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# The FCC's Minority Ownership Policies From Broadcasting to PCS

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Marc S. Martin\*\*

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## INTRODUCTION

This Article will discuss the Federal Communications Commission's (FCC or Commission) minority ownership policies from their origins in the broadcast context to their most recent setback in the broadband personal communications services (PCS) context. In addition, this Article examines the future of the Commission's minority auction preferences in light of *Adarand Constructors, Inc. v. Pena*,<sup>1</sup> in which the Supreme Court overturned much of the legal foundation for the FCC's minority ownership policies.

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1. *Adarand*, 115 S. Ct. 2097 (1995).

## I. THE ORIGINS OF THE COMMISSION'S MINORITY OWNERSHIP POLICIES

There is no debate about the fact that minorities are underrepresented in the ranks of broadcast owners. There were no minority-owned radio stations until 1949 when the Commission awarded radio station WERD, Atlanta to Jesse B. Blayton.<sup>2</sup> There were no minority-owned television stations until almost twenty years later, in 1973, when the Commission awarded the license for WGPR-TV, Detroit, to a minority-owned business.<sup>3</sup> As a result, FCC Chairman Richard Wiley took the first step toward addressing this issue when he charged his staff with the task of examining what could be done to promote minority ownership of broadcast services. The Commission's staff responded in 1978, during the chairmanship of Charles Ferris, with a series of policy recommendations in the *1978 Broadcast Policy Statement*.<sup>4</sup> It authorized the use of comparative hearing preferences favoring minority applicants, the distress sale policy, and the award of tax certificates to owners of broadcast or cable systems who sold to minority-controlled businesses. When the *1978 Broadcast Policy Statement* was issued, minorities owned approximately .05 percent (or 40) of the approximately 8500 broadcast licenses issued by the FCC.<sup>5</sup>

During the 1980s, when these policies were implemented, the United States saw its first significant increase in minority ownership. For example, Percy Sutton established a significant radio station group,<sup>6</sup> and Frank

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2. In 1949, J.B. Blayton purchased all the common stock of Radio Atlanta, Inc., owner of radio station WERD. *See Negro Buyer Plans To Run Radio Station—WERD Here*, ATLANTA JOURNAL, Sept. 15, 1949; *see also WERD's 15th Anniversary Highlights The Month Of October For WERDLAND*, THE PRINTED WERD, Oct. 1961 at 1. (copy on file with author).

3. WGPR, Inc., a subsidiary of International Free and Accepted Modern Masons, Inc., was authorized to construct a new commercial television station to operate on channel 62, Detroit, Michigan on May 31, 1973. *See In Re App'n of W.G.P.R., Inc., Detroit, Mich. for Constr. Permit for New TV Brdcst. Station, Memorandum Opinion and Order*, 42 F.C.C.2d 836 (1973); *see also In Re Request by WGPR, Inc., Detroit, Mich. for Waiver of Grant Fee, Request*, 54 F.C.C.2d 297 (1975).

4. Statement of Policy on Minority Ownership of Brdcst. Facils., *Public Notice*, 68 F.C.C.2d 979 (1978) [hereinafter *1978 Broadcast Policy Statement*].

5. *FCC Administration of Internal Revenue Code §1071, 9-10: Hearings before the Subcomm. on Oversight of the House Comm. on Ways and Means, 103d Cong., 1st Sess.* (1995) (statement of William E. Kennard, FCC General Counsel) [hereinafter *Kennard testimony*].

6. In 1972, Percy Sutton founded Inner City Broadcasting when he purchased WLIB-AM, New York. *Inside Inner City Broadcasting*, BROADCASTING & CABLE, Jan. 8, 1990, at 104, 104. Inner City Broadcasting is the nation's largest black-owned group of radio stations. Alfred Edmond, Jr., *25 Years of Blacks in Media*, BLACK ENTERPRISE, July 1995,

Washington acquired several cable systems serving, at one point in time, more than 440,000 subscribers.<sup>7</sup> Since the policies were first adopted in 1978, however, minority ownership in the broadcast industry has grown from less than 1 percent to a modest 3 percent of all stations in the United States.<sup>8</sup> Therefore, because between 1978 and 1995 minority ownership in the broadcast sector tripled on a percentage basis while the total number of stations more than doubled, the Commission's minority ownership policies clearly succeeded in promoting minority ownership.<sup>9</sup>

In 1981, Congress provided the FCC with the authority to award licenses by random selection (lottery), rather than by comparative hearing, to speed up the licensing process for services such as cellular radio, low power television (LPTV), and wireless cable (Multichannel Multipoint Distribution Service or MMDS).<sup>10</sup> Variations on the broadcast minority ownership policies were soon adopted to apply to the lottery context.<sup>11</sup> In the early 1980s, however, the Commission decided not to extend its minority ownership policies to common carrier services, such as cellular radio.<sup>12</sup> Specifically, the Commission determined that minority ownership of common carrier licenses would not promote "diversity of viewpoints" because common carriers, including cellular carriers, do not exercise editorial control over the content of the communications transmitted by

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at 104, 104.

7. *Debate over Diversity: Tax Certificates Defended at Senate Hearing*, COMM. DAILY, Mar. 8, 1995, at 1, 2.

8. Geraldine Fabrikant, *Slow Gains by Minority Broadcasters*, N.Y. TIMES, May 31, 1994, at D1. Merely examining the percentages of minority ownership over time does not provide a clear picture of the growth in minority broadcast ownership because the number of broadcast stations has more than doubled since 1978. In fiscal year 1978, there were approximately 9565 broadcast stations in operation. FCC, 44TH ANNUAL REPORT/FISCAL YEAR 24 (1978). Four tax certificates were issued. FCC, MINORITY OWNERSHIP LISTS (1994) [hereinafter MINORITY OWNERSHIP LISTS]. In calendar year 1995, approximately 22,685 broadcast stations were in operation, including low power television. *Broadcast Station Totals as of December 31, 1995*, FCC News, Jan. 19, 1996, at 1; Three hundred twenty-six tax certificates had been issued from 1978 to May 1995 when the FCC discontinued the tax certificate program. See FCC, MM, TAX CERTIFICATES ISSUED THROUGH MAY 1995 (1995) (copy on file with the FCC, Washington, D.C.).

9. See, e.g. *Kennard testimony*, supra note 5.

10. Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 1242, 95 Stat. 357, 736 (codified as amended at 47 U.S.C. § 309(i) (1988)).

11. See, e.g., *In re Amendment of the Comm'n's Rules to Allow the Selection from among Certain Competing App'ns Using Random Selection or Lotteries Instead of Comparative Hearings*, *Second Report and Order*, 93 F.C.C.2d 952, paras. 4, 51, 67-69, 75-76 (1983) [hereinafter *Lottery Second Report and Order*].

12. *In Re Cellular Mobile Systems of Fla.*, *Memorandum Opinion and Order*, 98 F.C.C.2d 231, para. 4 (1984).

their licensed facilities.<sup>13</sup> Accordingly, the Commission determined that common carrier minority preferences would not serve the interests of the First Amendment. In the absence of minority ownership policies, levels of minority ownership in the cellular industry have not approached even the modest levels of those in the broadcast sector.<sup>14</sup>

In little time, spectrum lotteries proved to be a highly inefficient means of awarding licenses. Several early lottery winners of cellular licenses quickly "flipped" or resold their licenses to larger entities for millions of dollars without ever delivering service to a single customer.<sup>15</sup> The Commission attempted to prevent lottery-related speculation by adopting antitrafficking and anti-green mail rules, but the licensing method remained troubled.<sup>16</sup> By its nature, critics argued, a lottery system awards licenses randomly rather than to the parties that value the licenses most.<sup>17</sup> As a result, entities with a bona fide interest in delivering service to the public were forced to engage in expensive private transactions to buy the licenses from the cellular lottery winners and then file for FCC approval of such purchases.<sup>18</sup> Indeed, at least 85 percent of the initial, nonwireline cellular lottery winners have sold their licenses to third parties.<sup>19</sup> Consequently, the lottery system delayed the introduction of cellular service to many markets and, by extension, curtailed the creation of new wireless telecommunications jobs throughout the United States.

