. *Metro Broadcasting*, 497 U.S. at 555-56.

58. *See id.* at 566.

59. *Id.* at 552. In *Metro Broadcasting*, plaintiffs challenged only the racial enhancement portion of comparative hearing policies.

60. *Id.* at 564-65.

61. *Id.* (footnote omitted).

62. *Id.* at 566 (noting that the FCC did not justify the regulations on a remedial basis).

they served the "important governmental objective" of promoting "programming diversity."[63] The Supreme Court determined that important differences existed between the broadcasting practices of minority owners and those of their non-minority counterparts.[64] According to the Court, the evidence suggested that an owner's minority status "'appear[ed] to have specific impact on the presentation of minority images in local news,' inasmuch as minority-owned stations tend to devote more news time to topics of minority interest and to avoid racial and ethnic stereotypes in portraying minorities."[65] Thus, the Court upheld the FCC's policies.[66] In *Adarand*, however, the Supreme Court overruled the intermediate standard of review[67] used in *Metro Broadcasting* and required that the FCC's affirmative action programs meet the strict scrutiny standard of review.[68]

B. Diversity Designed To Correct Racial Imbalance: Fullilove v. Klutznick[69]

The Public Works Employment Act conditioned federal support for local public works on a ten percent set-aside for minority-owned businesses.[70] In deciding the constitutionality of the set-aside, the

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63. *Id.*; *cf.* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 311-15 (1978) (opinion of Powell, J.) (plurality opinion finding that diversity in admissions to schools of higher education was a compelling interest).

64. *Metro Broadcasting*, 497 U.S. at 580.

65. *Id.* at 581 (footnote omitted).

66. *Id.* at 552.

67. The *Adarand* Court also specifically overruled the intermediate standard of review used in *Metro Broadcasting, Inc. v. FCC*. The Court stated that to the extent *Metro Broadcasting* was inconsistent with this ruling, it was overruled. The Court reasoned that *Metro Broadcasting* departed from prior cases in two respects: one, it turned its back on *Croson's* explanation as to why strict scrutiny of all government racial classifications is essential; and second, *Metro Broadcasting* rejected congruence between the standards applicable to federal and state racial classifications. In addition, the *Adarand* Court 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.

68. In *Adarand*, the Supreme Court failed to determine whether diversity is a compelling governmental interest under the strict scrutiny test. Accordingly, uncertainty remains as to whether the FCC's broadcast affirmative action programs would be constitutional under this new test. *See* Baynes, *Life After* Adarand, *supra* note 20, at 91-97.

69. 448 U.S. 448 (1980).

70. *Id.* at 453-54. The Act authorized a $4 billion appropriation for federal grants to state and local governments for use in public works projects. *Id.* at 453. The primary purpose of the Act was to stimulate the national economy. *Id.* at 456-57.

Supreme Court failed to produce a majority opinion.[71] The Chief Justice noted at the outset that although racial classifications call for "close examination," the Court owed deference to congressional decisions.[72] Chief Justice Burger explained:

> We are bound to approach our 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.[73]

Chief Justice Burger 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."[74] He employed a two-part test, which first asked "whether the *objectives* of th[e] 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."[75]

After employing this test, the Court upheld the program.[76] Chief Justice Burger wrote that Congress "not only 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."[77]

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71. Chief Justice Burger wrote an opinion; Justices Marshall and Powell wrote concurring opinions; Justices Stewart and Stevens wrote dissenting opinions. *See id.* at 452.

72. *Id.* at 472 (opinion of Burger, C.J.).

73. *Id.* Section 5 of the Fourteenth Amendment empowers Congress to enforce the Fourteenth Amendment. Section 5 specifically provides: "The Congress shall have power to enforce by appropriate legislation the provisions of this Article." U.S. CONST. amend. XIV, § 5. The Fourteenth Amendment otherwise provides that:

> No 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. § 1.

74. *Fullilove*, 448 U.S. at 491 (opinion of Burger, C.J.).

75. *Id.* at 473.

76. *Id.* at 492.

77. *Id.* Justice Powell wrote separately to express his view that the plurality opinion employed "strict judicial scrutiny." *See id.* at 496 n.1. Justice Stewart 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 generally id.* at 522-32.

C. Past Discrimination: United States v. Paradise[78]

In 1972, a district judge in 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.[79] After lengthy litigation concerning discrimination in both hiring and promotion,[80] in 1983 the district court ordered that at least fifty percent of those promoted must be Black as long as qualified Black candidates were available.[81] This quota would last until the Department implemented an acceptable promotion procedure.[82] A plurality of the Supreme Court found that there was a compelling governmental interest[83] for this quota because it was designed to remedy past and present discrimination by the Alabama Department of Public Safety.[84]

The *Adarand* Court reserved judgment on whether the program upheld in *Fullilove* would survive strict scrutiny. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 235 (1995). 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." *Id.*

78. 480 U.S. 149 (1987).

79. *Id.* at 154-55 (plurality opinion). The Fifth Circuit affirmed. *Id.* at 156.

80. *Id.* at 157-62.

81. *Id.* at 163.

82. *Id.* at 164.

83. 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." *Id.* at 171. 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 "the whites promoted *since* 1972 'were the specific beneficiaries of an official policy [that] systematically excluded all blacks.'" *Id.* at 173 (quoting the opinion of the circuit court). 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 acceptable promotion procedures. *Id.* at 177-78. The fifty percent quota lasted only until twenty-five percent of a rank was Black. The Court found that the fifty percent quota was constitutionally permissible because it addressed the Department's delay in developing nondiscriminatory promotion procedures. *Id.* at 179-82. The Court also found that the quota did not impose an unacceptable burden on third-party white applicants because it was temporary and "extremely limited," applying only for promotions to corporals and not other upper ranks. Moreover, the burden imposed was diffuse like a hiring goal. *Id.* at 182-83.

84. *Id.* at 167-71. In addition, the plurality found that the remedy was narrowly tailored. *See id.* at 171-85. 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.

D. The Supreme Court Modifies Its Affirmative Action Jurisprudence

1. City of Richmond v. J.A. Croson Co.[85]

The City of Richmond adopted a Minority Business Utilization Plan,[86] which required prime contractors who were awarded city construction contracts "to subcontract at least [thirty percent] of the dollar amount of the contract to one or more Minority Business Enterprises."[87] Using the strict scrutiny standard,[88] the Supreme Court invalidated the city's plan.[89] The *Croson* Court held that there was no compelling governmental interest[90] because the City of Richmond presented only generalized assertions of past discrimination.[91]

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85. 488 U.S. 469 (1989).

86. 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. Minority group members were defined as "[c]itizens of the United States who are Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts." *Id.* No geographic limits restricted the plan; "an otherwise qualified [Minority Business Enterprise] from anywhere in the United States could avail itself of the 30% set-aside." *Id.*

87. *Id.* at 477.

88. *See id.* at 494. Racial classifications are constitutional under this standard only if they: (1) further a compelling governmental interest; and (2) are narrowly tailored.

89. *Id.* at 511.

