Programming the Future of Equal Employment Opportunity in Broadcasting: Lutheran Church-Missouri Synod v. FCC

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PROGRAMMING THE FUTURE OF EQUAL EMPLOYMENT OPPORTUNITY IN BROADCASTING: LUTHERAN CHURCH-MISSOURI SYNOD v. FCC

Minorities and women have a very small role in the communications industry.1

Bias both conscious and unconscious, reflecting traditional and unexamined . . . habits of thought, keeps up barriers that must come down if equal opportunity and nondiscrimination are ever genuinely to become this country's law and practice.2

I. INTRODUCTION

Despite the growing importance of the Internet and cable television, non-cable television and radio currently remain the primary media through which most Americans receive entertainment and information.3 Within this communications climate, the District of Columbia Circuit Court of Appeals recently considered whether the equal protection requirement that government agencies treat all groups identically, regardless of past privilege or disadvantage, precludes the FCC from fostering minority participation in broadcasting.4

Specifically, Lutheran Church-Missouri Synod v. FCC presented the issue of whether the Supreme Court's decision in Adarand Construc-

1. Mike Wells, FCC Struggles for Wireless License Diversity, WASH. POST, Nov. 11, 1994, at C1. "The FCC estimates that women or minorities own only 1 or 2 percent of all communications companies. Of 10,000 commercial broadcast radio and television stations, only 300 are minority controlled." Id.

2. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 274 (1995) (Ginsburg, J., dissenting); see also Adarand, 515 U.S. at 243 (Stevens, J., dissenting) (dismissing any "moral or constitutional equivalence between a policy that is designed to perpetuate a caste system . . . [and] . . . [r]emedial race-based preferences [which] reflect the opposite impulse: a desire to foster equality in society"). But see Adarand, 515 U.S. at 240 (Thomas, J., dissenting) (arguing that remedial laws are morally and constitutionally equivalent to laws which subjugate people in that remedial laws effect paternalism, which undermines equality).


(347)
structors, Inc. v. Pena effectively invalidated FCC regulations requiring broadcast licensees to institute affirmative minority recruitment plans. In broad terms, Adarand required courts to subject all governmental imposed racial classifications to strict constitutional scrutiny. This mandate emerged, however, from a fractured series of equal protection cases that created a subtle spectrum of permissible and impermissible remedies and left the practical breadth of the Adarand holding uncertain.

In Lutheran Church, the District of Columbia Circuit Court of Appeals approved an equal protection challenge to FCC equal employment opportunity criteria for license renewal. The renewal criteria required each broadcasting licensee to design a program that would encompass eligible local minorities in its application pool, because licensees had historically hired few minorities. The court stated that Adarand controlled the case regardless of whether the regulations affected ultimate employment decisions, and therefore, the court applied a strict scrutiny analysis.

This Note examines Lutheran Church in light of the Supreme Court's equal protection jurisprudence, culminating in the Adarand decision. Part II of this Note provides background concerning equal protection cases and the promulgation of equal employment opportunity (EEO) regulations by the FCC. Part III details the

6. See Lutheran Church, 141 F.3d at 344, reh'g denied, 154 F.3d at 487.
7. See Adarand, 515 U.S. at 227.
9. See Lutheran Church, 141 F.3d at 354.
10. See 47 C.F.R. § 73.2080 (a)-(c) (1997).
11. See Lutheran Church, 141 F.3d at 351. The court also stated that, after Adarand, programming diversity ceased to constitute a compelling governmental interest that could survive strict scrutiny. See id. at 355-56. Some commentators contend, however, that Adarand merely created ambiguity about whether prospective diversity can constitute a compelling governmental interest in any context. See Jim Chen, Embryonic Thoughts on Racial Identity as New Property, 68 U. COLO. L. REV. 1123, 1124-25 (1997) (noting that Metro Broadcasting Court's characterization of broadcasting diversity as important interest survived Adarand, but fearing educational affirmative action is doomed under compelling interest requirement of strict scrutiny). The survival of the prospective diversity interest under strict scrutiny, in any context, seems unlikely in the aftermath of the Fifth Circuit holding that diversity failed to sustain a public law school's affirmative action admission program against equal protection challenge. See Hopwood v. Texas, 78 F.3d 932, 944-45 (5th Cir. 1996).
12. For a discussion of equal protection cases, see infra notes 17-97 and accompanying text.
facts underlying *Lutheran Church*. Part IV describes the conclusions and rationale of the Court of Appeals, including those of two dissenting judges. Part V critically analyzes the majority's reasoning. Finally, Part VI predicts that the court's holding will stifle the FCC's ability to promote minority participation and ownership in the communications industries.

II. BACKGROUND

A. Equal Protection Cases

Generally, the Supreme Court's equal protection jurisprudence indicates that racial classifications warrant strict scrutiny. The complex continuum of opinions produced by the Court shows, however, that the appropriate standard of analysis has proved difficult to settle.

1. *Regents of the University of California v. Bakke*

The fractured result in *Regents of the University of California v. Bakke* illustrates the divisiveness of affirmative action issues for the Supreme Court. In *Bakke*, a white male applicant launched a successful equal protection challenge against a medical school's policy of setting aside ten percent of seats in each admitted class for minority students. Justice Powell's independent opinion announced

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13. For a discussion of the facts of *Lutheran Church*, see infra notes 98-108 and accompanying text.

14. For a discussion of the court's analysis and holding in *Lutheran Church*, see infra notes 109-61 and accompanying text.

15. For a critical discussion of the court's decision in *Lutheran Church*, see infra notes 162-82 and accompanying text.

16. For a discussion of the potential impact that *Lutheran Church* may have on the ability of the FCC to promote minority participation in communications, see infra notes 183-87 and accompanying text.


20. See id.

21. See id. at 319. The University of California at Davis Medical School subjected disadvantaged minority applicants to less stringent admissions standards than those to which the medical school subjected other applicants. See id. at 305. The admissions plan set aside 16 of the 100 available seats for members of designated minority groups, although minorities could also compete for places among the other 94 seats. See id. at 274. Admissions officers tried to assess whether indi-
the judgment of the divided Court. In that opinion, Justice Powell held that the Fourteenth Amendment extends equal protection to all individuals, regardless of membership in an historically exploited or benefited race. Justice Powell stated that, although racial classifications are not unconstitutional per se, they automatically evoke the most demanding scrutiny.

Justice Powell also concluded, however, that federally funded universities may consider racial or ethnic minority status as one factor among a range of acceptable factors in the admission process. His conclusion rested on a conviction that diversity among a student body was a constitutionally permissible goal. Thus, the medical school's admissions plan satisfied the first prong of the strict scrutiny analysis by addressing a compelling state interest—educational diversity. The plan failed the second strict scrutiny prong, individual minority applicants had suffered actual economic or educational deprivation. See Bakke, 438 U.S. at 272-76.

Bakke, a white male applicant, was rejected twice from the Davis Medical School, and thereafter, brought equal protection and 1964 Civil Rights Act Title VI challenges against the medical school. See id. at 278. Bakke contended that the superioritiy of his grades and MCAT scores, compared with those of some of the 16 students filling set-aside seats, indicated that the medical school would have admitted him if he could have competed for all 100 seats. See id. at 275, 277-78.

See id. at 269. Four Justices decided the case in Bakke's favor on statutory grounds without reaching the constitutional question. See id. at 411-12 (Stevens, J., concurring in the judgment in part and dissenting in part).

See Bakke, 438 U.S. at 289-90. Specifically, Justice Powell stated that "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color." Id. Justice Powell considered all racial classifications "inherently suspect," because he could not discern a method adequate to determine which groups, among the many groups that could potentially claim historical disadvantage, deserve heightened legal protection. See id. at 293 n.32, 296-97.

See Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 291 (1978); see also Korematsu v. United States, 323 U.S. 214, 216 (1944) ("[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such rights are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny."); Hirabayashi v. United States, 320 U.S. 81, 216 (1943) ("Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality").

See Bakke, 438 U.S. at 311.

See id. at 311-12.