In the case of LPTV and MMDS, the Commission was inundated with applications, but many of the markets still have no MMDS or LPTV

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13. *Id.* para. 5.

14. The FCC maintains no records on the number of cellular licenses held by minorities. Testimony in congressional hearings, however, has indicated that minority ownership percentages are minimal. *See, e.g., Reed E. Hundt, Chairman, FCC: Before the Subcomm. on Minority Enterprise, Finance, and Urban Development of the House Comm. on Small Business*, 103d Cong., 2d Sess. 5 (1994) [Hereinafter *Testimony of Reed E. Hundt*] (discussing a U.S. Minority Business Development Agency study finding that, out of the hundreds of telecommunications licensees, "only eleven minority firms are engaged in the delivery of cellular, specialized mobile radio, radio paging, or messaging services") (copy on file with author).

15. *See, e.g., Implementation of Section 309(j) of the Comm. Act Competitive Bidding, Notice of Proposed Rule Making*, 8 FCC Rcd. 7635, para. 34 n.22 (1993) [hereinafter *Auction Notice of Proposed Rule Making*] (discussing the lottery winners of the rural cellular licenses for Columbia County, Wisconsin, who sold their licenses for \$62.3 million in 1990, 165 days after a construction permit was issued).

16. *See, e.g., In re Amendment of Part 22 of the Comm'n's Rules to Provide for Filing and Processing of App'ns for Unserved Areas in the Cellular Serv., Third Report and Order and Memorandum Opinion and Order on Reconsideration*, 7 FCC Rcd. 7183 (1992); *id. Report and Order*, 7 FCC Rcd. 719, paras. 30-31 (1992).

17. *See Auction Notice of Proposed Rule Making*, 8 FCC Rcd. para. 34 n.22.

18. *Id.*

19. *Id.* para. 34 n.21.

service years after licensure by lottery.<sup>20</sup> Although the lack of service is not attributable solely to the lottery process, lotteries did not result in faster service to the public. The FCC authorized minority ownership policies for LPTV lotteries, and the percentage of minority participation increased as a result.<sup>21</sup> In fact, it is estimated that approximately 13 percent of the LPTV licenses held today are owned by minorities. Unfortunately, the effectiveness of the policies was overshadowed by the fact that LPTV service has not been a high-profile success in the marketplace.<sup>22</sup>

By the mid-1980s, FCC policymakers began to reconsider the merits of the lottery system for all services. In 1985, Chairman Mark Fowler testified before Congress in support of an FCC proposal to award licenses by auction rather than by lottery.<sup>23</sup> The theory underlying spectrum auctions is that although the initial costs are high, auctions are more efficient, and ultimately more cost-effective, because the license is awarded in the first instance to the party that values the license most.<sup>24</sup> By contrast, lotteries, which usually require a negligible initial fee, often generate wasteful post-license grant transactions.<sup>25</sup> Under an auction system, the government receives the payment for the license and can apply the proceeds to fund government programs and finance, or help reduce, the federal debt.<sup>26</sup> Congress, however, remained vigilantly opposed to auctions, in part, because the higher acquisition costs were viewed as a barrier to market entry for entities with lack of access to capital, such as small and minority- and women-owned businesses.

As questions began to surround the lottery process, Dennis Patrick,

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20. See, e.g., David Kaut, *Rising Wireless Cable Casts Wary Eye on Capitol*, MULTICHANNEL NEWS, May 8, 1995, at 152, 152.

21. See generally *Lottery Second Report and Order*, 93 F.C.C.2d 952 (1983); See also Communications of Abacus Television in MM Dkt. No. 87-268 (Nov. 19, 1995) (stating that 10.7% of LPTV stations are minority owned, while 2.6% of full power TV stations are minority-owned).

22. LPTV had traditionally been treated as a second-tier service by the FCC. For example, LPTV channels are not covered by the "must carry" requirements of the Communications Act, which mandate that full power broadcast TV stations' programming to be offered by cable systems to their cable subscribers. In addition, the FCC has proposed to not guarantee to LPTV licensees digital conversion channels. See *Advanced TV Sys. and Their Impact Upon the Existing TV Brdcast. Svc., Fourth Further Notice of Proposed Rule Making*, 10 FCC Rcd. 10,540, paras. 25-26 (1995).

23. *FCC Chairman Proposes Legislation to Auction Industry Licenses*, DAILY REP. FOR EXECUTIVES, May 3, 1985, at A22; See also Bill McCloskey, *FCC Chairman Asks for Auctions on Some Channels*, ASSOCIATED PRESS, May 2, 1985 (copy on file with author).

24. *Auction Notice of Proposed Rule Making*, 8 FCC Rcd. para. 34 n.20.

25. *Id.* para. 34 n.21.

26. *Id.*; see also EVAN KWEREL & ALEX D. FELKER, USING AUCTIONS TO SELECT FCC LICENSES (OPP Working Paper No. 16, 1985).

FCC Chairman during the late 1980s, separately commenced an inquiry concerning the potential elimination of the Commission's broadcast minority ownership policies.<sup>27</sup> To ensure that those policies were not eliminated, Congress included provisions in the Commission's appropriations bills from 1988 to 1994 to prohibit the Commission from expending funds on any initiative designed to eliminate the broadcast minority ownership policies.<sup>28</sup>

## II. PCS AND THE OPPORTUNITY FOR A NEW LICENSING SCHEME

In the 1990s, the FCC made spectrum allocations and adopted service rules for PCS.<sup>29</sup> PCS is essentially an advanced digital mobile communications service that promises to compete with cellular and the specialized mobile radio (SMR) in the delivery of voice, data, paging, and facsimile services to customers by radio transmission.<sup>30</sup> Several industry observers contended that the licensing of a significant new radio service, like PCS, would provide the Commission with an opportunity both to improve the efficiency of its licensing procedures and to promote minority ownership in the telecommunications industry.<sup>31</sup>

Following the 1992 presidential election in which the federal deficit was a prominent issue, the Clinton administration persuaded Congress to agree to provide the Commission with auction authority in the Omnibus Budget Reconciliation Act of 1993.<sup>32</sup> The Act included a mandatory provision, however, that required the Commission to ensure the economic opportunity of small businesses, rural telephone companies, and women-

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27. See *In re* Reexamination of the Comm'n's Comparative Licensing, Distress Sales and Tax Certificate Policies Premised on Racial, Ethnic or Gender Classifications, *Notice of Inquiry*, 52 Fed. Reg. 596 (1987).

28. See, e.g., H.R. CONF. REP. NO. 708, 103d Cong., 2d Sess. 39-40 (1994) (making appropriations for the Commission through September 30, 1995 and "restor[ing] FCC funding restrictions contained in last year's Appropriations Act . . . [and] prohibit[ing] the use of funds by the FCC to . . . [c]hange or reexamine changes of current policies governing comparative licensing, distress sales and tax certificate policies intended to expand opportunities for minorities").

29. *In re* Amendment to the Comm'n's Rules to Establish New Personal Comm. Servs., *Second Report and Order*, 8 FCC Rcd. 7700 (1993).

30. 47 C.F.R. § 24.5 (1995) (defining PCS as "[r]adio communications that encompass mobile and ancillary fixed communication that provide services to individuals and businesses and can be integrated with a variety of competing networks").

31. See, e.g., *In re* Implementation of Section 309(j) of the Comm. Act Competitive Bidding, *Sixth Report and Order*, 78 Rad. Reg. 2d (P & F) 934, para. 30 (1995) [hereinafter *Competitive Bidding Sixth Report and Order*] (describing the comments of BET Holdings, Inc.).