90. The *Croson* Court noted that it was almost impossible to assess whether Richmond's affirmative action plan was narrowly tailored because it was not linked to identified discrimination. *Id.* at 507. Nonetheless, the Court observed that Richmond did not consider race-neutral means and that the thirty percent quota was based on unrealistic assumptions. *Id.* at 507-08. The Court noted that the City of Richmond failed to show that many of the barriers to minority participation, such as lack of capital or failure to meet bonding requirements, were discriminatory. The Court suggested that a race-neutral program of city financing for small firms would lead to greater minority participation. *Id.* at 507. 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." *Id.* In addition, under the plan, no inquiry was made as to whether the particular minority business receiving the preference suffered from the effects of past discrimination by the city or prime contractors. The Court also noted that "any Black, Hispanic or Oriental entrepreneur *from anywhere in the country* enjoyed an absolute preference over other citizens based solely on their race." *Id.* (emphasis added).

91. *Id.* at 489-90. The *Croson* Court distinguished the facts of its case from *Fullilove*. *Id.* at 489-90. In *Fullilove*, the Court relied on the fact that Congress, "unlike any State or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment." *Id.* at 490. 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. *Id.* The *Croson* 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." *Id.* The Court stated: "To hold

According to the Court, to establish a compelling governmental interest, the government needed to make a prima facie showing of prior or present discrimination.[92] The discrimination could either be by the governmental actor or by its passive complicity in the discrimination of others.[93] The Court reasoned that "any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice."[94] However, the alleged discrimination must be more than a mere allegation of societal discrimination.[95] Finally, the Court noted that a gross statistical disparity between utilized minority business enterprises and those available for use may constitute prima facie proof of a pattern or practice of discrimination.[96]

2. Adarand Constructors, Inc. v. Pena[97]

In *Adarand*, the Supreme Court extended the *Croson* strict scrutiny standard of review to federal affirmative action programs.[98] Therefore, all racial classifications—federal, state, or local, malevolent or benign—must be analyzed by a reviewing court under strict scrutiny.[99] The *Adarand* Court sought to find "consistency" and "congruence" between all standards of review that the Court had previously employed for race-

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otherwise [would] cede control . . . to the [fifty] state legislatures. . . . and insulate any [state] racial classification from judicial scrutiny. . . ." *Id.*

92. *See id.* at 504.

93. *See id.* at 492.

94. *Id.*

95. *See id.* at 503.

96. *Id.*

97. 515 U.S. 200 (1995). In *Adarand*, the 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, violates the equal protection component of the Fifth Amendment's Due Process Clause." *Id.* at 204.

98. *Id.* at 235. Four justices – Ginsburg, Souter, Breyer, and Stevens – dissented. *Id.* at 242, 264. Two of the dissenting opinions urged deference to Congress in this field. *See id.* at 264 (Stevens, J., dissenting), 271 (Ginsburg, J., dissenting). Justices Scalia and Thomas concurred in the decision but evinced an abhorrence for affirmative action programs of any kind. *See id.* at 239 (Scalia, J., concurring in part and concurring in the judgment), 240 (Thomas, J., concurring in part and concurring in the judgment). Even in the case of past discrimination, Justice Scalia would limit a remedy only to those who could show that they actually suffered discrimination. *Id.* at 239 (Scalia, J., concurring in part and concurring in the judgment).

99. *See id.* at 227 (noting that such classifications are constitutional only if they: (1) further a compelling governmental interest; and (2) are narrowly tailored).

based legislation or regulations.[100] The Court sought "congruence" because, even if the law was designed with the best intentions, the Supreme Court was of the opinion that voluntary race-based affirmative action plans had the tendency to stereotype and stigmatize their beneficiaries.[101]

In *Adarand*, Justice O'Connor wanted to dispel the notion that strict scrutiny is "strict in theory, but fatal in fact."[102] Noting that race discrimination still occurs, she explained: "The 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."[103] She specifically stated: "When 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."[104] She took note of the existence of discrimination, and the constitutionality of race-based remedies in eliminating it, by citing the *Paradise* case.[105]

The Court remanded the *Adarand* case for further consideration of the principles that it announced in its opinion.[106] The *Adarand* district court noted that the court of appeals failed to decide the question of whether

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100. *Id.* at 223-24.

101. *Id.* at 226-27.

102. *Id.* at 237 (quoting Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring in judgment)).

103. *Id.*

104. *Id.*

105. *Id.* In *Paradise*, every Justice of the Supreme Court agreed that the Alabama Department of Public Safety's "pervasive, systematic, and obstinate discriminatory conduct" justified a narrowly tailored race-based remedy. *See id.* at 237 (citing United States v. Paradise, 480 U.S. 149, 167 (1987)).

106. *Id.* at 239. 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.

Adarand Constructors, Inc. v. Pena, 965 F. Supp. 1556, 1558 (D. Colo. 1997). The district court judge also noted that "the Tenth Circuit's vacation of its judgment and remand to the trial court eluded him since there was no genuine issue of material fact." *Id.* The district court noted that the decision to require strict scrutiny "alters the playing field in some important respects." *Id.* The district court was of the opinion 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.*

the interests served by the use of subcontractor compensation clauses are properly described as "compelling."[107] The circuit court also failed to address the issue of narrow tailoring in terms of strict scrutiny review.[108]

IV. ESTABLISHING A COMPELLING GOVERNMENT INTEREST TO SUPPORT FCC AFFIRMATIVE ACTION PROGRAMS

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.[109] According to the *Croson* Court, three crucial elements may establish a compelling governmental interest for an affirmative action program: (1) showing a government entity was a "passive participant" in discrimination against members of minority groups;[110] (2) showing the underutilization of minority participants in the relevant market;[111] and (3) showing anecdotal evidence of the discrimination.[112] In the remainder of this Section, we will show that the

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107. *See Adarand*, 965 F. Supp. at 1558. The *Adarand* district court found that Congress considered a "vast body of evidence" of past discrimination before it enacted the affirmative action proposals. *See id.* at 1576. The evidence suggested that by holding hearings and examining evidence and testimony, Congress regularly reexamined the issue of disadvantage in federal contracting due to racial discrimination and found that the disadvantage continued. *Id.* at 1575. Congress also received various reports from the Small Business Administration demonstrating a continued need for programs to remedy the disparities between minorities and non-minorities. *Id.* In addition, there was evidence of numerous post-*Croson* "disparity studies" comparing "actual utilization of minority owned businesses with availability levels." *Id.* The studies "show[ed] a serious pattern of discrimination across all regions." *Id.*

The district court found that "Congress had a strong basis in evidence from which it could conclude there were significant discriminatory barriers facing minority business." *Id.* at 1576. The court cited some of the most notable aspects of the evidence: "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." *Id.* (quoting *Fullilove*, 448 U.S. at 467). The district court found, on the record, that "Congress had sufficient evidence, at the time these measures were enacted, to determine reasonably and intelligently that discriminatory barriers existed in federal contracting." *Id.* However, it clearly labeled this finding as dicta. *Id.* at 1570.

108. *See id.* at 1558. On remand, the district court found that the government program was not narrowly tailored. *Id.* at 1581. The district court noted that the more identifiable the discriminatory barriers were, the more likely it was that the measures enacted to eliminate those barriers were narrowly tailored. *Id.* at 1577.

109. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 500 (1989).

110. *Id.* at 492.

111. *Id.* at 503.

112. *Id.* at 479-84.

first two of these considerations are met in the field of FCC spectrum licensing.