See id. But see Hopwood v. Texas, 78 F.3d 932, 944 (5th Cir. 1996) (stating that "Justice Powell's view in Bakke is not binding precedent on this issue" and holding that "any consideration of race or ethnicity by [a state-funded] law school for the purpose of achieving a diverse student body is not a compelling interest under the Fourteenth Amendment"); cf. Goodwin Liu, Affirmative Action in Higher Education: The Diversity Rationale and the Compelling Interest Test, 33 HARV. C.R.-C.L. L. REV. 381, 401-09 (1998) (contending that compelling interest prong comprises two distinct tests: whether interest is substantively important enough to satisfy policy judgment and whether government can satisfy tort-like evidentiary burden).
however, because the minority set-aside plan was not a necessary means to achieve diversity.\textsuperscript{28}

2. \textit{Fullilove v. Klutznick}

Two years after deciding \textit{Bakke}, the Supreme Court considered an equal protection challenge to a federal program that set aside ten percent of construction grants for minority contractors, in \textit{Fullilove v. Klutznick}.\textsuperscript{29} Again, the case produced several opinions and no majority.\textsuperscript{30} In an opinion joined by two others, Chief Justice Burger stated that “[a]ny preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure it does not conflict with constitutional guarantees.”\textsuperscript{31}

Chief Justice Burger upheld the ten percent set-aside as constitutionally valid under a two part test.\textsuperscript{32} First, he concluded that Congress had the authority to remedy minority under-representa-

\textsuperscript{28} See \textit{Bakke}, 438 U.S. at 314-15. The Court found that consideration of minority status as a factor to assess achievement constituted a less intrusive alternative means to attain academic diversity because each candidate could thereby compete for every available seat in a class. See \textit{id.} at 315-18.

\textsuperscript{29} 448 U.S. 448 (1980). In \textit{Fullilove}, construction contractor associations challenged the minority business enterprise (MBE) provision of the Public Works Employment Act of 1977. See \textit{id.} at 453. The MBE provision stated that, unless the Secretary of Commerce granted a waiver, the federal government would only grant funds for local public works projects if at least 10 percent of the grant would fund minority enterprises. See \textit{id.} at 454. The statute defined minorities as United States citizens “who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts.” \textit{id.}

\textsuperscript{30} See \textit{id.} In his concurrence, Justice Powell stated that the proper test should be whether federal legislation, which uses racial classification is a “necessary means of advancing a compelling governmental interest.” \textit{Fullilove}, 448 U.S. at 496 (Powell, J., concurring). Justice Powell concluded that the MBE provisions constituted “equitable and reasonably necessary means [to redress] identified discrimination,” which he had recognized as a compelling governmental interest in \textit{Bakke}. See \textit{id.} at 510 (Powell, J., concurring).

Justice Marshall, joined by Justices Brennan and Blackmun, concurred in the judgment but applied the less exacting standard he had previously advocated in \textit{Bakke}. See \textit{Bakke}, 438 U.S. at 361 (Marshall, J., concurring). He found the MBE provision “plainly constitutional” after investigating whether racial classifications, which are intended to remedy past discrimination, serve important governmental goals and are substantially related to achieving those goals. See \textit{Fullilove}, 448 U.S. at 519 (Marshall, J., concurring).

In dissent, Justice Stewart, joined by Justice Rehnquist, contended that because the equal protection guarantee of the Fourteenth and Fifth Amendments “absolutely prohibits invidious discrimination by government, . . . any official action that treats a person differently on account of his race or ethnic origin is inherently suspect and presumptively invalid.” \textit{id.} at 523 (Stewart, J., dissenting). Moreover, the rule remains appropriate when persons injured by a racially biased law are members of the majority race. See \textit{id.} at 525.

\textsuperscript{31} \textit{id.} at 491. Justice Burger advocated significant deference, however, when considering a racial classification in remedial federal legislation. See \textit{id.} at 472.

\textsuperscript{32} See \textit{Fullilove}, 448 U.S. at 473, 480.
tion in federally funded contracting.\textsuperscript{33} Second, he concluded that in the circumstances, the racial classification constituted a permissible means to realize the congressional objective.\textsuperscript{34}

3. \textit{Wygant v. Jackson Board of Education}

In \textit{Wygant v. Jackson Board of Education},\textsuperscript{35} the Supreme Court held that a school board's policy of firing non-minority teachers before firing minority teachers during layoffs, even if the non-minority teachers had seniority, violated the Equal Protection Clause of the Fourteenth Amendment.\textsuperscript{36} Writing for a plurality in this case, Justice Powell applied the two prongs of strict scrutiny.\textsuperscript{37}

\textsuperscript{33} See \textit{id.} at 473. Justice Burger found that Congress could do so under its Commerce Power because the provision's legislative history provided a rational basis for Congress to conclude that the subcontracting practices of prime contractors could preserve the lack of minority businesses' access to public contracting opportunities, and that this inequity affects interstate commerce. \textit{See id.} at 475.

\textsuperscript{34} See \textit{Fullilove v. Klutznick}, 448 U.S. 448, 473, 480 (1980). First, with reference to school desegregation cases, Chief Justice Burger rejected the suggestion that congressional actions must be "color-blind" because he feared color-blindness would "freeze the status quo." \textit{Id.} at 482 (citing N.C. Bd. of Educ. v. Swann, 402 U.S. 43 (1971)). Second, Chief Justice Burger concluded that any incidental detriment to innocent non-minority contractors constituted a permissible "sharing of the burden" inherent in even a narrowly tailored remedial program. \textit{See id.} at 484. Third, Chief Justice Burger concluded that Congress could enact more expansive remedial legislation if the MBE program did not include enough historically disadvantaged businesses. \textit{See id.} at 485. Fourth, Chief Justice Burger found that administrative scrutiny provisions excluding non-"bona fide" minority business enterprises proved that the legislation was not overinclusive. \textit{See id.} at 487-88.

\textsuperscript{35} 476 U.S. 267 (1986). Chief Justice Burger and Justices Rehnquist and O'Connor joined Justice Powell's opinion. \textit{See id.} at 269. Justice O'Connor also wrote separately concerning her conclusion that the provision was not narrowly tailored. \textit{See id.} at 294. She concluded that the "disparity between the percentage of minorities on the teaching staff and the percentage of minorities in the student body [was] not probative of employment discrimination . . . ." \textit{Id.} Justice White concurred in the judgment, but concluded that none of the Board's interests, even in combination, could constitute a compelling state interest. \textit{See id.} at 295 (O'Connor, J., concurring).

In dissent, Justice Marshall, joined by Justices Brennan and Blackmun, found it significant that the Teachers' Union had ratified the preferential layoff provision and that the procedure helped to maintain recent gains in minority hiring made under a constitutionally valid affirmative action hiring policy. \textit{See Wygant}, 476 U.S. at 300, 303 (Marshall, J., dissenting).

\textsuperscript{36} \textit{See id.} at 283-84. In \textit{Wygant}, the 1972 Collective Bargaining Agreement between the local School Board and Teachers' Union provided that during layoffs, "teachers with the most seniority in the district [would] be retained, except that at no time [would] there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff." \textit{Id.} at 270. During later years, the School Board laid off plaintiffs, who were non-minority teachers with seniority but retained some minority teachers. \textit{See id.} at 272.

\textsuperscript{37} \textit{See id.} at 275-78.
First, Justice Powell concluded that societal discrimination alone was "too amorphous" to support race-based remedial action as a compelling governmental interest.\(^3\) Second, Justice Powell determined that the preferential layoff system failed the narrowly tailored means test.\(^4\) Although he maintained the view that innocent individuals can permissibly bear *some* burden in effecting strategies to remedy racial discrimination, Justice Powell concluded that forfeiting existing employment constituted a burden that was impermissibly onerous.\(^4\) Forfeiture of employment was simply too much to ask a single individual to contribute to any remedial plan.\(^4\) Moreover, the School Board could institute a less intrusive alternative method to remedy past discrimination, such as a preferential hiring plan.\(^4\)


In *City of Richmond v. J.A. Croson Co.*,\(^4\) the Court invalidated a city plan that set aside thirty percent of local construction funding for awards to minority contractors.\(^4\) For the majority, Justice

\(^3\) See *Wygant*, 476 U.S. at 276. For a definition of "race-based," see T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060, 1063 (1991) (identifying "race-based" as "decisions and conduct that would have been different but for the race of those benefited or disadvantaged by them").

\(^4\) See *Wygant*, 476 U.S. at 282. Justice Powell proceeded to the second prong of the analysis because findings that the Jackson School Board had previously discriminated against hiring minority faculty could prove that a compelling governmental interest existed. See *id.* at 275-78.


\(^4\) See *Wygant*, 476 U.S. at 282. Justice Powell distinguished *Fullilove* on the grounds that the 10 percent set-aside spread its burden among many contractors, only precluding their competition for certain contracts. See *id.* at 283.

\(^4\) See *id.* at 282-83.


\(^4\) See *id.* at 469. Under the plan, the city would award the set-aside portion of contracts to minority business enterprises (MBEs) located anywhere in the United States, not just to local minority enterprises. See *id.* Minority enterprises included those with at least fifty percent ownership by African-American, "Spanish-speaking, Oriental, Indian, Eskimo, or Aleut citizens." *Id.*
O’Connor held that the plan violated the individually held rights of non-minority contractors, which were guaranteed by the Equal Protection Clause of the Fourteenth Amendment. Specifically, the plan excluded non-minorities from competition for certain public contracts based on racial classification.