32. Pub. L. No. 103-66, 107 Stat. 312 (codified as amended in scattered sections of U.S.C.).

and minority-owned businesses under a competitive bidding regulatory regime.<sup>33</sup>

The 1993 grant of auction authority presented the FCC with critical policy and legal concerns. First, as a policy matter, the Commission is statutorily required to determine whether the grant of a radio license would serve the public interest.<sup>34</sup> On its face, this inherently vague public interest mandate conflicts with the simplicity of awarding a license to the highest bidder by traditional auction methodologies. If the Commission's license auctions mirrored fine art or furniture auctions, for example, all new PCS licensees would belong to an exclusive club whose sole admission criterion would be unlimited access to capital. Congressional hearings and federal studies have demonstrated that the minority community lacks such significant access to capital.<sup>35</sup> Therefore, minority applicants would participate in such auctions at a significant disadvantage to nonminority bidders in the absence of measures designed to level the economic playing field. Second, as a legal matter, if the Commission were to implement the Omnibus Budget Reconciliation Act by adopting race- or gender-conscious auction preferences, then there would be a significant risk that such measures would be challenged as violating Fourteenth Amendments' Equal Protection Clause and the equal protection component of the Fifth Amendment's due process clause.<sup>36</sup>

At the time the Omnibus Budget Reconciliation Act was enacted, the Commission was led by James Quello, who served as Chairman from November 1993 to November 1994, preceding President Clinton's appointment of Reed Hundt. In September 1993, the Commission proposed to set aside a 20 MHz block of PCS spectrum for so-called designated entities on the basis of their status as minorities, women, small businesses, or rural

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33. 47 U.S.C.A. § 309(j)(4)(D) (West Supp. 1995); see also *Auction Notice of Proposed Rule Making*, 8 FCC Rcd. 7635, paras. 72-76 (1993). These entities were referred to by the Commission as the "designated entities," a term to describe the groups earmarked for preferential treatment in the Act. *Id.* para. 79.

34. 47 U.S.C. § 307(a), (c) (1988).

35. See, e.g., *In re Implementation of Section 309(j) of the Comm. Act Competitive Bidding, Fifth Report and Order*, 9 FCC Rcd. 5532, para. 97 (1994) [hereinafter *Competitive Bidding Fifth Report and Order*] (discussing a congressional study finding that women and minorities face particularly severe problems in raising capital. See Small Business Credit and Business Opportunity Enhancement Act of 1992, Pub. L. No. 102-366, §§ 112(4) and 331(a)(4), 106 Stat. 986 (1992)); *id.*, paras. 98-99 (discussing a federal study illustrating that a minority applicant for a mortgage, identical in all pertinent respects to a white applicant, was 60% more likely to be denied a mortgage loan. See ALICIA H. MUNNELL ET AL., *MORTGAGE LENDING IN BOSTON: INTERPRETING HMDA DATA* (Fed. Reserve Bank of Boston Working Paper No. 92-7, 1992)).

36. U.S. CONST. amend. V, amend. XIV, § 1.



telephone companies.<sup>37</sup> The *Auction Notice of Proposed Rule Making* concluded that any race- or gender-conscious measures would likely be deemed "benign discrimination" under then-existing Supreme Court precedent and would be reviewed under an intermediate standard of judicial scrutiny.<sup>38</sup> Pursuant to an intermediate scrutiny test, a reviewing court would have to find that such preferential measures are narrowly tailored to serve a significant governmental interest.<sup>39</sup> The *Auction Notice of Proposed Rule Making* requested comprehensive comments from which the Commission could develop a clear and convincing record demonstrating whether and how such measures could survive intermediate scrutiny.<sup>40</sup> More than 600 comments, reply comments, and ex parte filings were submitted in the record, the overwhelming majority of which supported auction preferences.<sup>41</sup>

Subsequently, however, under the chairmanship of Reed Hundt, the Commission adopted final PCS auction rules that differed significantly from the Commission's *Auction Notice of Proposed Rule Making*.<sup>42</sup> In *Competitive Bidding Fifth Report and Order*, the Commission established "entrepreneurs' blocks" in which two spectrum blocks were set aside for applicants meeting certain financial qualifications.<sup>43</sup> By restricting eligibility to participate in the entrepreneurs' blocks according to the financial status of the applicant, rather than race or gender, the Commission appeared to have created a more solid legal foundation for its preference scheme than that under its previous set-aside proposal. The two blocks were a C block comprised of 493 licenses in the 30 MHz Basic Trading Area (BTA) and an F block comprised of 493 licenses in the 10 MHz block BTA.<sup>44</sup>

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37. *Auction Notice of Proposed Rule Making*, 8 FCC Rcd. 7635, para. 4 (1993).

38. *Id.* para. 73.

39. *Id.*

40. *Id.*

41. *Competitive Bidding Sixth Report and Order*, 78 Rad. Reg. 2d (P & F) 934, para. 10 (1995).

42. *See Competitive Bidding Fifth Report and Order*, 9 FCC Rcd. 5532 (1994).

43. *Id.* paras. 118-29.

44. *In re Amendment of the Comm'n's Rules to Establish New Personal Comm. Servs., Memorandum Opinion and Order*, 9 FCC Rcd. 4957 (1994). The Commission allocated six broadband PCS licenses in each market in the United States in the following manner: three 30 MHz blocks (two comprised of 51 regional, or Major Trading Area (MTA), licenses and one comprised of 493 BTA licenses) and three 10 MHz blocks (all comprised of BTA licenses). *Id.* para. 17, 24 & n.23. In each market, these PCS licenses will be potential competitors of two existing cellular service providers, several existing paging service providers, and at least one "cellular-like" dispatch communications provider (*e.g.*, Nextel Communications, Inc.). The entrepreneur blocks, comprised of the C and F blocks, were ultimately divided into two separate auctions. The C block auction was originally scheduled to take place shortly after the close of the A and B blocks auction. *See Competitive Bidding*

The Commission's *Competitive Bidding Fifth Report and Order* created a preference structure far more elaborate than the existing broadcast minority ownership policies.<sup>45</sup> It adopted essentially a four-tier range of preferences, the eligibility for which depended upon additional qualifications of the applicant.<sup>46</sup> First, all applicants eligible for the entrepreneurs' blocks could be eligible for a certain favorable rate of government financing and a discounted up-front payment.<sup>47</sup> Second, "small businesses," defined by the FCC as businesses with gross revenues under a certain threshold, were also eligible for a superior rate of government financing and a 10 percent bidding credit with which to lower the price of a winning bid.<sup>48</sup> Third, minority- and/or women-owned businesses eligible for the entrepreneurs' blocks could be eligible for an even more favorable rate of government financing and a 15 percent bidding credit.<sup>49</sup> Lastly, minority- and/or women-owned businesses that also qualify as small businesses would be eligible for the most favorable rate of government financing and a 25 percent bidding credit.<sup>50</sup>

On February 10, 1995, the Telephone Electronics Corp. (TEC) filed an Emergency Motion for Stay of the C block auction.<sup>51</sup> Among other things, TEC argued that because the auction preferences available to financially qualified women- and minority-owned businesses are more

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*Sixth Report and Order*, 78 Rad. Reg. 2d (P & F) 934, para. 3 (1995).

45. *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd. paras. 93-117.

46. *Id.* para. 114.

47. *Id.* para. 115.

48. *Id.* para. 15.

49. *Id.* at 5539-40. Small business minority preferences were also adopted for the narrowband PCS and interactive video and data service (IVDS). Before the legal foundation for the Commission's minority preferences was undermined in *Adarand Constructors, Inc. v. Pena*, 113 S. Ct. 2097 (1995), three auctions of licenses in these services took place: ten nationwide narrowband PCS licenses (advanced, mostly two-way paging licenses), 30 regional narrowband PCS licenses, and 594 IVDS licenses. No minority-owned applicants won the most coveted prizes of the three auctions, the ten nationwide narrowband PCS licenses. Nevertheless, minority-owned businesses won approximately 35% of the 30 (approximately 11) regional narrowband PCS and approximately 24% of the 594 IVDS licenses (roughly 140). Robert Aamoth, *Uncle Sam Hits the Jackpot*, COMM. INT'L, Sept. 1994, at 5, 5; see also Text of 'Affirmative Action Review' Report to President Clinton Released July 19, 1995, Daily Lab. Rep. No. 139, at D30 (July 20, 1995).