A. Passive Complicity in the Discrimination of Others

The *Croson* case distinguished "past discrimination" from "societal discrimination."[113] According to *Croson*, past discrimination by the government, or the government's passive participation in the discrimination by others, would serve as a compelling government interest.[114] The Court reasoned that "any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice."[115] Evidence of diffuse non-specific societal discrimination would be an insufficient compelling governmental interest. In *Adarand*, Justice O'Connor suggested 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 in addressing the "lingering effects of racial discrimination."[116]

The Third, Ninth, and Tenth Circuits have provided some clarity as to what constitutes passive complicity.[117] In *Contractors Association of*

113. *Id.* at 497.

114. *Id.* at 492.

115. *Id.* Unlike this past discrimination – active or passive – diffuse, non-specific societal discrimination is an insufficient governmental interest.

116. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995).

117. In contrast, in *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), the Fifth Circuit erroneously attempted to narrow the notion of "past discrimination" sufficient to establish an affirmative action program. *See Hopwood*, 78 F.3d at 948-55. The Fifth Circuit held that the district court erred in finding that the general discrimination by public educational institutions in the State of Texas constituted the "past discrimination" necessary for one law school to establish an affirmative action program. *See id.* at 950-51. 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. *Id.* at 951. 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." *Id.* at 952. The court looked upon the issue of past discrimination very narrowly and only considered discrimination by the specific governmental actor – the University of Texas Law School – to satisfy the compelling governmental interest requirement. *See id.*

The Fifth Circuit deemed the evidence presented by the law school relating to its "bad reputation" in the minority community and its perception as "hostile" to minorities as insufficient "present effects of past discrimination" to justify the affirmative action program. *Id.* The court held this opinion because the "bad reputation" and "hostile" environment could not be traced to actions of the law school. *Id.* at 953. In addition, the law school's actual past discriminatory actions, having ended in the 1960s, were too remote in time. *Id.* Because the court found that the admissions policy failed the "compelling interest" prong of the strict scrutiny test, the court concluded that it did not have to

Eastern Pennsylvania v. City of Philadelphia, the Third Circuit found unconstitutional the provisions of a Philadelphia ordinance that created a set-aside for Black subcontractors on city public works contracts.[118] Quoting *Croson*, 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."[119] The Third Circuit stated that, to be a passive participant, the city had to play a "material role" in private discrimination.[120] For example, the court suggested that the city could remedy discrimination by a local trade association if the city had been a passive participant in the private discrimination of that trade association.[121]

Other circuits have also elaborated on the meaning of passive participation. The Ninth Circuit stated that "[m]ere infusion of tax dollars into a discriminatory industry may be sufficient governmental involvement" to constitute passive participation in private discrimination.[122] The Tenth Circuit stated: "Although 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."[123]

Based on the foregoing, we conclude that the FCC can adopt race-based affirmative action programs to remedy those situations in which the FCC's actions or policies inhere in the discrimination of others. For the FCC to establish a race-based affirmative action program, such as race-based benefits in competitive bidding in the wireless industry, the FCC must identify and establish that discrimination exists.[124] The

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examine whether it was "narrowly tailored" to advance the government's interest. *Id.* at 955.

118. Contractors Ass'n of E. Pa. v. Philadelphia, 91 F.3d 586 (3d Cir. 1996).

119. *Id.* at 599. The court found insufficient evidence of discrimination by prime contractors against Black subcontractors. *Id.* at 600-01.

120. *See id.* at 596.

121. *Id.* at 601. The court also held that the city did not passively participate in such discrimination because it did not award contracts through trade association membership. *See id.* at 602. 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." *Id.* at 605.

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

123. Concrete Works of Colo., Inc. v. City of Denver, 36 F.3d 1513, 1529 (10th Cir. 1994); *see also* Pappas v. Giuliani, 290 F.3d 143, 151 (2d Cir. 2002) (affirming, despite a First Amendment challenge, the grant of summary judgment by the district court and finding the police commissioner was entitled to terminate a police officer based on his bigoted statements to avoid "passive complicity" in such discrimination).

124. *See* Baynes, *Paradoxes of Racial Stereotypes*, *supra* note 20, at 995.

discrimination must be specified; it cannot be merely the identification of societal discrimination. It can be discrimination by the FCC against minority licensees. It can also be FCC participation in discrimination by the private sector, including FCC licensees, suppliers, lenders, brokers, and customers, against minority-owned telecommunications businesses.

We note that, like most governmental agencies, the FCC failed to examine its own past conduct to determine whether it discriminated against minority applicants and licensees.[125] Instead, it conducted several exhaustive studies to determine whether the capital markets and the telecommunications industry discriminated against minority applicants and licensees.[126] These studies were designed to determine whether the FCC was a "passive participant" in the discrimination by others against minority applicants and licensees.[127] We believe that the results of the studies show that FCC has been a "passive participant" in the discrimination by the capital markets industry.

A connection exists between the FCC's financial requirements and the discrimination that potential licensees face in receiving loans from financial institutions. The FCC's "passive participation" in discrimination is analogous to that of a city in hiring contractors; both involve the distribution of a limited resource. A city taking bids on construction offers a limited resource in the form of the tax dollars used to achieve construction of a project. In such a case, the *Croson* Court stated, a city could develop programs to make sure that its tax dollars were not being used in a discriminatory way.[128] Similarly, the FCC is licensing and allocating the limited resource of wireless spectrum licenses. By awarding licenses via auctions in which the person with the most money wins, the FCC is distributing its licenses in a manner that incorporates discrimination by the capital markets against minority-owned businesses.

1. Capital Market Forces in the Telecommunications Industry

In the study, *Whose Spectrum Is It Anyway?,* researchers found that survey respondents, including licensees as well as brokers, lenders, or other market intermediaries, cited access to capital as "the most common

125. *See id.*

126. Ivy Planning Group LLC, Federal Communication Commission, *Whose Spectrum Is It Anyway? Historical Study of Market Entry Barriers, Discrimination and Changes in Broadcast and Wireless Licensing: 1950 to Present* 6 (Dec. 2000), *at* http://www.fcc.gov/opportunity/meb_study/historical_study.pdf (last visited Jan. 12, 2003).

127. *Id.* at 5.

128. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 492 (1989).

and pervasive barrier to entry."[129] In fact, media broker Brian Cobb stated that "[o]ur number one criteria . . . is can they pay for it at the closing and will they pay the most. And that kind of thing supersedes everything."[130]

Minority-owned businesses have the dual burden of paying large amounts of money to acquire wireless licenses at auctions and paying the costs of building their wireless systems. By having less access to cash, however, a company is less viable.[131] A cash-strapped company is less able to attract and maintain top personnel, operate up-to-date facilities, upgrade and maintain state-of-the–art equipment, retain competent attorneys to represent them before the FCC, promote the business to customers, or acquire additional licenses.[132] Consequently, limited access to capital severely limits the ability of minority-owned businesses to acquire wireless licenses.

Capital market discrimination is a major barrier to the development and success of minority-owned businesses.[133] The seminal work on discrimination is *The Economics of Discrimination*, in which Gary Becker translated discrimination into economic terms.[134] Following Dr. Becker's early work, many other empirical studies have documented discrimination against minority-owned businesses.[135] Nearly seventy percent of small, minority-owned businesses use personal funds to finance their businesses whereas only one-half of white-owned businesses have to resort to personal funds.[136] In fact, black-owned businesses rely more heavily upon forms of consumer credit—especially credit cards–than white-owned businesses do.[137] Ninety-two percent of black

129. *See Whose Spectrum Is It Anyway?*, *supra* note 126, at 17.