Interpreting all racial classifications as suspect, Justice O’Connor stated that only strict scrutiny can distinguish invidious classifications from classifications that are benign or remedial.

Under the first prong of the analysis, the Court concluded that the city had not proven a compelling interest because it had not presented specific findings that the city, itself, had discriminated in the award of past construction contracts.

Under the second prong of the analysis, the Court found that the thirty percent requirement was not narrowly tailored to achieve any permissible goal. Specifically, the Court concluded that the plan permitted waiver if a constructor showed that qualified minority businesses were unavailable to satisfy the quota. However, when Croson’s recruitment efforts failed to secure the requisite minority subcontracts and the company applied for waiver of the requirement, the city denied its request. See Croson, 488 U.S. at 481-83.

While calculating its bid, Croson unsuccessfully solicited subcontracting bids from at least five MBEs. Just before the general bids were due, Croson located a willing minority subcontractor. Unfortunately, the subcontractor failed to compute its bid in time leaving Croson to submit its MBE-deficient bid and request a waiver of the quota. While calculating its bid, Croson unsuccessfully solicited subcontracting bids from at least five MBEs. See id. at 482. Just before the general bids were due, Croson located a willing minority subcontractor. See id. Unfortunately, the subcontractor failed to compute its bid in time leaving Croson to submit its MBE-deficient bid and request a waiver of the quota. See id. The subcontractor subsequently bid a price, which exceeded the figure Croson had factored into its bid by $7,663.16. See id at 483.

The city rejected Croson’s waiver request because of the available MBE’s bid. The city also refused to raise the contract price to accommodate the extra subcontracting expense or to grant Croson the project even though it had submitted the only bid. Instead, the city decided to hold an entirely new bidding competition. See id.

See id. at 493. The Clause provides that “[n]o State shall... deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV. Justice O’Connor reiterated Justice Powell’s statement in Bakke that equal protection cannot operate differently when applied to different races, even when applied to a member of a historically benefited race. See id. at 494; see also Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 289-90 (1978).

The purpose of strict scrutiny is to ‘smoke out’ illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool; the test also ensures that the means chosen ‘fit’ this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.

Id. at 493.

The only possible goal the Court discerned was “outright racial balancing.” Id. Justice O’Connor noted that even this impermissible goal
set-aside plan failed strict scrutiny because the remedial rationales for the plan, as well as its method of application, were arbitrary.50 First, the Court found that the city’s evidence of past discrimination, statistical comparisons of public contracts awarded to minority enterprises with the number of minorities in the city’s total population, was inapposite and capricious.51 Second, the Court found that the thirty percent quota was an inescapably random figure.52 Third, the haphazard inclusion of certain racial groups granted remedies to peoples who had never suffered discrimination in Richmond, if they had ever lived in the city at all.53

5. Metro Broadcasting, Inc. v. FCC

In Metro Broadcasting, Inc. v. FCC,54 the Supreme Court upheld two FCC policies that operated according to racial classifications.55 Under one policy, the FCC Review Board awarded “substantial enhancement” to minority-owned broadcasters who competed with non-minorities for new licenses.56 Under the other policy, a broad-

rusted on the unfounded assumption that under completely equitable circumstances, minorities would “choose a particular trade in lockstep proportion to their representation in the local population.” Croson, 488 U.S. at 507; see also Local 28 of Sheet Metal Workers Int’l Ass’n v. EEOC, 478 U.S. 421, 494 (1986) (O’Connor, J., concurring in part and dissenting in part). But see Contractors Ass’n of Eastern Pa., Inc. v. City of Philadelphia, 91 F.3d 586, 602 (3d Cir. 1996) (suggesting that disparity index, comparing city contracts awarded to minority group against statistical expectation based on group’s participation in bidding processes, satisfied Croson evidentiary standard).

50. See Croson, 488 U.S. at 510.

51. See id. at 501. To comprehend past discrimination when special qualifications are involved, legislatures should consider the population of available qualified minorities rather than the percentage of minorities in the total population. See id. at 501-02; see also Hazelwood School Dist. v. United States, 433 U.S. 299, 308 (1977).

52. See Croson, 488 U.S. at 507. The Court found no permissible rationale for the arbitrary percentage. See id. It suspected two impermissible goals caused the city to choose a random quota. See id. at 507-08. First, the city might have wanted to achieve “outright racial balancing.” Id. Second, the city may have aimed to ease its administrative burden by enforcing an arbitrary remedial quota instead of customizing remedies on a case-by-case basis. See id. at 508.

53. See Croson, 488 U.S. at 506. The Court noted that it may well be that Richmond has never had an Aleut or Eskimo citizen . . . . If a [thirty percent] set aside was ‘narrowly tailored’ to compensate [African-American] contractors for past discrimination, one may legitimately ask why they are forced to share this ‘remedial relief’ with an Aleut citizen who moves to Richmond tomorrow?

Id.


55. See id. at 552.

56. See id. at 556, 558. Although the Review Board apparently gave minority ownership significant weight, the Board also considered other factors including local residence and civic participation. See id. at 559. Officially, the Commission
caster whose license was in jeopardy from a revocation or renewal review could opt to avoid those unpleasant proceedings by assigning the license to a minority enterprise in a "distress sale."57

Justice Brennan, writing for the majority, stressed that Congress had recently prohibited the FCC from spending appropriated funds to evaluate or alter its minority ownership policies.58 Before the new legislation, the FCC had suspended the proceedings underlying the Metro Broadcasting decision pending a reevaluation of its minority ownership policies.59 The congressional prohibition on spending, however, effectively mandated continuity of the existing FCC minority ownership policies.60 Deferring to this congressional mandate, Justice Brennan applied the standard advocated by Justice Marshall in Fullilove, that is, whether a benign racial classification serves an important government objective and relates substantially to achieving that objective.61

Justice Brennan concluded that promoting future programming diversity, rather than just remedying prior discrimination, constituted an important governmental goal.62 Justice Brennan considered six factors: "diversification of control of mass media communications, full-time participation in station operation by owners . . . , proposed program service, past broadcast record, efficient use of the frequency, and the character of the applicants." Id. at 557; see also Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393, 394-99 (1965); Winter Park Communications, Inc. v. FCC, 873 F.2d 347, 350 (1989) (noting that "qualitative enhancements cannot . . . overcome clear quantitative differences").

57. Metro Broadcasting, 497 U.S. at 557. This constitutes an exception to the general rule. See id. Usually, FCC regulations prohibit a broadcaster whose license has been targeted for scrutiny from assigning its license until the FCC has held a hearing about the license in question. See id.


60. See Metro Broadcasting, 497 U.S. at 563.

61. See id. at 564 (citing Fullilove v. Klutznick, 448 U.S. 448, 473, 519 (1980)).

62. See id. at 566. Justice Brennan reasoned that the finite nature of radio frequencies required the FCC to ensure that diverse views and materials reached the public via the limited airwaves. See id. at 566-67; see also Associated Press v. United States, 326 U.S. 1, 20 (1945) (stating that "the wildest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public").
drew a close analogy between diversity in broadcasting and diversity among a student population, which the Court had previously upheld as a permissible government objective in *Bakke.* The Court afforded considerable weight to both expert determinations made by the FCC and factual findings made by Congress; and thus, concluded that preferential minority ownership policies constituted a method essential to the promotion of diverse programming.

Furthermore, Justice Brennan concluded that FCC promotion of minority ownership of broadcasting licenses, through enhanced license awards and distress sales, did not shift an onerous burden onto individual non-minority broadcasters. Justice Brennan reached this conclusion because the plaintiffs had not forfeited broadcast licenses that they already possessed. Rather, the plaintiffs claimed that FCC policies impeded their capacity to secure licenses at all. The Court found, however, that the diminished competitive edge experienced by the plaintiffs constituted a permissible share of the burden in a national process of eradicating discrimination.

Justice O'Connor argued in dissent, however, that remediation of past discrimination constituted the only permissible government objective under the appropriate standard — strict scrutiny. *See Metro Broadcasting,* 497 U.S. at 612 (O'Connor, J., dissenting). Similarly, Justice Kennedy contended that broadcasting diversity failed to rise to the level of a compelling interest. *See id.* at 633 (Kennedy, J., dissenting).

The Court approved FCC and congressional determinations that minority ownership promotes diversity in broadcasting, rejecting an argument that impermissible stereotyping undergirded those determinations. *See id.* at 569-79. In other words, the determination was not based on a belief that every minority licensee would produce programming geared toward minority audiences or express a "discrete minority viewpoint." *Id.* at 579. Rather, similar to the conclusion of Justice Powell in *Bakke,* Congress and the FCC concluded that minority ownership promoted diverse programming when considered in the aggregate. *See id.* But see Mishkin, *supra* note 18, at 883 (arguing that concept of aggregation failed to satisfy tight means/end fit requirement of strict scrutiny). Also, after reviewing the FCC's failed past efforts, the Court concluded that race neutral alternatives could not effectively promote diversity. *See Metro Broadcasting,* 497 U.S. at 584-89.