50. *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd. 5532, paras. 132-33 (1994). The FCC also adopted an exception to the financial affiliation rules for minority-owned applicants and extended its tax certificate policy to the PCS context. *Id.* para. 113. Tax certificates were ultimately repealed in 1994. Deduction For Health Insurance Costs of Self-Employed Individuals, Pub. L. No. 104-7, § 2(a), 109 Stat. 93, 93 (1995) (to be codified at 26 U.S.C. 1071).

51. See Emergency Motion for Stay, Telephone Elecs. Corp. v. FCC, No. 95-1015, 1995 WL 364043 (D.C. Cir., 1995) (copy on file with author).

generous than those available for other financially qualified entities, such as TEC, the Commission's rules unconstitutionally discriminated against other bidders on the basis of race and gender.<sup>52</sup> On March 15, 1995, the U.S. Court of Appeals for the D.C. Circuit issued a stay of the *Competitive Bidding Fifth Report and Order's* race- and gender-conscious provisions, the C block auction application process, and the C block auction, pending completion of judicial review.<sup>53</sup> Perhaps most disturbing development to the Commission was the fact that the D.C. Circuit Court granted the stay while *Metro's* intermediate scrutiny standard was still the law of the land. The stay was lifted on May 1, 1995, however, after the plaintiff withdrew its appeal.<sup>54</sup> The Commission rescheduled the C block auction for August 2, 1995.

Three days before the FCC's deadline to file applications to participate in the rescheduled C block auction, the Supreme Court decided *Adarand Constructors, Inc. v. Peña*.<sup>55</sup> *Adarand*, as discussed further below, overturned *Metro Broadcasting, Inc. v. FCC*<sup>56</sup> "to the extent that *Metro Broadcasting* is inconsistent with" the Court's decision in *Adarand* that "racial classifications . . . must be analyzed by a reviewing court under strict [rather than intermediate] scrutiny."<sup>57</sup> The Commission subsequently postponed the C block auction indefinitely.<sup>58</sup>

Immediately after the Court's issuance of *Adarand*, however, the Commission proposed to eliminate all of its race- and gender-conscious preferences and regulations applicable to the broadband PCS C block auction.<sup>59</sup> The proposal was largely supported by minority applicants as the fastest means to remove the cloud of litigation from the C block auction.<sup>60</sup> Any significant delay was viewed as a grave threat by minority applicants at that time because of the rapid growth of cellular systems and the impending grant of 99 MTA PCS licenses, which would provide the

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52. *Id.* at 14-16.

53. Telephone Elecs. Corp. v. FCC, No. 95-1015, 1995 WL 364043 (D.C. Cir. Mar. 15, 1995).

54. *Competitive Bidding Sixth Report and Order*, 78 Rad. Reg. 2d (P & F), para. 3 (1995).

55. *Adarand*, 115 S. Ct. 2097 (1995).

56. *Metro Broadcasting*, 497 U.S. 547 (1990).

57. *Adarand*, 115 S. Ct. at 2113.

58. FCC Postpones Short-form Filing Date for 493 BTA Licenses Located in the C Block for Personal Comm. Svc. in the 2 GHz Band, *Public Notice*, (June 13, 1995).

59. See *In re* Implementation of Section 309(j) of the Comm. Act Competitive Bidding, *Further Notice of Proposed Rule Making*, 78 Rad. Reg. 2d (P & F) 950, para. 2 (1995) [hereinafter *Competitive Bidding Further Notice of Proposed Rule Making*].

60. See *Competitive Bidding Sixth Report and Order*, 78 Rad. Reg. 2d (P & F) 934, para. 8 (1995).

financially large A and B block winners with a headstart to establish market share.<sup>61</sup> In view of the sentiments of the minority community, the FCC eliminated the C block preferences, without eliminating the F block preferences, rescheduled the C block auction to begin August 29, 1995,<sup>62</sup> and announced its intention to commence a comprehensive study of the need for preferences pursuant to the test articulated in *Adarand*.<sup>63</sup> The FCC also granted the 99 MTA PCS licenses on June 23, 1995. Despite the FCC's best intentions, however, the administrative delay would only worsen as two additional stays were issued by reviewing courts in two different cases before the C block auction finally commenced on December 18, 1995.<sup>64</sup>

In the spring of 1996, as the C block auction reached its second of three bidding stages, the FCC released a Notice of Proposed Rule Making concerning how to treat the remaining blocks of PCS spectrum—blocks D, E and F.<sup>65</sup> Specifically, the FCC asked the public to submit comments regarding whether, *inter alia*, the FCC should follow the pattern it established in the C block by substituting small business preferences in the place of race- and gender-conscious preferences for the F block. The FCC explained in the Notice that the uncertain constitutionality of race- and gender-conscious measures could create additional delays to the FCC's granting of F block licenses. Avoiding delays like those experienced in the C block context is an integral factor for ensuring the economic viability of the F block licensees because they are scheduled to enter the market as, in all likelihood, the sixth wireless telecommunications service provider. In addition, any F block licensee would begin at a significant disadvantage by

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61. See, e.g., Letter from Clance Peterson, President, Peterson County Communications, Inc. to the Honorable Reed E. Hundt, Chairman, FCC (June 22, 1995) (contact the FCC for a copy of this letter).

62. See *id.* para. 4.

63. Competitive Bidding Sixth Report and Order, 78 Rad. Reg. 2d (P&F) (1995).

64. *Cincinnati Bell v. FCC*, 69 F.3d 752 (6th Cir.), *stay dissolved sub nom in consolidated cases*, *Omnipoint v. FCC*, No. 95-1391 (D.C. Cir., Sept. 29, 1995), *motion to vacate denied sub nom*, *FCC v. Radiofone, Inc.*, 116 S. Ct. 283 (Stevens, J.), *motion to vacate denied*, 116 S. Ct. 373 (1995) (mem.); see *In re Request of Radiofone, Inc.*, for a Stay of the C Block Broadband PCS Auction and Associated Rules, *Opinion* in DA 95-2496 (Dec. 26, 1995). Because the aforementioned decisions did not address the constitutionality of the Commission's minority ownership policies, they are not discussed herein. Even after the C block auction commenced, a federal government shutdown resulting from failed budget negotiations would temporarily suspend the FCC's actions in late December 1995 and early January 1996.

65. See *In re Amendment of Part 20 of the Comm'n's Rules—Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap*, *Notice of Proposed Rule Making*, FCC 96-119 (March 20, 1996) [hereinafter *F block Notice of Proposed Rule Making*].

acquiring only 10 MHz of PCS spectrum rather than 30 or 25 MHz like its preexisting PCS and cellular competitors, respectively.<sup>66</sup>

Accordingly, this Article next discusses whether (1) the FCC's PCS minority ownership policies could be found constitutional under *Adarand* and (2) if so, whether the societal benefits of preferential measures are outweighed by the likely delays caused by constitutional challenges to them for services such as PCS where the timing of market entry is critical to the licensee's economic viability.