130. *Id.*

131. *Id.*

132. *Id.* at 17-18.

133. There has been substantial research evidencing discrimination in other contexts. *See generally* Kenneth J. Arrow, *What Has Economics To Say About Racial Discrimination?,* 12 J. ECON. PERS. 91 (1998); Timothy Bates, *Unequal Access: Financial Institution Lending to Black- and White-Owned Small Business Start-Ups*, 19 J. URB. AFF. 487 (1997); William A. Darity, Jr. & Patrick L. Mason, *Evidence on Discrimination in Employment: Codes of Color, Codes of Gender*, 12 J. ECON. PERS. 63 (1998); Helen Ladd, *Evidence on Discrimination in Mortgage Lending*, 12 J. ECON. PERS. 41 (1998); John Yinger, *Evidence on Discrimination in Consumer Markets,* 12 J. ECON. PERS. 23 (1998).

134. GARY S. BECKER, THE ECONOMICS OF DISCRIMINATION 3 (1957).

135. *See infra* notes 139-46 and sources cited therein.

136. RAYMOND SUAREZ & ROBERT CULL, DEP'T OF COMMERCE, CAPITAL FORMATION AND INVESTMENT IN MINORITY BUSINESS ENTERPRISES IN THE TELECOMMUNICATIONS INDUSTRIES 10 (Apr. 1995).

137. *See generally* Bates, *Unequal Access*, *supra* note 133.

entrepreneurs reported that they found it difficult to raise capital, and seventy-five percent of black business owners believe that many black-owned businesses became so discouraged by unfavorable experiences that they ceased trying to raise capital.[138]

The capital available to minority-owned businesses is much less than that available to majority-owned businesses. Businesses owned by white males were "four times more likely than [minority-owned businesses] to secure $1,000,000 or more to start or acquire a business;" "three to six times more likely to secure $100,000 to $1,000,000 and two to three times more likely to secure $50,000 to $100,000;" and "twice as likely to receive equity capital from partners and investors."[139] Minority-owned businesses usually pursued commercial bank loans, when available. Seventy-three percent of black-owned businesses polled obtained their capital from banks.[140] After controlling for credit-worthiness, a study by Cavalluzzo, Cavalluzzo, and Wolken showed that the denial rate for credit of black-owned firms was twice that of white firms.[141] They also found that black-owned firms pay higher interest rates than non-minority-owned firms after controlling for firm characteristics.[142] In a later study by Cavalluzzo and Cavalluzzo, after controlling for firm characteristics, they found that black and Hispanic firms had statistically significant higher probabilities of loan rejection than non-minority firms.[143] Banks provided white borrowers with $1.83 in debt capital for each dollar of equity they invested in their business; in contrast, black borrowers received only $1.16 for each dollar of equity capital.[144] Professor Bates concluded that "banks treat white and black loan recipients differently even when their qualifications do not differ."[145] In a

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138. *See* Eugene Carlson, *Turned Down,* WALL ST. J., Feb. 19, 1993, at R1.

139. SUAREZ & CULL, *supra* note 136, at 11 (noting that some of these disparities are attributable to the "lack of wealth creation and intergenerational wealth accumulation by minority communities"). Other data show that Black households had a median net worth of $3,397, versus $39,135 for white households. TIMOTHY BATES, BANKING ON BLACK ENTERPRISE 44-45 (1993). Professor Bates maintained that "[l]acking assets, . . . [B]lack entrepreneurs remain ill-equipped to cope with economic adversities and to exploit economic opportunities." *Id.* at 45.

140. Carlson, *supra* note 138, at R1.

141. *Access to Credit for Minority Owned Businesses: Competition, Small Business Financing and Discrimination: Evidence for a New Survey* (1999), *available at* http://www.chicagofed.org/cedric/publications/BusAcc/II.%20Access%20to%20Credit.pdf.

142. *Id.*

143. *Id.* However, because of small sample size, they were not able to unequivocally show that prejudice caused this disparity.

144. BATES, BANKING ON BLACK ENTERPRISE, *supra* note 139, at 50.

145. *Id.*

study commissioned by the U.S. Small Business Administration, even when controlling for credit history, Faith Ando found that black borrowers were less likely to receive loan approval.[146]

The average financing received by newly formed small businesses ranged from $32,178 for businesses owned by white males to $15,908 for black-owned businesses.[147] In a survey of minority-owned telecommunications businesses, all of the owners reported that they required capital in excess of these averages.[148] Some minority-owned entrepreneurs who have the potential to start new businesses never do because they are unable to obtain the financial capital necessary to launch their planned ventures.[149] These entrepreneurs are known as "discouraged entrepreneurs," and this phenomenon is most pronounced in capital intensive lines of small businesses.[150]

Dr. William D. Bradford conducted a capital market study on behalf of the FCC.[151] In the study, Bradford found that forty-three percent of auction participants responded affirmatively to a survey question asking whether they had applied for debt financing.[152] Many telecommunications and other technology-based ventures require substantial start-up investment. Limitations on capital constrain minority-owned businesses and their participation in the capital-intensive telecommunications businesses.[153] Bradford found that the loan applications of minority-owned wireless firms were less likely to be accepted than those applications of non-minority firms.[154] These same

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146. SUAREZ & CULL, *supra* note 136, at 15 (citing FAITH ANDO, AN ANALYSIS OF ACCESS TO BANK CREDIT (1988)).

147. *Id.* at 17.

148. *Id.* (citing a telephone survey conducted by Quality Management International, May 22-June 2, 1994).

149. Bates, *Unequal Access, supra* note 133, at 488.

150. *Id.* (citing Z. Acs & D. Audretsch, *Small Firm Entry in Manufacturing,* 56 ECONOMICA 255-265 (1989)).

151. WILLIAM D. BRADFORD, DISCRIMINATION IN CAPITAL MARKETS, BROADCAST/WIRELESS SPECTRUM SERVICE PROVIDERS AND AUCTION OUTCOMES (Dec. 5, 2000), *at* http://www.fcc.gov/opportunity/meb_study/capital_market_study.pdf (last visited Jan. 12, 2003). Dr. Bradford is the "Endowed Professor of Business and Economic Development and a Professor of Finance at the School of Business, University of Washington." *Id.* at iii. The data was collected from the FCC Auction Application Survey. *Id.* at vi. In that survey, auction applicants were questioned about their latest license applications or attempted acquisitions; this information was supplemented by information available on the FCC website. *Id.*

152. *Id.* at 11-12 (noting that this response may be low because it may overlook firms that inquired but did not apply because they were discouraged).

153. *See id.* at v.

154. *Id.* at vii.

minority borrowers also paid higher interest rates than non-minority firms.[155]

Dr. Bradford's study is buttressed by other studies. For instance, the National Telecommunications Information Administration Report found that minorities who acquired capital for telecommunication properties were better educated than their white counterparts.[156] This disparity might be indicative of discrimination.