The Court's approval of preferential minority ownership policies was tempered by the fact that the FCC had failed in its efforts to promote diversity. *See Metro Broadcasting,* 497 U.S. at 596.

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6. Adarand Constructors, Inc. v. Pena

Five years later, the Court overruled the intermediate scrutiny standard it had established in *Metro Broadcasting*.\(^{69}\) In *Adarand Constructors, Inc. v. Pena*,\(^ {70}\) the Court invalidated a federal statute which required that at least ten percent of funds appropriated by the Department of Transportation be expended with small businesses owned and controlled by members of groups who had suffered social and economic disadvantage.\(^ {71}\)

Pursuant to the statute, the Department of Transportation had promulgated regulations instructing state governments to presume that women and members of certain racial groups qualified as disadvantaged individuals under the statute.\(^ {72}\) In the case that followed, Adarand Constructors contended that it lost a subcontract to a higher-bidding minority business because the government subsidy provided a financial incentive for the general contractor to hire a certified disadvantaged subcontractor, which stripped Adarand of its ability to compete.\(^ {73}\)

Writing for the five-to-four majority, Justice O'Connor overruled the intermediate scrutiny standard established in *Metro Broadcasting* by holding that “all racial classifications, imposed by whatever federal, state, or local governmental actor, must be ana-
lyzed by a reviewing court under strict scrutiny." Justice O'Connor isolated two specific problems with the *Metro Broadcasting* decision. First, the *Metro Broadcasting* majority had "turned its back" on the concern enunciated by the *Croson* majority that courts may be unable to distinguish a truly benign racial classification from one "motivated by illegitimate notions of racial inferiority or simply racial politics." Second, Justice O'Connor reasoned that *Metro Broadcasting* contravened the proposition that courts should undertake "congruent" equal protection analyses in the state and federal systems. As

74. *Id.* at 227.

75. See *id.* at 224, 226. Justice O'Connor explained the majority's decision to overrule its *Metro Broadcasting* precedent, as a return to the Court's (proper) pre-*Metro Broadcasting* equal protection jurisprudence. *See Adarand*, 515 U.S. at 233-34.

76. *Id.* at 226; *see also* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989). Justice O'Connor noted that the *Metro Broadcasting* Court "did not explain how to tell whether a racial classification should be deemed 'benign,' other than to express confiden[ce] that an 'examination of the legislative scheme and its history' will separate benign measures from other types of racial classifications." *Adarand*, 515 U.S. at 225 (citing *Metro Broadcasting* Inc. v. FCC, 497 U.S. 547, 564 n.12 (1990)); *see also* Deborah Hellman, *Two Types of Discrimination: The Familiar and the Forgotten*, 86 Cal. L. Rev. 315 (1998).

Hellman has proposed that the complexity of the Supreme Court's equal protection jurisprudence, particularly when dealing with moral questions, stems from conflation of two distinct types of discrimination. *See id.* at 316. Specifically, the Court only recognizes "proxy discrimination" which employs one classification to access a target group, which is characterized by a trait different from the classification's trait. *See id.* at 317-18. In contrast, the Court fails to recognize "non-proxy" discrimination, where the classification, itself, constitutes the goal. *See id.* at 318.

According to Heller, the Court misapplies a proxy analysis to non-proxy cases by dealing uniformly with all "classification" issues. *See id.* at 323-25. The Court's narrow tailoring concept examines whether a proxy trait (e.g., race) can act as an effective stand-in for another group (e.g., people who have suffered economic disadvantage). *See id.* at 325. However, since non-proxy cases do not present this issue (i.e., whether there is a tight fit between proxy trait and target group), the narrow tailoring concept is inapposite. *See id.* at 328. Hellman suggests that, instead of worrying about narrow tailoring in non-proxy contexts, the Court should address moral questions raised by non-proxy discrimination. *See id.* at 328-29.

Under the similar reasoning of Justice Ginsburg's *Adarand* dissent, minority broadcasters are benefited, not because race stands for disadvantage, but because morally valid reasons (like programming diversity) support such a classification. *See Adarand*, 515 U.S. at 273-75 (Ginsburg, J., dissenting). But cf. Timothy L. Hall, *Educational Diversity: Viewpoints and Proxies*, 59 Ohio St. L.J. 551, 551 (1998) (suggesting that diversity cannot constitute compelling interest because courts use of race stultifies free intellectual market).

77. *See Adarand*, 515 U.S. at 224 (citing Buckley v. Valeo, 424 U.S. 1, 93 (1976)). Commentators have suggested, however, that Justices O'Connor and Scalia disregarded their positions in *Croson* when they "inexplicably held in *Adarand* that congressional action aimed at remedying effects of past discrimination in the several states should be analyzed under the same standard as state action, using strict scrutiny." Frank S. Ravitch, *Creating Chaos in the Name of Consistency: Affirmative Action and the Odd Legacy of Adarand Constructors*, Inc. v. Pena, 101 Dick. L. Rev. 281, 288 (1997).
a result, *Metro Broadcasting* also contravened two other propositions from prior Supreme Court cases — "skepticism" and "consistency." According to Justice O'Connor, *Metro Broadcasting* diverged from the prior line of Supreme Court cases by holding that benign racial classifications warranted less skepticism than other racial classifications. In addition, the *Metro Broadcasting* Court violated the principle of "consistency" by contemplating membership in an historically advantaged or disadvantaged group as a relevant factor in its equal protection analysis.

It is important to note, however, that the *Adarand* majority did not disturb the *Metro Broadcasting* holding that diversity in broadcast programming constitutes, at least, an important government objective.

In *Croson*, where the Court struck down a local ordinance under strict scrutiny, both Justices O'Connor and Scalia explicitly stated that Congress gained power to legislate on case-related issues in its role as enforcer of the Fourteenth Amendment, while the states' ability to do so became curtailed by enhanced federal power. *See Croson*, 488 U.S. at 490, 521-22 (O'Connor, J., majority opinion; Scalia, J., concurring). Justice Stevens observed that these views comport with the *Fullilove* plurality and the *Metro Broadcasting* majority. *See Adarand*, 515 U.S. at 248-50 (Stevens, J., dissenting).

The Fourteenth Amendment directly empowers Congress at the same time it expressly limits the States. This is [based on] consensus . . . that the Federal Government must be the primary defender of racial minorities against the States . . . . A rule of 'congruence' that ignores a purposeful 'incongruity' so fundamental to our system of government is unacceptable.

*Adarand*, 515 U.S. at 255 (Stevens, J., dissenting).

78. *Id.* at 226-27. Justice O'Connor conceded that the prior cases addressing this issue created a constitutional standard for reviewing racial classifications, which was uncertain "in the details." *Id.* at 223-24. However, she contended that those cases taken together had at least established the principles of skepticism, consistency and congruence. *See id.* Under "skepticism," all racial classifications warrant "searching examination." *Id.* at 223; *see also* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 273 (1986). Under "consistency," each individual receives the same equal protection of the laws, regardless whether that individual suffered societal disadvantages or benefited from societal advantages. *See Adarand*, 515 U.S. at 224 (citing *Croson*, 488 U.S. at 494); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 289-90 (1978)).

79. *See id.* at 227. Thus, the majority overcame the problem presented by the conception of stare decisis it had enunciated in Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 840 (1992) (stating that overruling long-established precedent may have adverse consequences for "ideal rule of law").


81. *See Metro Broadcasting*, 497 U.S. at 566; *see also* *Adarand*, 515 U.S. at 258. (Stevens, J., dissenting) (contending *Adarand* did not diminish "[i]t he proposition that fostering diversity may provide a sufficient interest to justify" a classification based on race).
B. Equal Employment Opportunity Regulations

In the Communications Act of 1934, Congress delegated to the FCC broad authority to promulgate rules regulating the electromagnetic spectrum. The Telecommunications Act of 1996 reaffirmed the 1934 statute, empowering the FCC to "perform any and all acts, make such rules and regulations, and issue such orders . . . as may be necessary in the execution of its functions." Among its delegated powers, the FCC has authority to grant and renew licenses "if public convenience, interest or necessity will be served thereby. . . ."

The 1996 Act added a provision requiring the agency to ascertain certain information before renewing a broadcast license. First, the FCC must ascertain whether a licensee seeking renewal has appropriately served the public. Second, it must ascertain whether the licensee seriously or repeatedly violated the 1996 Act or the FCC's rules and regulations during its previous license term.

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85. Id.