### III. MINORITY PREFERENCES UNDER *ADARAND*

In *Adarand*, the Supreme Court reviewed a minority preference program administered by the Small Business Administration (SBA) and employed in a variety of government contracting contexts by federal agencies. Specifically, *Adarand* involved a minority contractor certified by the SBA as meeting certain race and economic factors to qualify for certain preferences. *Adarand Constructors*, a nonminority business, failed to win a U.S. Department of Transportation bid to construct highway rail guards in Colorado, despite qualifying for the work and submitting the lowest bid.<sup>67</sup> The Supreme Court found that all minority preferences, including those involving "benign discrimination," must meet the Court's most exacting standard, "strict scrutiny."<sup>68</sup> Under the test, all race-conscious measures must be narrowly tailored to meet a compelling governmental interest.<sup>69</sup> This holding explicitly overturned the Court's holding in *Metro Broadcasting*<sup>70</sup> that the FCC's "benign" minority ownership policies need only meet an intermediate standard of review by "serv[ing an] important governmental objective" and being "substantially related to the government's interest."<sup>71</sup>

Nevertheless, the Court in *Adarand* stated that some measures could survive a strict scrutiny analysis, such as those designed to address "pervasive, systematic, and obstinate discriminatory conduct."<sup>72</sup> In addition, as Justice Stevens contended in his dissent in *Adarand*, nothing in *Adarand* overturned the analysis the Court first upheld in *Regents of the*

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66. The FCC's *F block Notice of Proposed Rule Making*, however, seeks comment on extending preferential measures to the D and E PCS blocks. *Id.*, paras. 53-55.

67. *Adarand*, 115 S. Ct. 2097, 2102 (1995).

68. *Id.* at 2113.

69. *Id.*

70. *Id.*

71. *Metro Broadcasting*, 497 U.S. 547, 564-65 (1990) (emphasis added).

72. *Adarand*, 115 S. Ct. at 2117 (citing *United States v. Paradise*, 480 U.S. 149, 167 (1987)).

*University of California v. Bakke*,<sup>73</sup> and which it affirmed in *Fullilove v. Klutznick*,<sup>74</sup> and *Metro Broadcasting*: that diversity could serve as a constitutional compelling governmental interest.<sup>75</sup> Although the application of race-conscious measures to common carrier services like PCS may not directly serve the goal of viewpoint diversity, it appears that such measures—where properly crafted and well-substantiated—could serve the goal of remedying the lack of ownership diversity consistent with *Adarand*.<sup>76</sup>

#### A. *Adarand* Analysis

*Adarand* raises the legal hurdle for the Commission's PCS auction preferences. Specifically, *Adarand* expressly rejected the *Metro Broadcasting* Court's intermediate standard of review for "benign" race-conscious programs administered by the federal government.<sup>77</sup> Rather, the Court in *Adarand* held that "all race classifications, imposed by whatever federal,

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73. *Bakke*, 438 U.S. 265 (1978). In *Bakke*, the Supreme Court reviewed the affirmative action program of a public medical school. A plurality of the Court (a four-Justice opinion together with the separate opinion of Justice Powell) found that the school's racial quota policy did not survive "the most exacting judicial examination" and ordered the admission of the otherwise qualified nonminority plaintiff, but also found constitutional the school's policy of taking the race of applicants into account in future admissions decisions so long as the policy was designed to achieve the goal of diversity in the student body and that race was only one consideration among several in its admission decision-making process. *Id.* at 272-320. Specifically, Justice Powell stated that utilizing race-conscious measures is constitutional where they are used to further the goal of creating a more diverse student body. *Id.* at 311-13, 320-23. In addition, Justice Powell suggested diversity is a constitutional goal for race-conscious measures in the education context in part because such diversity helps serve the goal of the "robust exchange of ideas" implicit in the First Amendment. *Id.* at 313. Nevertheless, the Court subsequently appeared to find the goal of diversity constitutional under facts unrelated to the First Amendment. *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

74. *Fullilove*, 448 U.S. 448 (1980).

75. *Adarand*, 115 S. Ct. at 2127 (Stevens, J., dissenting).

76. *But see* *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996). In *Hopwood*, the Fifth Circuit found unconstitutional the affirmative action program of the University of Texas Law School. The court in *Hopwood* held that, in light of *Adarand*, diversity is no longer a constitutional compelling governmental interest. As discussed further below, however, Circuit Judge Wiener, concurred rather than joined in the *Hopwood* opinion specifically because he disagreed with the court's interpretation that *Adarand* overturned *Metro Broadcasting*, *Fullilove*, and *Bakke* to the extent those cases held that diversity is a constitutional governmental interest. Accordingly, at a minimum, *Adarand* appears to have created uncertainty regarding whether diversity remains a constitutional basis to support minority preferences.

77. *Adarand*, 115 S. Ct. at 2112 (stating that "strict scrutiny of all governmental racial classifications is essential"). *But see* *Metro Broadcasting*, 497 U.S. at 564-65 (permitting nonremedial race-conscious measures that serve "important government objectives" and "are substantially related to achievement of those objectives").

state, or local government actor, must be analyzed by a reviewing court under strict scrutiny."<sup>78</sup> In addition, although the Court was less clear on this point, *Adarand* indicates that only remedial measures designed to respond to direct evidence of discrimination could survive strict scrutiny.<sup>79</sup> Without additional evidence, it is likely that a reviewing court would find, like the Court in *Metro Broadcasting*, the Commission's minority auction preferences to be nonremedial measures.

For race-conscious federal programs to survive strict scrutiny,<sup>80</sup> the government must provide a "strong basis in evidence" and demonstrate that a compelling governmental interest is at stake.<sup>81</sup> In addition, the govern-

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78. *Adarand* 115 S. Ct. at 2117 (stating 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."). This aspect in the *Adarand* decision is inconsistent with the Court's precedent. Specifically, the Court in *Croson* has applied strict scrutiny to a state-administered affirmative action program. In doing so, the Court in *Croson* distinguished precedent that had not applied strict scrutiny in *Fullilove* and *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986), in similar circumstances, by observing that *Croson's* facts did not implicate Congress' broad power under §5 of the Fourteenth Amendment. Nevertheless, the Court in *Adarand* stated that

[it] is true that various Members of this Court have taken different views of the authority § 5 of the Fourteenth Amendment confers on Congress to deal with the problem of racial discrimination, and the extent to which courts should defer to Congress' exercise of that authority. . . . We need not, and do not, address these differences today. For now, it is enough to observe that Justice Stevens' suggestion that any Member of the Court has repudiated in this case his or her previously expressed views on the subject . . . is incorrect. *Adarand*, 115 S. Ct. at 2114.

79. *Adarand*, 115 S. Ct. at 2111-14. The Court in *Adarand* cited *United States v. Paradise*, 480 U.S. 149, 167 (1987), as the kind of case that could survive the Court's notion of strict scrutiny. *Paradise* involved the imposition of a court-administered hiring quota on the Alabama Department of Public Safety to redress a nearly four-decade history of the "pervasive, systematic, and obstinate" discriminatory exclusion of black candidates for promotion. *Paradise*, 480 U.S. at 166-170. In *Paradise*, the Court declined to articulate the appropriate standard of review for race-conscious measures, but nevertheless concluded "that the relief ordered survives even strict scrutiny analysis." *Id.* at 167. Because the race-conscious measure favorably cited by the Court in *Adarand* was remedial, it follows that in the future the Court will only find similarly remedial federal programs can survive *Adarand's* strict scrutiny test.

80. The strict scrutiny test used in *Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989) can be used to identify possible evidentiary requirements for federal classifications. However, the *Croson* decision applied to state actions, and it is unclear whether its principle that only remedial measures can survive strict scrutiny carries over to the federal analysis.

81. *Id.* at 499-500. Although *Adarand* did not explicitly overturn *Metro Broadcasting's* finding that nonremedial measures can be constitutionally permissible, *Metro Broadcasting*, 497 U.S. at 563, strict scrutiny makes it far less likely that non-remedial measures will survive. See *Adarand*, 115 S. Ct. at 2117 (stating that "[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it" (emphasis added)); Cf. *id.* at 2118 (Scalia, J., concurring) (stating that "[i]n my view,

ment must demonstrate that the plan is narrowly tailored to serve that compelling interest.<sup>82</sup>

### 1. Evidence Establishing a Compelling Governmental Interest

Because *Adarand* did not clearly articulate how remedial race-conscious measures could survive strict scrutiny, *Adarand's* predecessor, *Croson*, is instructive. *Croson* requires a "strong basis in evidence for [the government's] conclusion that [race-conscious] remedial action [is] necessary."<sup>83</sup> Specifically, the Court in *Croson* demanded that the government "identify[y] that discrimination with the particularity required by the Fourteenth Amendment."<sup>84</sup> This "particularity" requirement has not been well defined, but it would appear from *Croson's* progeny that more is required than simply evidence of low percentages of minority participation in the relevant market.<sup>85</sup> Instead, to establish discrimination, statistical evidence

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government can never have a 'compelling interest' in discriminating on the basis of race in order to 'make up' for past racial discrimination in the opposite direction"). Because *Adarand* provides insufficient guidance, it is difficult to determine whether the government's interest in reducing fundamental inequities in a market generally, rather than its interest in remedying specific past discriminatory practices, can be compelling.