The FCC's anecdotal study, entitled *Whose Spectrum Is It Anyway?*, also buttressed Dr. Bradford's study. This study reported that brokers and large lenders indicated that they worked with very few minority telecommunications applicants or buyers.[157] Media broker, Brian Cobb, observed that minority applicants are more likely to be stereotyped.[158] He stated that a seller will ask more questions of a minority buyer and want more documentation of financial capability.[159] After stating that he had not observed racial discrimination, Cobb ironically said, "I don't think it's a matter of prejudice—it's not overt prejudice. It's a matter of—it's a perception that [minorities and women] may not have as much money to close, so they ask more questions."[160] Jim Winston, Executive Director of the National Association of Black-Owned Broadcasters, stated that minorities often had more stringent loan terms than their white counterparts.[161] Winston explained:

> There was always the ongoing problem being a minority buyer, the terms were always stiffer. If you could get a lending institution to talk to you, the terms they came up with were always stiffer, so that minority buyers often found themselves having to sign a personal guarantee to the bank when they borrowed money against the station. So, essentially, they would take a security interest in all the assets of the station and would still come to the borrower and say [that they wanted] a personal guarantee from you on top of that. There always seemed to be the stories of guys who were buying their second or third or fourth stations, who were still being required to do personal guarantees. And, nobody was seeing anybody else's bank loan

155. *Id.*
156. *See* SUAREZ & CULL, *supra* note 136, at 30.
157. *Whose Spectrum Is It Anyway?*, *supra* note 126, at 47.
158. *See id.*
159. *Id.*
160. *Id.*
161. *Id.* at 25.

> documents. But there was this view that the restrictions were—that personal guarantees stayed with our guys longer.[162]

When required to pledge personal assets to secure loans, minority-owned businesses are often confronted with additional market barriers as a result of historic disparities of intergenerational wealth between people of color and their demographic counterparts.[163] S. Jenell Trigg, a communications lawyer, stated that minorities "have less collateral and less personal equity before they entered into business" than other demographic groups.[164] She continued, "[T]hey're always starting off at a deficit when it comes to cash. And the longer it takes to acquire property, the more legal fees . . . . If you give up, you've got nothing to show for it . . . . You're pouring . . . bad money into good."[165]

The *Whose Spectrum Is It Anyway?* survey respondents also cited a higher cost of capital for minority-owned telecommunications businesses than for others. Anthony Chase, an African-American radio and wireless licensee, said that the higher cost of capital for small business "comes with the territory, and you just have to learn to work with it."[166] Chase explained:

> [M]y sense is that the [cost of capital] is always very high for start up businesses and it's certainly no exception in my case. It's very high. It's a real barrier to entry in the business. And you know, you just [have to] suffer through it and hope that your first deal doesn't necessarily become your last because you have to pay pawnshop rates to get into the business.[167]

More explicitly, Charles Cherry, an African-American licensee, thinks that "race probably adds an additional risk factor, but [he] can't say that's the sole sort of determinative in these kinds of deals . . . . [His] gut tells [him] that he's paying a high price [because he is a minority]."[168]

In contrast, a number of small non-minority licensees surveyed reported a relatively easy time in raising capital. For instance, white licensee, Trent Boaldin, reported that his bankers were helpful in suggesting to him how to improve his likelihood of getting a loan.[169] He stated:

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162. *Id.*
163. *Id.* at 27.
164. *Id.*
165. *Id.*
166. *Id.* at 36.
167. *Id.*
168. *Id.*
169. *Id.* at 35.

> We approached three lenders . . . . They had some suggestions for changes to make to the assumptions and improvements to make in the plan. So we incorporated the various suggestions from each one that we talked to, revised the plan, and sent it back . . . . [A]nd then at that point we got the indication from one of them that [he was] willing to go. . . . We're pleased with what we've got.[170]

Whose Spectrum Is It Anyway? concluded that, while small broadcasting and wireless telecommunications businesses have struggled to find affordable and sufficient capital, discriminatory practices in the banking industry have disadvantaged minority-owned businesses more so than their demographic counterparts.[171]

Related to the discrimination is the fact that lenders and venture capitalists are generally only interested in funding deals that exceed $10 million or are in more than one market.[172] Exceptions are sometimes made for stations in top ten markets.[173] In addition, the loan applicant needs to have "credibility" with the banker.[174] Media broker, Brian Cobbs, reported that not having "credibility" is "a big handicap for somebody starting out that doesn't have a lot of money or maybe has certain talents but doesn't have the sophistication in the financial area to put that package together."[175] The importance of having such "credibility" is illustrated by reports of experienced minorities who were not treated seriously by bankers.[176] Peter W. Fong, an Asian-American wireless applicant, recalled:

> It just seemed like we don't have any track record, and it is very difficult for people to take us credibly. You have to start somewhere, and we are not coming off from some Chinese restaurant, you know, jumping into telecommunications. I myself have [fifteen] years working with the telephone company, and my partner had [twenty-five] years, and so we know what we are doing, but still it . . . is just very difficult for people to take us seriously.[177]

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170. *Id.*
171. *Id.* at 27.
172. *Id.* at 39.
173. *Id.*
174. *Id.* at 44.
175. *Id.* at 45.
176. *Id.* at 44-45.
177. *Id.* at 45.

2. The FCC Passively Contributes to Capital Market Discrimination Against Minority-Owned Businesses

The competitive bidding process authorized by Congress incorporates the barriers to entry faced by minority-owned businesses in the capital markets.[178] By auctioning public spectrum to the highest bidder,[179] the FCC acts as a passive participant in the discrimination of the capital markets against minority-owned businesses. Competitive bidding for licensing means that the person who has access to the most capital has the best opportunity to win a license.[180] If most minority-owned businesses are less likely to obtain financing due to discrimination in the capital markets, then minority-owned businesses are at a severe disadvantage in getting licenses.[181] Bradford concludes that "[w]hen there is capital market discrimination, minorities will be capital constrained and less likely to qualify for any auction and less likely to win auctions."[182] At the *Policy Forum on Market Entry Barriers Faced by Small Minority and Women-Owned Businesses in the Communications Industry*, Janet Smith, the president of the group that completed the *Whose Spectrum Is It Anyway?* study, testified that "[c]apital is king" and that the key difference between the success of minority-owned businesses and their demographic counterparts was "access to capital."[183]

Capital market discrimination results in a smaller pool of minority applicants. The FCC deposit requirements, which are up-front payments prior to competitive bidding, further diminish the opportunities for minority-owned businesses. For example, only 48.3 percent of minority applicants in the FCC competitive bidding became qualified bidders whereas 67.5 percent of the white-owned firms became qualified bidders.[184] Capital market discrimination also affects the potential maximum bid of minority applicants. For every dollar that whites receive from capital markets, members of minority groups receive

178. *See id.* at 108.

179. *See generally id.* at 108-12.

180. *See id.* at 108 (noting that "successful applicants, as a result of the auction bidding process, are required to pay tens and often hundreds of thousands of dollars to the FCC for each license awarded to them").

181. *Id.*

182. BRADFORD, *supra* note 151, at 27.

183. *In re* Policy Forum on Market Entry Barriers Faced by Small Minority and Women-Owned Businesses in the Communications Industry (Dec. 12, 2000), at 75 (testimony of Janet Smith).

184. ERNST & YOUNG LLP, FCC ECONOMETRIC ANALYSIS OF POTENTIAL DISCRIMINATION UTILIZATION RATIOS FOR MINORITY- AND WOMEN-OWNED COMPANIES 12 (1999).

considerably less. The result is that qualified minority bidders are less likely to secure spectrum through bidding or to secure as much spectrum as white-owned businesses.