To ascertain this information, the FCC considers, among other factors, whether the licensee has complied with the agency's EEO regulations. Under the relevant regulations, a licensee’s past performance must satisfy two closely related requirements. First, hiring practices must not discriminate against any person on the basis “of race, color, religion, national origin, or sex.” Second, licensed stations must institute an affirmative EEO program, including a plan for outreach-style recruitment of minorities and women. If an annual employment report filed by a licensee does not clearly show that these requirements have been satisfied, the licensee must file a more detailed account of its recent EEO efforts.

90. See In re Streamlining Broadcast EEO Rules and Policies, Order and Notice of Proposed Rulemaking, MM Dkt No. 96-16 (1996). Each licensee files a Broadcast Station Annual Employment Report in May reporting its workforce profile for a selected payroll period, broken down into “full and part-time status, job category, gender, and race or ethnic origin.” Id. 8. At the same time, each station files a “Broadcast Equal Employment Opportunity Program Report” outlining general information about the licensee’s recruitment and hiring practices during the last year. See id.

In the case of a licensee employing over ten employees, it will automatically satisfy EEO requirements if the proportion of minority representation is at least fifty percent of that of the relevant labor force. See id. 10. If not, the FCC issues a letter of inquiry requesting more detailed documentation of the licensee’s recruitment efforts. See id. If the documentation indicates adequate recruitment efforts, the licensee has not violated FCC regulation regardless of whether those efforts resulted in employment of minorities. See In re Streamlining Broadcast EEO Rules and Policies, Order and Notice of Proposed Rulemaking, MM Dct No. 96-16, ¶ 15 (1996).

92. 47 C.F.R. § 73.2080 (a) (1997).
93. See 47 C.F.R. § 73.2080 (b), (c) (1997). Previous FCC regulations considered whether the percentage of minority employees correlated to the percentage of minorities in the relevant working population. See Lutheran Church, 141 F.3d at 347. In 1987, however, the FCC changed the regulations to focus on affirmative recruitment efforts instead of proportional goals. See id.
94. See 47 C.F.R. § 73.2080 (c) (1997). These requirements have developed since 1968, when a petition from the Board for Homeland Ministries and the Committee for Racial Justice Now of the United Church of Christ urged the FCC to deny licenses to broadcasters engaged in discriminatory hiring, creating the impetus for the FCC to first enunciate its anti-discrimination policy. See In re Petition for Rulemaking to Require Broadcast Licensee to Show Nondiscrimination in Their Employment Practices, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 F.C.C.2d 766, ¶ 11 (1968). In its action on the petition, the FCC found discrimination incompatible with a licensee’s duty to serve public interests and needs under the Communication Act of 1934. See id. ¶¶ 9-11. The next year, the FCC also asserted that its system, which relied solely on complaints, constituted an inefficient and inadequate method to remedy discrimination for at least two reasons. See In re Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices, Report and Order, 18 F.C.C.2d 240, ¶ 4 (1969). First, individual complaints consumed unmanageable agency time. See id. Second, many victims of discrimination did not file complaints for fear that they lacked proof or the possibility to prevail. See id. To overcome these obstacles, the FCC promulgated rules mandating non-discriminatory
In the regulations, the FCC outlined procedures designed to include minorities and women in applicant pools from which they had often suffered exclusion. Specifically, the regulations required licensees to design an EEO policy that included an affirmative minority recruitment plan, to fully inform employees and applicants about the policy, and to conduct continuing evaluation of the effectiveness of the plan. By adopting such procedures, broadcast licensees automatically satisfied their obligations under the FCC regulations, even if their efforts did not result in increased employment of minorities and women.

III. FACTS

Lutheran Church-Missouri Synod (the Church) operated two radio stations under FCC licenses. The Church's non-commercial AM station broadcasted exclusively religious content, while its commercial FM station broadcasted a hybrid format of classical music and religious programming. A local seminary provided space for both stations free of rent. Under an informal agreement, the seminary furnished the space for the radio stations in exchange for efforts by the Church to employ seminarians at its radio stations.

Because of the religious mission of the radio stations, the Church required station employees to know about Lutheran doctrine. Thus, the stations' employment advertisements required applicants to possess classical music training as well knowledge
about Lutheranism. In defense of its license renewal application, the Church contended that widespread minority incompatibility with these criteria explained apparent deficiencies in the stations’ compliance with the EEO regulations. Citing King’s Garden, Inc. v. FCC, the Church contended that FCC regulations exempted religious broadcasters from the general prohibition on preferential hiring.

The FCC and Administrative Law Judge, however, took a more limited view of King’s Garden. They interpreted King’s Garden to exempt religious broadcasters from a general prohibition on preferential hiring only in the hiring of employees whose jobs substantially affect on-air espousal of a religious message. Based on this interpretation, the FCC Review Board concluded that the Church violated the EEO regulations by discriminating in hiring for the positions of receptionist, secretary and engineer because such positions did not substantially influence on-air espousal of the Church’s ministry.

IV. NARRATIVE ANALYSIS

A. Panel Opinion

In deciding Lutheran Church, a panel of the District of Columbia Circuit Court of Appeals concluded that it was required to apply strict scrutiny under Adarand because the EEO requirements used racial classifications and effectively pressured FCC licensees to reach quota-like hiring goals. The panel held that the regulations failed strict scrutiny because they were not narrowly tailored to fulfill a compelling governmental objective.

102. See id.
103. See id.
104. 498 F.2d 51 (D.C. Cir. 1974).
108. See 12 F.C.C.R. 2152 ¶ 5 (1997). The FCC Review Board found it significant that station management did not try to change employment processes to comply with the regulations despite notice from counsel and warnings from a concerned inferior employee that the Church’s employment plan was deficient under the FCC regulations. See id. Deficiencies included the following: employment applications lacked notice of the EEO policy but stated a preference for Lutherans; only cursory and irregular minority recruitment efforts; failure to evaluate success of EEO plan and review it accordingly. See id.
110. See id. at 356.
1. **Proper Standard of Review: Strict Scrutiny**

After determining that the Church had standing to raise an equal protection challenge, the court considered whether the EEO regulations warranted strict scrutiny or a more relaxed standard of review. Accepting the Church's position that *Adarand* should control, the court concluded that it was bound to apply strict scrutiny.

In reaching this conclusion, the court rejected the FCC's argument that *Adarand* only mandates strict scrutiny for practices that elicit direct race-conscious effects on hiring decisions. Distinguishing Title VII cases in which courts have differentiated between "preliminary" and "ultimate" employment decisions, the court concluded that no textual basis exists for such a distinction in the Equal Protection Clause. Because it found no reason to apply different standards even if such a distinction could be made, the court determined that it did not need to determine whether the EEO regulations affected hiring decisions directly or indirectly.

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111. See *id.* at 350. In determining that the Church had standing to raise an equal protection challenge to the regulations, the court stated that the FCC finding that the Church had violated the EEO regulations had harmed the Church. See *id.* at 349. Likely harms included: (1) tainting stations' licensing record for future scrutiny; (2) imposing unreasonable regulatory burden by requiring remedial record-keeping; and (3) economic hardship flowing from development and administration of involved EEO scheme as well as possible liability in a "reverse-discrimination" suit. See *id.* at 349-50. The court suggested, moreover, that "forced discrimination may itself be an injury." *Id.*; see also *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702, 707 (9th Cir. 1997) (stating that "person suffers injury in fact if the government requires or encourages as a condition of granting him a benefit that he discriminate against others based on their race or sex").

Alternatively, the court indicated that the Church had standing regardless of whether it had actually suffered injury. See *Lutheran Church*, 141 F.3d at 350. Under this theory, the Church could establish standing on behalf of non-minorities who could have suffered subsequent discrimination if the Church had implemented a hiring plan, which satisfied the EEO regulations. See *id.* at 349. Specifically, the court held that a plaintiff who is forced to participate in a discriminatory scheme, may bring suit (despite the fact that the scheme will actually injure others) by raising a third party's constitutional rights when plaintiff is the "only effective adversary" of the challenged regulation or law. See *id.*; see also *Barrows v. Jackson*, 346 U.S. 249, 259 (1953) (permitting white homeowner to challenge restrictive covenant imposing racial constraint on conveyance of her property).

112. See *Lutheran Church*, 141 F.3d at 350-51.

113. See *id.* at 351. More specifically, the FCC and DOJ both contended that "rational basis" constituted the proper standard because the EEO regulations "stop[ped] short of establishing preferences, quotas, or set-asides." *Id.*

114. See *id.*; see also *Page v. Bolger*, 645 F.2d 227, 233 (4th Cir. 1981) (holding that section 717 of Title VII, which forbids government from discriminating in "personnel actions," does not apply to decisions with no immediate effect on employment).