82. *Croson*, 488 U.S. at 491-93. See also *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986).

83. *Croson*, 488 U.S. at 500 (quoting *Wygant*, 476 U.S. at 277).

84. *Id.* at 492.

85. See, e.g., *Coral Constr. Co. v. King County*, 941 F.2d 910, 918 (9th Cir. 1991) (noting that statistical comparisons are "an invaluable tool" in demonstrating the discrimination necessary to establish a compelling interest). The most probative type of evidence was discussed in *Croson*: "Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a service and the number of such contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion might arise." *Croson*, 488 U.S. at 509.

There are many cases where, despite some attempt to prove a compelling interest, the court ruled that it was not sufficient. See *Associated Gen. Contractors of Cal., Inc. v. City and County of San Francisco*, 813 F.2d 922, 933 (9th Cir. 1987) [hereinafter *AGCC I*] (finding that statistics relied upon to support ordinance failed to identify discrimination with the precision required to demonstrate a compelling interest), *petition dismissed*, 493 U.S. 928 (1989); *O'Donnell Constr. Co. v. District of Columbia*, 963 F.2d 420 (D.C. Cir. 1992); *Contractors Ass'n. of E. Pa., Inc. v. City of Philadelphia*, 893 F. Supp. 419 (E.D. Pa. 1995) [hereinafter *CAEP I*]. There are, of course, cases that proved sufficient discrimination to establish a compelling governmental interest. See, e.g., *Contractors Ass'n. of E. Pa., Inc. v. City of Philadelphia*, 6 F.3d 990 (3d Cir. 1993) [hereinafter *CAEP II*]; *Vogel v. City of Cincinnati*, 959 F.2d 594 (6th Cir.), *cert. denied*, 506 U.S. 827 (1992) (accepting the government's admission of "wide statistical disparities" between the city's labor force and the racial composition of the police department as sufficient evidence of past discrimination to justify the city's affirmative action programs); *Associated Gen. Contractors of Cal., Inc. v. Coalition for Economic Equity*, 950 F.2d 1401 (9th Cir. 1991), *cert. denied*, 503 U.S. 985 (1992) [hereinafter *AGCC II*]; *Cone Corp. v. Hillsborough County, Fla.*, 908



of a low percentage of minority participation must "in some way be linked to additional evidence" to guarantee that discrimination is the cause of the statistical disparity.<sup>86</sup>

As an additional protection, the party challenging the program then has the opportunity to rebut the evidence of statistical disparity by proving a "neutral explanation for the . . . disparit[y] . . . , showing the statistics are flawed; . . . demonstrating that the disparities shown by the statistics are not significant or actionable; or . . . presenting contrasting statistical data."<sup>87</sup>

In the PCS auction context, the *Croson* standard of evidence would require the Commission to compile a substantial evidentiary record, which may prove prohibitively expensive and a difficult task for the Commission to undertake. Specifically, *Adarand* suggests that the Commission would have to both document the statistical disparity of minority license ownership in telecommunications and compile convincing evidence of discriminatory barriers to capital and market entry faced by minorities.<sup>88</sup> Furthermore, *Adarand* perhaps suggests that discriminatory licensing practices by the Commission in the past that could be used to support the PCS preferences as a constitutional remedial program.<sup>89</sup> Nevertheless, *Adarand* and *Croson* provide little assurance as to whether even such a comprehensive record would survive strict scrutiny.<sup>90</sup>

There are, however, areas from which to gather such evidence. First, testimony has been submitted before Congress regarding the statistical disparity in minority license ownership in telecommunications.<sup>91</sup> In addition, Congress has conducted hearings and determined in the Small Business Credit and Business Opportunity Enhancement Act of 1992 that

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F.2d 908 (11th Cir.), cert. denied, 498 U.S. 983 (1990).

86. *CAEP I*, 893 F. Supp. at 429. See also *O'Donnell*, 963 F.2d at 426 (stating that "[t]he idea that discrimination caused the low percentage [of minority participation] is nothing more than a hypothesis . . .").

87. *Coral*, 941 F.2d at 921.

88. *Adarand*, 115 S. Ct. 2097 (1995).

89. *Id.*

90. See *McCrossan Const. Co. v. Cook*, No. CIV-95-1345, (D.N.M., April 2, 1996). The court in *McCrossan*, under facts similar to *Adarand*, denied a plaintiff's motion for a preliminary injunction against the award of a construction contract to a Small Business Administration Section 8(a)-certified defendant that had received preferential treatment in the competitive bidding process. The court held, *inter alia*, the plaintiff failed to demonstrate a likelihood that it could prevail in arguing that the Small Business Administration's Section 8(a) program could not survive *Adarand's* strict scrutiny test. Although this case is only the first step of a federal district court's interpretation of *Adarand*, it is evidence that certain preferential measures could survive *Adarand's* strict scrutiny test.

91. See *Testimony of Reed M. Hundt*, *supra* note 14.

nationally minorities lack equal access to capital.<sup>92</sup> With regard to the FCC's own broadcast licensing practices, the agency granted radio licenses to exclusively non-minority applicants until 1956 and television licenses to nonminority applicants until 1973. Moreover, this disparity was further entrenched by the licensing methodology—comparative hearings—which favored applicants with experience in broadcasting. Few minorities had employment opportunities with broadcasting companies until the civil rights laws and cases concerning education, equal employment opportunities, fair housing, and voting rights in the mid-60s and early 70s—years after the valuable radio and full-power TV licenses had already been granted to nonminority applicants.<sup>93</sup> Accordingly, the FCC's comparative hearing procedure contained an inherent bias in favor of nonminorities until reforms were finally adopted in 1978.<sup>94</sup> These reforms, however, were not extended to the cellular radio service when it initiated licensing by comparative hearings or, as discussed above, when it switched to the lottery mechanism. Therefore, the most valuable telecommunications licenses were granted to non-minorities in similarly disproportionate percentages as in the broadcast context.<sup>95</sup> Further study could demonstrate

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92. See *supra* note 35 and accompanying text.

93. Indeed, because most broadcasting licenses were granted by the time the comparative hearing preferences were adopted in 1978, essentially the only means for a minority applicant to acquire a broadcast station was (and is) to purchase one from an existing licensee. Purchasing a station, however, requires access to capital, which, due to the documented discrimination in the lending sector, creates an additional barrier to market entry for the minority community. Under these circumstances, therefore, the most effective minority ownership policy was the FCC's tax certificate policy. The FCC's minority tax certificate policy provided the non-minority seller with a tax-deferral incentive to sell its station to a minority-owned business, and would also encourage the seller to reduce the station's sales price commensurate with the transactions tax savings. Despite the policy's effectiveness, Congress eliminated the minority tax certificate policy in 1994 in response to unsubstantiated allegations of abuse. Self-Employed Persons Health Care Deduction Extension Act of 1995, Pub. L. No. 104-7, §2, 109 Stat. 93.