The FCC's passive participation in the capital market discrimination against minority-owned businesses is not the sole issue to be considered in determining whether a remedial affirmative action program is permissible. The *Croson* Court stated that another factor to be considered is the utilization of minority-owned businesses.[185] We look at this issue in the next Section.

B. The Underutilization of Minority Licensees

Studies used to prove the existence of remediable discrimination must demonstrate "gross statistical disparities between the proportion [of those licensed] . . . and the proportion of [those] willing and able to [be licensed]."[186] In *Croson*, the Supreme Court was concerned that the statistical evidence used to establish discrimination was faulty because it compared the number of minority-owned firms awarded contracts to the percentage of minorities in Richmond's population.[187] The *Croson* Court held that constitutionally permissible statistical evidence of discrimination would compare those minority-owned firms utilized by the City of Richmond to those available in the City of Richmond to perform that type of work.[188] The *Croson* Court derived the adverse impact rules from the Department of Labor guidelines for showing adverse impact.[189]

It may be that measuring the probability that a minority-owned firm will win a license at auction is a more accurate indicator of discrimination

185. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 492 (1989).

186. Engineering Contractors Ass'n of S. Fla., Inc. v. Metro. Dade County, 122 F.3d 895, 907 (11th Cir. 1997) (internal quotation marks omitted). Anecdotal evidence may be used to help establish discrimination; it is especially helpful to buttress the statistical evidence. *Id.* However, anecdotal evidence alone does not prove discriminatory practices.

187. *Croson*, 488 U.S. at 501.

188. *Id.* at 501-02.

189. Information on Impact, 29 C.F.R. § 1607.4 (2002); *see also Engineering Contractors Ass'n*, 122 F.3d at 914 (citing 29 C.F.R. § 1607.4D as analogous authority on disparity indices indicative of discrimination). Section 1607.4D prescribes an eighty percent rule. 29 C.F.R. § 1607.4D (2002). Assume that one hundred qualified and available minority-owned and one hundred qualified and available majority-owned firms exist in a particular city over the course of a year. If all one hundred of the majority-owned firms win contracts, but only seventy of the qualified minority-owned firms do so, then there is evidence of adverse impact. Seventy minority-owned firms as compared to one hundred majority-owned firms is less than eighty percent, which indicates underutilization.

than the ratio of utilized minority-owned firms to those available to do the work.[190] Dr. Bradford performed such a calculation in *Discrimination in Capital Markets, Broadcast/Wireless Spectrum Service Providers and Auction Outcomes* and determined that the probability of a minority–owned business winning a license in the firm's most recent auction is lower than the probability of a non-minority owned firm.[191] The results were statistically significant.

However, the *Croson* Court required the utilization ratio analysis to evaluate the constitutionality of remedial affirmative action programs.[192] This utilization analysis is complex in its application to the telecommunications industry for two reasons. First, in the telecommunications industry, the numerator of the utilization ratio, the number of firms obtaining licenses, is likely to be constant and fixed, with fewer opportunities over time than in the contracting industry. This result occurs because the FCC awards a finite number of licenses and the license term is for several years. Thus, few opportunities exist for the FCC to award other licenses to recipients. In contrast, in the contracting context, the numerator of the utilization ratio, which is the number of firms actually receiving a contract, is larger and more dynamic than in the telecommunications licensing context. Many more contracts occur because many more opportunities are present for contractors to receive awards, and the awards are likely to be recurring. In the contracting context, the government offers many contracts and subcontracts in which a small business may win awards for doing several parts of several different jobs. For instance, a small business could win different awards to do masonry, carpentry, and painting on several different jobs across a city over the course of one year whereas a small telecommunications company has fewer opportunities to win a license in that year.

Second, in the telecommunications industry, the denominator of the utilization ratio, the number of firms qualified and available to win a license, is not easy to discern because there is no requirement, except money or access to capital for someone bidding on a wireless license. The pool of potential applicants could include individuals with no previous connection with the telecommunications industry. Funeral parlor owners, nightclub owners, CPAs, attorneys, physicians, as well as telecommunications industry executives could all try to acquire a license.

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190. Bradford found that the probability of a minority-owned firm winning a license at auction was consistently less than the probability of a majority-owned firm doing so. BRADFORD, *supra* note 151, at viii.

191. *Id.*

192. *Croson*, 488 U.S. at 501-02.

The FCC has no rules preventing individuals from other industries from acquiring wireless licenses. In contrast, in the contracting industry, it is somewhat easier to identify those individuals who are available and qualified to do the work. These contractors often have to submit their qualifications to do a job. They often have to meet certain technical or experiential requirements before participating. Given these considerations, we believe that the foregoing analysis is very conservative because the denominator chosen includes only those individuals who actually applied for a license.

1. Average Wireless Utilization Ratio Calculations

The FCC engaged the services of the accounting firm, Ernst & Young, to conduct a study on utilization ratios for the wireless auction.[193] Ernst & Young calculated several different utilization ratios: (1) the General Utilization Ratio that indicates the percentage of winners, those who won at least one license, among all auction applicants;[194] (2) the Qualifying Ratio that calculates the percentage of applicants who qualify to bid among all auction applicants;[195] (3) the Success Ratio that indicates the percentage of auction winners, those who won at least one license, among all qualified auction applicants;[196] and (4) the Economic Value Ratio that calculates minority-owned businesses' share of the total economic value of the licenses secured as compared to the total economic value of licenses auctioned.[197]

a. The General Utilization Ratio

The General Utilization Ratio presents "an overall view of the auction outcomes, based on the number of applicants and winners" for each part of the wireless spectrum that has been part of the competitive bidding process.[198] It calculates the ratio of the number of businesses receiving wireless spectrum licenses to the available pool of businesses applying for

193. ERNST & YOUNG LLP, FEDERAL COMMUNICATIONS COMMISSION, FCC ECONOMETRIC ANALYSIS OF POTENTIAL DISCRIMINATION UTILIZATION RATIOS FOR MINORITY- AND WOMEN-OWNED COMPANIES IN FCC WIRELESS SPECTRUM AUCTION (Dec. 5, 2000), *at* http://www.fcc.gov/meb_study/auction_utilization_study.pdf (last visited Jan. 12, 2003).

194. *Id.* at 2. Throughout the study, Ernst & Young defined an "auction applicant" as "a company (or an individual) who submitted Form 175 ("Short Form") indicating an interest to participate in an auction." *Id.* at 2 n.1.

195. *Id.* at 2.

196. *Id.*

197. *Id.*

198. *Id.*

spectrum licenses and compares them demographically.[199] By calculating a utilization ratio in this fashion, the available pool of minority-owned entities is limited to those actually seeking spectrum in the particular auction. It is a very conservative measure of utilization; it does not include all those minority-owned businesses that would have submitted a bid but for discrimination that precluded them from being aware of the process. We believe that actually considering only those minority-owned businesses that submitted applications is a more defendable measure of utilization.[200] Ernst & Young found that "[w]hen participation and success are measured by counting the percentages of winners from all auction participants (general utilization ratio), minority and women applicants appear to be somewhat less likely to win at least one license relative to other applicants. These results were statistically significant."[201] The general utilization ratios for all auctions showed that 37.40 percent of non-minority and 31.97 percent of minority applicants win licenses.[202] These differences were statistically significant, showing on average that minority-owned businesses won licenses at lower rates than other firms.[203]

When auction applicants were grouped by size, Ernst & Young failed to find a statistical discrepancy between small minority and small non-minority firms.[204] When large companies were compared, however,

199. *Id.* at 2, 9-11.