115. See *Lutheran Church*, 141 F.3d at 331.
The court found, however, that even if it were required to apply a less exacting standard to practices that affect employment decisions indirectly, strict scrutiny would still be the appropriate standard in this case because the FCC regulations at issue effectively mandated stations to discriminate in hiring.\textsuperscript{116} Specifically, the court found that the regulations obliged stations to prefer hiring minorities to approximate a goal of proportional population representation, rather than to merely encourage outreach in recruiting methods.\textsuperscript{117} The court was especially disturbed by the FCC's recommendation that stations find statistical "under-representation" should examine their employment policies, because the court interpreted the term "under-representation" to indicate the existence of a quantifiable minority employment requirement for FCC licensing.\textsuperscript{118}

Next, the panel rejected the agency's contention that its EEO program merely sought equitable treatment for minorities.\textsuperscript{119} The contention failed because, according to the panel, it depended on a faulty presumption that egalitarian employment practices would produce statistically proportional minority employment in broadcasting.\textsuperscript{120}

2. Regulations Fail Strict Scrutiny

After holding that strict scrutiny applied, the court next applied that standard. The court considered, first, whether a permis-

\textsuperscript{116} See id.
\textsuperscript{117} See id. at 351-52. In other words, the regulations effectively exerted pressure on broadcasting licensees to satisfy a statistical goal by recommending that each station evaluate its past and present employment profile by comparison with the number of employable minorities and women in the area. See id. By reaching this conclusion, the court rejected its own earlier statement. See id. at 352 n.10. In dicta to an opinion four years earlier, the court had accepted the FCC's (now "over-simplified") argument that its EEO regulations do not "require a licensee to achieve numerical goals of minority employment as do certain [other] government 'affirmative action plans.'" Lutheran Church, 141 F.3d at 352 n.10 (citing Florida State Conference of Branches of the NAACP v. FCC, 24 F.3d 271, 272 (D.C. Cir. 1994)).

\textsuperscript{118} See id. at 352. Focus on "'under-representation' necessarily implies that if such a situation exists, the station is behaving in a manner that falls short of the desired outcome." Id. For the complete text of relevant EEO regulations, see 47 C.F.R. § 73.2080 (a)-(c).

\textsuperscript{119} See Lutheran Church, 141 F.3d at 352.

\textsuperscript{120} See id. The court stated two reasons for rejecting this presumption: first, the FCC did not present evidence in its support; second, the FCC had previously disavowed the proposition when it stated that it did not believe "fair employment practices will necessarily result in the employment of any minority group in direct proportion to its numbers in the community." Id. (citing EEO Guidelines for Broadcast Renewal Applicants, 79 F.C.C.2d 922, ¶ 19 (1980)).
sible and compelling governmental objective supported the EEO regulations, and second, whether the regulations constituted appropriately narrow means of achieving that objective. The court concluded that the regulations failed both requirements.

Under the first prong of the analysis, the court held that no compelling governmental interest existed that could validate the regulations. The court rejected the FCC's suggestion that promotion of diverse programming content constituted a compelling interest for two reasons. First, the FCC's failure to precisely define "diverse programming" evoked the criticism that any definition that would not offend the First Amendment was indefensibly abstract. Second, the court concluded that the Metro Broadcasting Court's characterization of programming diversity as an "important" governmental interest could not rise to the level of a compelling governmental interest.

Under the second prong of the analysis, the court rejected the FCC argument that hiring minority clerical employees constituted a narrowly tailored method to enhance programming diversity. The court pointed to a logical inconsistency in the FCC's case: since the FCC had contended that there was no significant connection between clerical and administrative employees and on-air espousal of a religious message, it was inconsistent for the FCC to also argue that minority perspectives would be voiced on the air if radio sta-

121. See Lutheran Church, 141 F.3d at 354.
122. See id. at 355-56.
123. See id. at 354.
124. See id.
125. See id. at 354. The court noted that any definition of "diverse programming" based on content would likely present acute First Amendment problems. See Lutheran Church, 141 F.3d at 354. The court suggested a precise definition: "the fostering of programming that reflects minority viewpoints or appeals to minority tastes." Id.
126. See id. As a necessary preliminary to this conclusion, the court referred to and dismissed two problems presented by Metro Broadcasting: first, the Metro Broadcasting Court was not bothered by the abstract definition of "diverse programming;" second, despite the fact that Adarand overruled intermediate scrutiny, the Metro Broadcasting Court's characterization of "diverse programming" as a "compelling" interest endured. See id. (referring to Supreme Court's ruling in Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 547 (1990)). The court stated, however, that in light of indications that the Supreme Court has since tried to curtail the Metro Broadcasting holding, it is unlikely that the diversity interest should now be considered compelling. See id. Also, the court referred to Justice O'Connor's Metro Broadcasting dissent, to argue that an interest as "amorphous" as diversity was not well suited to an analysis of minority perspectives. See id. at 355 (citing Metro Broadcasting, 497 U.S. at 614 (O'Connor, J., dissenting)).
127. See Lutheran Church, 141 F.3d at 356.
tions hired minorities for those same clerical and administrative positions.128

B. Dissent of Chief Judge Edwards

In dissent to the court's denial of a petition for rehearing en banc, Chief Judge Edwards contended that Adarand did not control Lutheran Church because obligatory set-asides of public funds are distinguishable from the FCC requirement that licensees take affirmative steps to ensure equal employment opportunities for women and minorities.129 Under this characterization, the EEO measures merely required broadcasting licensees to avoid status quo exclusionary hiring policies, and they did not constitute racial classifications.130

Chief Judge Edwards, thus, concluded that the majority should not have applied the strict scrutiny standard.131 According to Chief Judge Edwards, the majority reached a different conclusion because it mischaracterized the regulations as drawing racial classifications, and therefore, incorrectly subjected them to the Adarand holding.132 Contrary to this mischaracterization, the regulations merely provided guidelines to aid stations in constructing lawful, non-discriminatory hiring programs.133

Distinguishing the obligatory set-asides at issue in Adarand, Chief Judge Edwards observed that the FCC regulations merely suggested strategies that broadcasters could employ to heighten awareness of latent discrimination in hiring practices.134 Neither the requirement that stations evaluate employment profiles nor the processing guidelines for FCC review obliged licensees to prefer women and minorities when hiring.135

Chief Judge Edwards suggested, moreover, that “no suspect ‘racial classification’ need arise simply because the law dictates that an

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128. See id. The court believed that the term “diversity” was forced to represent several concepts, which were actually distinct. See id. Specifically, the court suggested that twentieth-century Americans have overburdened the term “diversity” by using it to both justify affirmative racial policies and as a “synonym for proportional representation itself.” Id.
129. See id. at 497 (Edwards, C.J., dissenting).
130. See Lutheran Church, 141 F.3d at 497 (Edwards, C.J., dissenting).
131. See id.
132. See id. at 498-99.
133. See id. at 497 (1998) (Edwards, C.J., dissenting). The EEO regulations only influence hiring decisions “in the sense that anti-discrimination law generally seeks to influence employers to avoid bias.” Id. at 496-97.
134. See Lutheran Church, 141 F.3d at 498-99.
135. See id.
employer might have to explain, on pain of sanction, why its hiring decisions were nondiscriminatory.”

Although race may play a role in the FCC’s decision to review a station’s hiring procedures, the Chief Judge continued, this does not compel a broadcaster to institute preferences to avoid investigation.

Finally, Chief Judge Edwards criticized the majority for unrealistically advocating “color-blindness” when “‘race’ exists as a social fact.” The Chief Judge believed that the majority erred by requiring strict scrutiny analysis whenever a policy makes an employer conscious of race. Rather, Chief Judge Edwards stated that “a person who is being scrupulously and self-consciously careful not to be a racist in a hiring decision is certainly ‘conscious of’ race – but in a positive way.”

C. Dissent of Judge Tatel

Like Chief Judge Edwards, Judge Tatel thought that Adarand did not require strict scrutiny analysis in the Lutheran Church situation. Judge Tatel distinguished Adarand from Lutheran Church on the basis that set-aside funds effectively excluded Adarand Contractors from business competition, whereas the FCC’s employment

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136. Id. at 497-98 (referring to disparate impact test enunciated in Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981) and Connecticut v. Teal, 457 U.S. 440 (1982)).

137. See id. at 497-98. The Justice Department had a similar view. After the Supreme Court decided Adarand, the DOJ issued a detailed memorandum considering which types of affirmative action programs would be subject to future strict scrutiny. See Ann Devroy & Kevin Merida, Justice Department Outlines Standards for Affirmative Action, Wash. Post, June 29, 1995, at A10. The Justice Department memorandum stated the following:

Mere outreach and recruitment efforts . . . typically should not be subject to the Adarand standards. Indeed, post Croson cases indicate that such efforts are considered race-neutral means of increasing minority opportunity. In some sense, of course, the targeting of minorities through outreach and recruitment campaigns involves race-conscious action. But the objective there is to expand the pool of applicants or bidders to include minorities, not to use race or ethnicity in the actual decision. If the government does not use racial or ethnic classifications in selecting persons from the expanded pool, Adarand ordinarily would be inapplicable.