94. Nevertheless, the Court in *Metro Broadcasting* deemed the FCC's comparative hearing preferences to be nonremedial. *Metro Broadcasting*, 497 U.S. 547, 566 (1990). Four years prior to the *1978 Broadcast Policy Statement*, the D.C. Circuit held that the FCC can favorably consider the race of an applicant in a comparative hearing proceeding to ensure the diversity of ownership and viewpoints. *TV 9, Inc. v. FCC*, 495 F.2d 929, 937-38 (1973), *cert denied*, 419 U.S. 986 (1974) (citing *Citizens Comm. Center v. FCC*, 447 F.2d 1201, 1213-14, n. 36 (1971)).

95. See *supra* note 14. As discussed above, the Commission's decision in the early 1980s not to extend minority ownership preferences to cellular licenses at its critical early licensing stage helped to ensure low levels of minority cellular license ownership. While this decision may not have constituted *de jure* discrimination, it is evidence of Commission licensing policy which failed to remedy how the inadequate access to capital in the minority community presented a barrier to market entry in the telecommunications sector. See also *Office of Comm. of the United Church of Christ v. FCC*, 425 F.2d 543 (D.C. Cir. 1969),

that such Commission practices require remedial measures as the FCC awards PCS licenses to compete with cellular.

In addition to providing evidence of the need for remedial action, the FCC could demonstrate that PCS preferential measures serve the compelling governmental interest of ownership diversity.<sup>96</sup> Specifically, as discussed above, the Court in *Adarand* did not hold that diversity cannot be a compelling governmental interest.<sup>97</sup> Accordingly, it would appear that the FCC retains the flexibility to develop record evidence in support of preferential measures that would serve the goal of ownership diversity, even where such preferences arguably do not also promote First Amendment objectives, as in the case of "transmission pipeline" services PCS.<sup>98</sup>

## 2. Narrowly Tailored to Remedy the Discrimination

To survive strict scrutiny, not only must a race-conscious measure serve a compelling state interest, it must also be narrowly tailored to redress the consequences of discrimination.<sup>99</sup> In *Coral Construction Co.*

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Office of Comm. of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966) (in which the D.C. Circuit Court first remanded and later overturned the FCC's license renewal of WLBT-TV in Mississippi that, according to evidence in the FCC's record, engaged in a variety of discriminatory programming activities, including the refusal to permit the broadcasting of any viewpoints contrary to the station's own segregationist ideology).

96. As discussed above, ownership diversity has been recognized by the Court in the education (*Bakke*) and contract-award (*Fullilove*) contexts as a constitutional governmental objective that serves the compelling interests of the Commerce Clause, the Thirteenth, Fourteenth, and Fifteenth Amendments. In addition, Congress and the Commission have long recognized ownership diversity as an objective separate and distinct from viewpoint diversity in the broadcasting context. See 47 U.S.C. § 309(j)(3)(B), (4)(D); *TV 9, Inc.*, 495 F.2d at 938, n.30. Armed with evidence of the disadvantages faced by many minority applicants in the auction context in the absence of race-conscious measures (i.e. the nationwide narrowband PCS auction, the C block PCS auction), and the inherent financial advantage in auctions held by non-minority incumbents to amortize costs and existing plant and to obtain access to capital, the FCC should be able to convincingly demonstrate that race-conscious measures are necessary to ensure the objective of ownership diversity. Like Sections 309(j)(3)(B) and (4)(D), this concept of ownership diversity would serve a broader goal than merely avoiding an undue concentration of licenses, also ensuring the dissemination of licenses among a broad variety of applicants.

97. See *supra* notes 72-76 and accompanying text. But see *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996).

98. See *McCrossan Const. Co. v. Cook*, No. CIV-95-1345, (D.N.M., April 2, 1996).

99. *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507-08 (1989). Under *Metro Broadcasting*, congressionally adopted race classifications, even if they are not remedial, may be constitutionally permissible to the extent that they serve compelling governmental interests, within the power of Congress, and are substantially related to the achievement of those objectives. *Metro Broadcasting*, 497 U.S. 547, 564-65 (1990). If *Metro Broadcasting's* finding that nonremedial measures may be permissible has not been overruled, then the *Croson* test must be adjusted accordingly.

*v. King County*,<sup>100</sup> the Ninth Circuit identified three indicia of acceptable narrowly tailored programs identified by the *Croson* Court. First, a minority preference program “should be instituted either after, or in conjunction with, race-neutral means of increasing minority business participation . . . .”<sup>101</sup> Second, the plan should avoid the use “of rigid numerical quotas.”<sup>102</sup> In fact, *Croson* indicated that flexibility should be encouraged with individualized consideration of applicants, such as allowing waivers in appropriate cases and preventing either the unfair exploitation of these plans or the imposition of a disproportionate burden on a few individuals.<sup>103</sup> Third, preferential treatment of minorities “must be limited in its effective scope to the boundaries of the enacting jurisdiction.”<sup>104</sup>

The analysis of the FCC’s minority broadcast ownership policies in *Metro Broadcasting* indicates that the FCC’s PCS minority preferences could survive strict scrutiny where properly substantiated. Under the first prong of *Coral*’s “narrow tailoring” test, the FCC must demonstrate that it seriously considered a variety of race-neutral methods of ensuring the economic opportunity of minority PCS applicants.<sup>105</sup> Even under the intermediate standard employed in *Metro Broadcasting*, the Court examined whether the FCC had seriously considered less restrictive and race-neutral preferences before adopting the final policy under review.<sup>106</sup> By eliminating the applicability of all race-conscious measures from the C block broadband PCS auction in the *Competitive Bidding Sixth Report and Order*,

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100. *Coral*, 941 F.2d 910 (9th Cir. 1991).

101. *Id.* at 922.

102. *Id.*

103. *Croson*, 488 U.S. at 507-08. See *AGCC I*, 813 F.2d 922, 936 (9th Cir. 1987).

104. *Coral*, 941 F.2d at 922. Of the three criteria, the third is the least applicable to the FCC because any minority preference adopted by the FCC would not be limited by territorial jurisdiction, but rather would apply to any license applicant owned by minorities who are U.S. citizens or are otherwise eligible under the Commission’s alien ownership rules.

105. The record does not reflect that the FCC seriously considered less restrictive preferential measures than the ones it ultimately adopted prior to *Adarand*. On the contrary, it initially proposed the more restrictive measure of a race-based spectrum set aside. *In re Implementation of Section 309(j) of the Comm. Act Competitive Bidding, Notice of Proposed Rule Making*, 8 FCC Rcd. 7635, paras. 73-76 (1993). As discussed above, however, immediately after *Adarand*, the FCC adopted race-neutral means to achieve diversity of ownership in the *Competitive Bidding Sixth Report and Order*.

106. See *Metro Broadcasting*, 497 U.S. at 590-91 (“In endorsing minority ownership preferences, Congress agreed with the Commission’s assessment that race-neutral alternatives had failed to achieve necessary programming diversity.”). See also *Coral*, 941 F.2d at 923 (finding that “while strict scrutiny requires serious, good faith consideration of race-neutral alternatives, strict scrutiny does not require exhaustion of every possible such alternative . . . however irrational, costly, unreasonable, and unlikely to succeed such alternative might be”).

the Commission has made a substantial effort to employ race-neutral means to achieve diversity in license ownership. In addition, if the C block auction ultimately fails to produce a significant number of minority-owned PCS licenses, then the Commission should have a stronger evidentiary basis to contend that race-conscious measures are necessary.

The second prong of the *Coral* "narrowly tailored" test requires flexibility in order to avoid quotas or unfairness in the program's application. The Court in *Metro Broadcasting* found that the Commission's broadcast and cable minority ownership policies satisfy this requirement.<sup>107</sup> The FCC's minority ownership policies cannot contravene any "legitimate firmly rooted expectation[s]" of competing applicants," nor severely increase the burden on nonminorities.<sup>108</sup> In addition, *Associated General Contractors of California, Inc. v. Coalition for Economic Equity* instructs that a plan is narrowly tailored when it is intended to remedy specifically identified discrimination.<sup>109</sup> Therefore, where the burdens of auction preferences can be demonstrated to be "relatively light and well distributed,"<sup>110</sup> they arguably are narrowly tailored.