200. We note that the *Croson* Court criticized the City of Richmond's affirmative action plan as being overly broad because it encompassed all racial and ethnic minorities – even those that were not a significant percentage of the City of Richmond's population or those that faced historic discrimination in that city. One could argue that these utilization numbers should be broken down into each racial and ethnic subgroup, *i.e.*, African Americans, Asian Americans, Latinos, Native Americans, and Pacific Islanders. However, we are of the opinion that *Croson* is distinguishable and inapplicable because *Croson* dealt with a city's affirmative action plan, which might have regional demographic anomalies. The FCC is a national agency that distributes licenses across the United States. Therefore, it is unnecessary to make demographic differences between racial and ethnic minority groups.

201. *Id.* at 4. The differences between probabilities was found to be statistically significant. *Id.* Ernst & Young noted that statistical significance tests are used to determine whether the difference between the two ratios indicates a systematic pattern. *Id.* at 10.

202. *Id.* at 10.

203. *Id.* Ernst & Young noted that the number of applicants for individual auctions, in which the percentage of minority-owned businesses win is sometimes larger and sometimes smaller than that of their demographic counterparts, were inconclusive. *Id.* at 10-11. These small numbers of applicants made some of the individual auction calculations because the number of minority applicants and winners were too small to use statistical tests. *Id.* at 11. In those cases in which sufficient numbers of minority owners were present, none of the differences was statistically significant for any individual auction. *Id.* at 10.

204. *Id.* at 11.

minority-owned businesses had a statistically significant lower general utilization ratio than their demographic counterparts.[205]

The lack of statistical difference among small businesses might also be related to the difference in auctions with installment payments. Ernst & Young found that minority-owned businesses are just as likely to win licenses in auctions with installment plans, whereas, in the absence of such plans, minority-owned businesses are less likely to win licenses than their demographic counterparts.[206] Since the FCC installment plan program was employed to benefit small businesses, it is no surprise that this program would also benefit many minority businesses, which are predominately small.

b. The Qualifying Ratio

Applicants must submit Form 175 and make an upfront payment to qualify to bid in an auction with the upfront payment determining bidding eligibility.[207] Each license to be auctioned has a certain number of bidding units.[208] An applicant provides an upfront payment for a certain number of bidding units, to be used singly or in combination, until his or her bidding units are exhausted.[209]

The qualifying ratio indicates the percentage of minority-owned businesses that qualify to bid.[210] Ernst & Young found a significant difference in average qualifying ratios for minority-owned businesses and their demographic counterparts.[211] The average qualifying ratio for minority applicants was 48.3 percent, much less than 67.5 percent for non-minority applicants.[212] This difference indicated a systematic disparity in qualifying rates.[213] In addition, minorities qualified at significantly lower rates even in auctions that used installment plans.[214] Ernst & Young speculated that differential access to capital would explain the lower qualifying ratio for minority-owned businesses.[215] Differential access to capital may hinder the minority-owned businesses'

205. *Id.*
206. *Id.*
207. *Id.*
208. *Id.*
209. *See id.*
210. *Id.* at 12.
211. *Id.*
212. *Id.*
213. *Id.*
214. *Id.*
215. *Id.*

ability to make the necessary upfront payments.[216] Ernst & Young explained the difference in the general utilization between minority applicants and their demographic counterparts on the difference in rates at which minority-owned businesses qualified to bid relative to other applicants.[217]

c. The Success Ratio

The success ratio is defined as "a measure of qualified applicants who win bids."[218] It is calculated as the percentage of winners out of all qualified applicants.[219] Ernst & Young found that qualifying minority applicants, in fact, won licenses at higher rates than their demographic counterparts.[220] Across all auctions, 66.1 percent of qualified minorities won licenses as compared to 55.4 percent of others.[221] When installment plans were considered, qualifying minority applicants were more likely than their counterparts to win in auctions and, in auctions without installment plans, qualifying minority applicants were less likely to win than their demographic counterparts.[222] These differences were statistically significant.[223]

The difference in outcomes between auctions with and without installment plans suggests that even qualifying minorities confront capital obstacles that impede their success in the absence of some sort of support. In grouping the demographic groups by size, no difference existed in the success ratios between large qualifying minority-owned businesses and their large demographic counterparts, but small qualifying minorities won licenses more than others.[224]

Ernst & Young concluded that, although minority applicants tended to qualify less frequently than other applicants, those that did qualify succeeded in receiving a license at rates comparable to all demographic groups.[225] Therefore, the biggest barrier for minorities was in qualifying to bid. Qualifying to bid is directly related to having sufficient capital.[226] Likewise, the results of the FCC auction regime are tied to access to

216. *Id.*
217. *See id.*
218. *Id.* at 13.
219. *Id.*
220. *Id.*
221. *Id.*
222. *Id.*
223. *Id.*
224. *Id.*
225. *Id.* at 14.
226. *See id.* at 11.

capital. Because most minority-owned businesses face capital market discrimination, they have less access to capital than their demographic counterparts. Therefore, the FCC auction regime has a deleterious and discriminatory effect on minority-owned applicants and licensees.

d. The Economic Value Per Winner Ratio

Ernst & Young pointed out that most of the auction revenues came from non-minority companies.[227] Examining the revenues also highlighted the disparity in economic value received by minority-owned winners as compared to others.[228] This disparity was partially attributable to the fact that the number of minority auction winners was smaller than the number of other winners.[229] The average value per winner was $22.5 million for minority applicants and $32 million for non-minority applicants.[230] Large, minority-owned companies contributed less auction revenues on average for their licenses than their demographic counterparts.[231] In contrast, for small minority-owned companies, the average value per winner was larger than that for non-minority counterparts.[232] Ernst & Young concluded that there was no systematic difference in averages between minority-owned and other companies.[233]

e. Comparison of the Ratios

The General Utilization Ratio better reflects the actual number of minority firms available than the Success Ratio. The FCC's standards in determining qualification relates to an applicant's ability to provide a ten-percent down payment within a certain prescribed time of the bid. Minority-owned businesses are more likely to rely on borrowed funds to make a down payment than non-minority-owned businesses. Therefore,

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227. *Id.* at 15.

228. *See id.* at 15, 30.

229. *Id.* at 15.

230. *Id.*

231. *Id.* at 16.

232. *Id.*

233. *Id.* Ernst & Young also calculated a return-on-payment ratio, which scaled the economic value of the licenses won with the upfront payments paid. *Id.* Because upfront payments determine the number of licenses on which the applicant may bid, Ernst & Young expected that the applicants who could make larger upfront payments would be able to win more valuable and numerous licenses. *Id.* However, Ernst & Young concluded that, as compared to their demographic counterparts, minority businesses generated relatively more value for licenses won relative to upfront payments made. *Id.* Ernst & Young pointed out that upfront payments may be an "imperfect indicator" of minority firms' interest in licenses. *Id.* at 17. In addition, upfront payment data were unavailable for many of the nineteen auctions in the study. *Id.* at 16.

if we were to use the pool of qualified bidders as the measure of availability as was done in the Success Ratio, the utilization ratio itself would incorporate capital market discrimination.