Memorandum from Walter Dellinger, Esq., Assistant Attorney General, Office of Legal Counsel, United States Dept. of Justice, to all Agency General Counsel (June 28, 1995) (footnotes omitted), at 7 [hereinafter Dellinger].


139. See Lutheran Church I, 154 F.3d at 498.

140. Id.

141. See id. at 501 (Tatel, J., dissenting).
regulations effectively *included* an expanded range of applicants in competition for jobs.\(^142\) Although the regulations increased competition for employment from the view of those benefited by exclusionary status quo hiring procedures, the regulations did not exclude anyone from that competition.\(^143\)

Judge Tatel concluded that the majority's decision to apply strict scrutiny extended *Adarand* beyond the prior interpretation of the Supreme Court or any other circuit court.\(^144\) Judge Tatel contended that *Adarand* extended strict scrutiny only to governmental classifications that effectively treat individuals differently according to race.\(^145\) In other words, instead of mere race consciousness, *only unequal treatment based on race triggers strict scrutiny.*\(^146\)

First, Judge Tatel distinguished the facts of *Adarand* from those in *Lutheran Church.*\(^147\) Specifically, government bonuses paid to contractors employing minority subcontractors are vastly different from the FCC's employment regulations.\(^148\) Judge Tatel based this observation on the fact that *Adarand*-type bonuses gave minority contractors a manifest competitive advantage, while the EEO regulations did not give minority job applicants a comparable advantage in the broadcasting industry.\(^149\) Thus, Judge Tatel determined that differential treatment had not followed from racial classification in *Lutheran Church.*\(^150\)

Second, Judge Tatel construed the major cases bolstering the *Adarand* decision differently from the majority.\(^151\) He viewed the *Croson*, *Wygant* and *Bakke* decisions as requiring actual unequal

\(^{142}\) See id. at 502.
\(^{143}\) See id. at 502-03.
\(^{144}\) See *Lutheran Church I*, 154 F.3d at 500. Judge Tatel found that the majority should have granted the FCC's motion to remand for reconsideration of the Church's Lutheran hiring preference according to new FCC regulations and unconditional FCC renewal of the Church's broadcasting licenses. See id. Had the court remanded, it would have adhered to the canon of construction that courts should avoid adjudicating constitutional questions when possible. See id. (citing *Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944)). If the FCC later found that the Church's outreach program violated the new regulations during a future review, the Church could have then raised the constitutional challenge. See id.

\(^{145}\) See id. at 501.
\(^{146}\) See *Lutheran Church I*, 154 F.3d at 502.
\(^{147}\) See id.
\(^{148}\) See id.


\(^{150}\) See *Lutheran Church I*, 154 F.3d at 502.
\(^{151}\) See id. at 503.
treatment for racial classifications to trigger strict scrutiny. Judge Tatel concluded that the EEO regulations did not produce unequal treatment. Rather, the regulations promoted equal treatment.

Judge Tatel had to deal with the majority's conclusion that the regulations in both *Adarand* and *Lutheran Church* provided "financial incentives" to hire preferentially, rather than requiring such preferences outright. Judge Tatel distinguished *Adarand* on the basis that the non-minority subcontractor had challenged the regulation because it effectively incapacitated him in his ability to bid competitively against minority subcontractors. In *Lutheran Church*, the EEO regulations did not create a comparable effect because they did not make minority candidates more employable than non-minority candidates.

Judge Tatel reasoned that the EEO regulations offered no real incentive for stations to give preference to minorities in hiring. He provided two illustrations. First, stations with inadequate outreach programs could not protect themselves from enforcement actions by preferentially hiring minority employees to meet a

152. See id.; see also City of Richmond v. J.A. Croson Co., 488 U.S. 469, 469 (1989) (striking city requirement that thirty percent of subcontracting for public construction contracts go to minority businesses); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 283 (1986) (concluding school board used racial preferences to determine which teachers to lay off); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 274 (1978) (stating that public medical school reserved class slots for minority students and evaluated minority applicants under less demanding admissions criteria).

153. See *Lutheran Church I*, 154 F.3d at 502-03. Judge Tatel found that the challenged regulations did not direct stations to hire any individual on the basis of race, require stations to maintain a specified racial balance in employment, or confer or withhold benefits on the basis of race. See id. "Indeed, nothing in the regulations prevents stations from evaluating job applicants solely on the basis of individual merit." Id. at 502. Judge Tatel noted that the Eleventh Circuit reached a similar conclusion in Peightal v. Metropolitan Dade County, 26 F.3d 1545, 1557-58 (11th Cir. 1994), where the court described "school recruitment programs targeted at minorities and outreach programs led by minorities as race-neutral." *Lutheran Church I*, 154 F.3d at 502.

154. See id. at 501-02. The regulations "merely require broadcasters to eliminate discriminatory practices, to expand the pool from which they hire, and keep adequate records." Id. at 502.

155. See id.

156. See id. In other words, "the core of the equal protection challenge was not that the system of bonuses provided an incentive for prime contractors to grant a racial preference, but that the bonuses directly put minority-owned subcontractors in a more competitive bidding position than non-minority owned subcontractors." *Lutheran Church I*, 154 F.3d at 502.

157. See id. at 502.

158. See id. at 502.

159. See id.
statistical goal. Second, stations with adequate outreach programs would never face sanctions, such as non-renewal of broadcast licenses, for failing to reach specific numerical levels of minority hiring.

V. CRITICAL ANALYSIS

In Lutheran Church, the District of Columbia Circuit Court of Appeals incorrectly concluded that the FCC’s equal employment opportunity regulations warranted strict scrutiny. On a formal level, the regulations did not create quota-like requirements based on race. On a practical level, the regulations did not prevent individuals from competing for jobs in broadcasting. Rather, the regulations enhanced competition for jobs by expanding the scope of applicants with access to employment opportunities in broadcasting. Thus, the heightened strict scrutiny standard was inappropriate in this case.

Under strict scrutiny, however, the EEO regulations fail both prongs of the analysis. First, the current Supreme Court would not find that prospective broadcasting diversity constitutes a compelling governmental interest. Second, the regulations cannot offer a narrowly tailored solution to employment inequities in broadcasting industry.

A. Should Strict Scrutiny Apply?

In Lutheran Church, the majority’s determination that the EEO regulations warranted strict scrutiny was based on a mischaracterization of those regulations. Instead of requiring broadcasting

160. See id; see also In re Kelly Communications, Inc., 12 F.C.C.R 17 868 ¶¶ 11-13 (1997).
161. See Lutheran Church I, 154 F.3d at 502; see also In re Louisiana Broadcast Stations, 7 F.C.C.R. 17, 868 ¶¶ 16-19 (1992) (holding station complied with EEO rule based on its minority recruitment efforts despite failure to hire any minorities); In re Applications of Certain Broadcast Stations Serving Communities in the Miami, Florida Area, 5 F.C.C.R. 4893 ¶¶ 13-17 (1990) (stating that FCC considers “overall efforts to recruit, hire and promote minorities”).
162. See Lutheran Church I, 154 F.3d at 497 (Edwards, C.J., dissenting), 502-03 (Tatel, J., dissenting).
163. See id. at 497 (Edwards, C.J., dissenting).
164. See id. at 502-03 (Tatel, J., dissenting).
167. See Lutheran Church I, 154 F.3d at 496-97 (Edwards, C.J., dissenting).
licensees to hire along racial lines or to fulfill racial quotas, the regulations merely required licensees to implement recruitment policies designed to encompass qualified local minorities in applicant pools from which they have been historically excluded. In other words, the Church did not violate the regulations by hiring white Lutherans instead of hiring a given number or percentage of minorities—because such a requirement did not exist in the regulations. Rather, the Church violated the regulations by neglecting to design and implement an affirmative minority recruitment plan that complied with FCC specifications.

The majority of the court glossed over the difference between set-aside public funds for minority subcontractors and the FCC requirement that its licensees make affirmative efforts to include eligible minority candidates in applicant pools. The essential difference is the following: the FCC would not award license renewal to a broadcaster who had failed to institute a valid recruitment plan even if that broadcaster hired minorities, whereas in Adarand, the

168. See id. The majority asserted that the regulations injured the Church by tarnishing its spotless licensing record and increasing its regulatory burden by requiring detailed employment records. See Lutheran Church-Missouri Synod v. FCC, 141 F.3d 344, 349 (D.C. Cir. 1998). The injury that Adarand Constructors suffered, however, was exclusion from competition for a construction contract. See Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 208-09 (1995).