The Commission's existing PCS minority preferences applicable to the F block arguably create a relatively light and well-distributed burden on nonminorities. Like the school admission preferences held to be constitutional in *Bakke*, the Commission's race- and gender-conscious measures are preferential factors among several that determine whether a particular licensee is eligible to deliver communications services to the public. All F block applicants, minority and non-minority, would have to meet a threshold financial qualification test. This requirement would narrowly tailor the preferences to those likely to have a need for assistance in access to capital, but would by no means assure license awards to minority applicants.<sup>111</sup> In addition, minority and nonminority applicants still must be found legally, technically, and otherwise qualified to hold an FCC license.

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107. See, e.g., *Metro Broadcasting*, 497 U.S. at 599; *AGCC II*, 950 F.2d 1401, 1417 (9th Cir. 1991) (finding that "the advantages provided by such preferences 'are relatively slight; . . . there are no goals, quotas, or set asides.'" (quoting *AGCC I*, 813 F.2d 922, 943 (9th Cir. 1987))). See also *Coral*, 941 F.2d at 924 (finding that "[t]he 'percentage preference method' . . . is simply not a quota").

108. See *Metro Broadcasting*, 497 U.S. at 597 (quoting *Johnson v. Transportation Agency*, 480 U.S. 616, 638 (1987)).

109. *AGCC II*, 950 F.2d at 1417.

110. *Id.* It is also possible for a nonminority entity to take advantage of bid preferences by acquiring a strategic noncontrolling equity interest. *Id.* at 1418.

111. *In re Private Land Mobile Rad. Serv. (Use of the 220-222 MHz Band)*, *Second Memorandum Opinion and Order and Third Notice of Proposed Rule Making*, 11 FCC Rcd. 188 (1995), para. 162. ("[N]o women- or minority-owned business won a nationwide PCS narrowband license.").

Further, by reserving only about one quarter of the more than 2000 PCS licenses to applicants eligible for the F blocks and by providing nonminorities meeting certain financial qualifications with similar preferential measures, the burden on such nonminority applicants is relatively light. Finally, the burden on nonminorities is also decreased by the fact that the F block auction will take place after the A, B, and C block auctions, and possibly the D and E block auctions, thereby providing a significant headstart advantage to applicants not eligible for minority preferences.<sup>112</sup>

Under the third prong of the *Coral* test, race-conscious PCS preferences could be permissible as long as the measures are enacted to remedy nationwide discrimination,<sup>113</sup> are within the powers of Congress,<sup>114</sup> and will not last longer than the discriminating effect it is designed to eliminate.<sup>115</sup> To survive, therefore, the PCS minority preference program must demonstrate that it is responding to a national problem of discrimination in the capital markets, licensing process, and/or telecommunications industry that impedes minority ownership in telecommunications.<sup>116</sup> In addition, as discussed above, the Commission's licensing policies by which it allocated a significant number of the telecommunications licenses may have impeded diversity in license ownership. The Omnibus Budget Reconciliation Act contains specific language delegating to the Commission the authority to devise rules to ensure diversity in license ownership. Congress has the authority to delegate such powers to the Commission pursuant to the Commerce Clause and the Civil Rights Amendments, with which it previously enacted a variety of anti-discrimination laws.<sup>117</sup> To comply with *Adarand* and *Croson*, however, the Commission would have to end the policies once it has attained its goals. If the Commission in fact achieves the goal of ownership diversity, then it should have little difficulty phasing out its preferential measures.

#### IV. THE FUTURE OF THE FCC'S MINORITY OWNERSHIP POLICIES

The difficult lesson learned from the FCC's experience of crafting

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112. See generally *F Block Notice of Proposed Rule Making*, FCC 96-119 (March 20, 1996).

113. See *AGCC II*, 950 F.2d at 1418 (finding, in the context of a state case, that a government must limit the reach of a preference program to minority groups located within its own borders).

114. See *Metro Broadcasting*, 497 U.S. at 563 & n.11 (citing *Fullilove v. Klutznick*, 448 U.S. 448, 473-78 (1980)).

115. *Fullilove*, 448 U.S. at 513 (Powell, J., concurring).

116. See *supra* notes 77-82 and accompanying text.

117. See, e.g., Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified at 42 U.S.C. § 2000d-4a (1988)).

preferential measures for PCS was offered by one commenter with prescience in the earliest stage of the Commission's auction proceeding: don't allow the perfect to become the enemy of the good.<sup>118</sup> Undertaking the effort to establish constitutional minority preferences does nothing to ensure the economic opportunity of minority-owned businesses in services where the timing of license grant is critical to the economic success of the minority applicants. The C block alone was delayed a year by multiple rounds of litigation. During the calendar year 1995, the cellular industry grew by a record number of 9.6 million subscribers—a 40 percent increase from 1994.<sup>119</sup> Most of these subscribers purchased cellular equipment and signed one to two year contracts with a cellular service provider. Therefore, this delay provided cellular licensees with an opportunity to ensure that many of its subscribers will have a significant financial disincentive to switch from cellular service to PCS service, particularly that offered by F block licensees.

Moreover, the C block's larger A and B block MTA competitors used the delay to gain a headstart in constructing and operating their PCS licenses. As a result, the capital markets' willingness to finance C and F block applicants has grown more cautious.<sup>120</sup> In this manner, the constitutional challenges to the minority preferences have succeeded in undermining their central purpose—improving access to capital. Accordingly, the FCC should remove the cloud of potential litigation and abandon efforts to adopt minority preferences for the F block. Rather, the FCC should extend the C block small business preferences to the F block.<sup>121</sup>

By no means, however, should the FCC abandon its efforts to ensure the economic opportunity of minority-owned business and redress the woeful disparities in minority ownership of telecommunications and broadcasting licenses. Rather, the FCC should target its efforts to spectrum-based services which are less time-sensitive. In addition, the FCC should immediately undertake the steps necessary to develop a record in support of minority ownership policies consistent with *Adarand*.<sup>122</sup>

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118. Comments of Cellular Communications, Inc. in PP Docket No. 93-253 at 2 (Nov. 10, 1993). (copy available from the FCC, Washington, D.C.)

119. See Cellular Telecommunications Industry Association, *U.S. Wireless Industry Survey Results: More than 9.6 Million Customers Added in 1995*, March 25, 1996 (copy on file with author).

120. See, e.g. Russell Pechman, *PCS Startup Seeks Financing For Buildup*, CORP. FINANCING WK., Apr. 22, 1996, at 1, 11.

121. It is likely that most minority-owned businesses will qualify as small businesses.

122. Shortly before publication of this Article, we were informed by FCC staff of the agency's plans to immediately commence a post-*Adarand* inquiry to develop a record in support of race-conscious policies. Although we have not had the opportunity to review such

Finally, minority ownership policies should be pursued in the wireless telecommunications context for new allocations of spectrum, including recent and expected grants to the FCC of formerly government-administered spectrum.

#### CONCLUSION

Although the Court in *Adarand* failed to clearly articulate what measures could satisfy its strict scrutiny standard, if the Commission can complete a comprehensive statistical analysis in support of its carefully crafted minority ownership policies, then it would appear that such policies could survive strict scrutiny in both the telecommunications and broadcasting contexts. Nevertheless, in the future, the FCC should pragmatically target minority ownership policies to services where there will not be a time delay in awarding the minority versus the nonminority licenses.

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a document, we are encouraged by this apparent move to overcome *Adarand's* newly erected barriers. In addition, we note that the FCC released a notice of proposed rule making in 1995 to reexamine the broadcast minority ownership policies. We hope that the FCC will reopen this proceeding to ensure that the proceeding's record reflects the benefits of any evidence gathered by the Commission's post-*Adarand* inquiry. *In re* Minority and Female Ownership of Mass Media Facils., *Notice of Proposed Rule Making*, 10 FCC Rcd. 2788 (1995).