Nonetheless, the comparison among the General Utilization Ratio, Qualifying Ratio, and Success Ratio shows that minority-owned businesses are generally underutilized in terms of auction outcomes. In addition, these ratios show that once the minority-owned business qualifies and obtains sufficient capital, it can perform almost as well at auctions as other businesses in the auction process. Each of these measures shows that the presence of installment payments may mitigate the effect of capital constraints on minority-owned businesses.

At an FCC policy forum, Dr. Bradford concluded that "installment plans is [sic] one form of financing . . . that, because of capital market restrictions, offsets the negative that would otherwise be experienced by women and minorities."[234] However, at the same forum, James Winston, Chair of the National Association of Black-Owned Broadcasters, criticized the FCC's use of installment payments.[235] Winston stated that, although the presence of installment payments may have increased the success rates of minority-owned applicants in obtaining licenses, many installment payment winners lost their licenses, lost their previously paid installment payments, and lost their upfront payments, or were forced into bankruptcy.[236] Winston was of the opinion that the "actual history of the installment payment" would show that "installment payments were the kiss of death."[237]

Clearly, Winston is right: the way the installment payment program worked, in his examples, seemed to disadvantage minority wireless applicants. Bradford's study does not necessarily suggest that the FCC re-establish its installment payment program. However, Bradford's findings, with Ernst & Young's, are very significant because they demonstrate that some sort of financing, like installment payments, greatly increases the number of successful outcomes for minority-owned businesses. This increase in successful outcomes clearly demonstrates

234. *In re* Policy Forum on Market Entry Barriers Faced by Small, Minority and Women-Owned Businesses in the Communications Industry (Dec. 12, 2000), at 44-46 (testimony of Dr. William Bradford) (noting that bidding credits also had a similar effect on the outcomes for minority-owned businesses).

235. *Id.* at 91-92.

236. *Id.* at 91 (noting that one of the few minority-owned companies that constructed a C-block license sold the system soon after it was constructed).

237. *Id.* at 92. Winston attributed the problem to the fact that installment plans made the FCC a "senior lender" and, as such, was able to revoke the license for nonpayment. *Id.*

that lack of success for these businesses is attributable to capital constraints.

The differences in the utilization measures also demonstrate the complexities of utilization ratios and the difficult question to be answered by federal and state governments pursuing an affirmative action program. These calculations, prescribed by the *Croson* Court, indicate the existence of remediable discrimination necessitating some sort of affirmative action relief.[238]

Each of these calculations of average underutilization are also significant because during some of these time periods the FCC had either race-neutral or race-conscious programs designed to increase participation by minority-owned or small businesses. After the race-conscious programs came into question post-*Adarand*, the race-based programs were eliminated and replaced by race-neutral programs designed to help small businesses.[239] Despite these programs, significant underutilization of minority-owned businesses existed in the FCC competitive bidding process.

2. Analysis of Individual Auctions by Programs

We have also analyzed some of the interesting Ernst & Young data across the individual auction of spectrum. For instance, one hundred percent of financially qualified minority-owned businesses won licenses in the DEF Block auction.[240] The DEF Block auctioned spectrum for mobile voice and data.[241] However, when those businesses that failed to qualify were considered, only 59.26 percent of minority applicants won these licenses.[242] This percentage was the highest general minority participation rate for any of the individual spectrum calculations.[243] Even though there appears to be a high utilization of qualified minority-owned businesses in the DEF auction, they received a much lower percentage of the monetary value in that auction, with only 3.17 percent of the net

238. The types of programs that may increase the utilization of minority-owned businesses include bidding credits for minority-owned businesses and installment payments. However, the discussion of possible affirmative action programs is beyond the discussion of this Article.

239. *FCC Report to Congress on Spectrum Auctions*, at B1, *available at* http://wireless.fcc.gov/auctions/data/papersAndStudies/fc970353.pdf (last visited Mar. 21, 2003).

240. *See* ERNST & YOUNG, *supra* note 193, at 24 (Table 9).

241. *Id.* at 9.

242. *See id.* at 18 (Table 1).

243. *See id.*

revenue.[244] The one hundred percent success by qualified minority-owned businesses in this auction is particularly significant because the DEF Block used installment payments and bidding credits for small businesses generally, not particularly for minority businesses. The high utilization ratio is probably attributable to the financing options that the FCC provided for this auction, which gave the minority-owned businesses an incentive to participate and allowed them to overcome the capital constraints imposed by capital market discrimination.

At the other end of the spectrum, the Nationwide Narrowband[245] auction had bidding credits for minorities but did not have financial incentives, such as installment payments or bidding credits for small businesses.[246] In this auction, no minority-owned businesses won a license in an auction, even though all six qualified.[247] Because this auction did not provide any financing arrangements, this low utilization ratio underscores the capital market discrimination that these groups face.

In the auctions where no bidding credits and no financing arrangements were provided to minority-owned businesses, no minority-owned businesses won a license.[248] In conclusion, underutilization of minority-owned businesses significantly decreased as the FCC used programs such as installment payments, low down payments, and bidding credits to address capital market discrimination against minority-owned businesses.

V. CONCLUSION

In *Adarand*, the Supreme Court held that all government affirmative action programs would be analyzed under the strict scrutiny test. Strict scrutiny requires that these remedial programs satisfy a compelling governmental interest and be narrowly tailored. The FCC has implemented several programs to increase ownership of broadcast and other spectrum by members of minority groups. In overruling the standard of review used in *Metro Broadcasting*, the *Adarand* Court raised the question of whether any FCC affirmative action programs can meet the stiff standard of *Adarand*.

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244. *Id.* at 27 (Table 13).

245. Narrowband was also a form of advanced paging and data.

246. ERNST & YOUNG, *supra* note 193, at 18 (Table 1); *see also* FCC Auction Small Business Incentives, Auction Design Summary (on file with author).

247. *See* ERNST & YOUNG, *supra* note 193, at 18 (Table 1); *id.* at 21 (Table 5).

248. Such was the case for auctions 4, 8, 9, 12, and 15. *See id.* at 18 (Table 1). These auctions were for multi-channel video and mobile voice and data services. *Id.* at 9.

In this Article, we analyzed these post-*Adarand* standards, and we argued that there is a compelling governmental interest for the FCC to adopt affirmative action programs for wireless auctions because the FCC has been a passive participant in the discrimination of the capital markets. Studies show that minority-owned businesses are less likely to receive bank loans than majority-owned businesses, after controlling for bad credit. This discrimination makes it much harder for minority-owned businesses to participate in the competitive bidding process with non-minority-owned firms. The budget constraints caused by capital market discrimination make it difficult for minority-owned businesses to win bids and to be deemed financially qualified to bid.

We also analyzed the FCC-commissioned studies that show that minority wireless auction participants have a lower probability of securing a license than their demographic counterparts. In addition, we employed the *Croson*-required utilization ratio analysis to show that capital market discrimination has led to the significant underutilization of minority-owned businesses in the wireless competitive bidding process. Therefore, a compelling governmental interest exists for the FCC to establish a remedial program for distributing wireless licenses.