169. See 47 C.F.R. § 73.2080(a) (1997). A rejected minority applicant could, of course, show that the broadcaster had discriminated on the basis of race when it hired a white applicant. See id.


171. See Adarand, 515 U.S. at 208; see also Dellinger, supra note 137. Similarly, Chief Judge Edwards concluded in his dissent that Adarand does not control this case because the regulations merely ask broadcasters to factor the reality of racial discrimination into their hiring procedures and not to participate in perpetuation of status quo discrimination. See Lutheran Church I, 154 F.3d at 498-99.

Regardless of their constitutionality after Adarand, the FCC’s employment regulations have not had a significant diversifying impact on broadcasting license ownership. See Daniel D. Barnes, Market Reforms in Telecommunications Licensing, 48 ADMIN. L. REV. 499 n.47 (1996). “Minorities and women have a very small role in the communications industry. The FCC estimates that women or minorities own only one or two percent of all communications companies. Of 10,000 commercial broadcast radio and television stations, only 300 are minority controlled.” Wells, supra note 1, at Cl.

At least one commentator, however, has criticized the Adarand majority’s conclusion on the grounds that the ten percent set-aside was based on demonstrated social and economic disadvantage, rather than a presumption that disadvantage coincided with racial minority. See Steven H. Hobbs, Personal Reflections on Adarand Construction Co. v. Pena, 2 RACE & ETHNIC ANCESTRY L. DIG. 18, 19 (1996). Under this reasoning, Adarand Constructors could have competed for the set-aside contract if it had shown past disadvantage, despite its status as a white-owned business. See id.
Department of Transportation only awarded extra compensation to a general contractor who subcontracted ten percent of its work to minority contractors, regardless of how it recruited its employees. 172

"Benign" classifications and policies are, moreover, fundamentally different from measures like the EEO regulations that reject theories advocating pure "color-blindness" and affirmatively recognize pervasive racial discrimination as a social fact. 173 If the regulations were race-neutral rather than benign racial classifications, then Justice O'Connor's concern that courts cannot distinguish benign racial classifications from those that are invidious would not be relevant. 174

The Justice Department reached this conclusion when it analyzed Adarand to understand implications that the decision had for government affirmative action programs. The Justice Department predicted that, even after Adarand, the courts would approve outreach policies that were intended to increase minority opportunities, because such efforts were race-neutral. 175 Under this inter-

172. See Adarand, 515 U.S. at 208; 47 C.F.R. § 73.2080 (a). With this distinction in mind, the ALJ did not consider the hiring of a Hispanic woman by the station as a strong plus in the Church's favor. See In re Applications of Lutheran Church-Missouri Synod, 10 FCC Rcd. 9880, 9912 (1995). The District of Columbia Circuit majority, however, asserted that the ALJ "discounted her hire... [because] he thought that the station was insufficiently race-conscious when it hired her." Lutheran Church, 141 F.3d at 352.

The majority concluded that the EEO regulations effectively made broadcasters decide to hire minorities at the expense of qualified non-minorities. See id. at 351. Again, this conflates two distinct moments of decision-making. See Lutheran Church I, 154 F.3d at 498-99 (Edwards, C.J., dissenting). The regulations affect the broadcaster's (preliminary) decision to actively endeavor to include minorities in its applicant pool, whereas STURAA affected the general contractor's (subsequent) decision about which among the available applicant pool to hire. See id.

The right to compete for a contract is also distinguishable from the right to possess a broadcasting license, which is subject to limitations. See Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 389 (1969) (stating that licensee "has no constitutional right to be the one who holds the license or to monopolize a radio frequency to the exclusion of his fellow citizens"). The FCC has long recognized that broadcasters stand in a fiduciary relationship to the public, requiring them to offer programming that reflects the local community because of the inherently limited nature of radio frequencies. See id.

173. See Gary Peller, Race Consciousness, 1990 DUKEL.J. 758, 847 (1990) (observing that racial differences comprise important "precondition to meaningful negotiation of the terms of our social spaces").

174. See Adarand, 515 U.S. at 229.

175. See Dellinger, supra note 137, at 7. In Adarand, Justice O'Conor advocated a "color-blind" approach to racial issues that echoed Justice Powell's statement that "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color." Univ. of Cal. v. Bakke, 438 U.S. 265, 289-90 (1978); see also Paul J. Mishkin, Foreword: The Making of a Turning Point - Metro and Adarand, 84 CALIF. L. REV. 875

http://digitalcommons.law.villanova.edu/mslj/vol6/iss2/5
pretation, *Adarand* would not control the EEO regulations at issue in *Lutheran Church*.\(^{176}\)

B. Programming Diversity Fails Compelling Interest Test\(^{177}\)

If strict scrutiny applies, prospective broadcasting diversity probably cannot rise to the level of a compelling governmental interest in light of *Adarand*.\(^{178}\) Although diversity has a long history of Supreme Court recognition as a governmental interest which could sustain otherwise suspect government programs under equal protection analyses, *Adarand* has effectively eviscerated this precedent.\(^{179}\) In an influential recent case, *Hopwood v. Texas*, the Fifth Circuit retreated from reference to diversity as an interest that could potentially validate a suspect classification.\(^{180}\) Rather, the


177. The regulations would probably also fail the narrow tailoring prong of strict scrutiny because, as the FCC has admitted, EEO programs combined with compulsory collaboration with minority leaders to ascertain community needs during the 1960s and 1970s were unable to rectify the dearth of minority viewpoints in broadcasting. *See Policy Statement and Notice of Proposed Rulemaking in the Matter of Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting, 92 F.C.C.2d 849 12 (1982).*

178. *See Donahue, supra* note 165, at 549 (predicting Supreme Court will find racial diversity does not constitute compelling government interest because: (1) *Adarand* and *Hopwood* compromised precedent provided by *Bakke* and *Metro Broadcasting*; (2) remediation of past discrimination has displaced diversity as compelling interest in affirmative action cases; and (3) five Justice Supreme Court majority is currently hostile to diversity interest). *But see* Goodwin Liu, *Affirmative Action in Higher Education: The Diversity Rationale and the Compelling Interest Test*, 33 HARV. C.R.-C.L. L. REV. 381, 413 (1998) (contending that remedial and diversity rationales derive from same moral "aspiration to eradicate . . . entrenched system of racial caste" such that conceptual separation rings artificial).

179. *See Donahue, supra* note 165, at 549. For a discussion of the history of diversity as a governmental goal, *see Bakke*, 438 U.S. at 311-12 (holding that student diversity constituted permissible state goal) (Powell, J.); Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990) (holding programming diversity constituted important permissible governmental objective). *But see* Adarand, 515 U.S. at 257. In his *Adarand* dissent, Justice Stevens argued that *Metro Broadcasting* enunciated the Court's view that prospective programming diversity constituted a governmental interest, which could sustain racial classifications. *See id.* at 257-58.

Fifth Circuit held that remedial interests are, exclusively, able to constitute a compelling government interest.\textsuperscript{181}

\section*{VI. IMPACT}

The \textit{Lutheran Church} holding extended and galvanized the power of \textit{Adarand} to invalidate affirmative action programs.\textsuperscript{182} Although the Supreme Court has not yet identified a workable distinction between benign and invidious classifications, it has also never held that race-neutral outreach programs that promote diverse applicant pools cannot be distinguished from those that award preferences on the basis of racial classifications.\textsuperscript{183} In \textit{Lutheran Church}, the District of Columbia Circuit majority conflated these concepts. The court, moreover, subjected the outreach programs to strict scrutiny without carefully analyzing the degree of pressure to hire minorities and women, if any, that broadcasting licensees experienced as a result of the EEO regulations.\textsuperscript{184}

Commentators have voiced concerns about judicial rulings, such as \textit{Lutheran Church}, which extend \textit{Adarand}.\textsuperscript{185} Such decisions could make Congress feel more comfortable about invalidating outreach-based affirmative action programs through new legislation.\textsuperscript{186} Even without specific legislation, however, the \textit{Lutheran Church} decision will inhibit the FCC from fostering participation by minorities and women in publicly licensed television and radio broadcasting, (providing comprehensive study and analysis of societal benefits from race-conscious admissions policies in higher education).


\textsuperscript{182.} For a discussion of the \textit{Adarand} holding and the Supreme Court’s reasoning, see supra notes 69-81 and accompanying text; see also Steven H. Hobbs, \textit{Personal Reflections on Adarand Construction Co. v. Pena}, 2 \textit{RACE & ETHNIC ANCESTRY} L. DIG. 18, 20 (1996) (contending that \textit{Adarand} majority foreclosed “creative possibilities [to correct] noxious legacy of discrimination”).

\textsuperscript{183.} See supra notes 17-96 and accompanying text. In other words, the District of Columbia Circuit’s holding conceals the distinction between governmental actions that prevent non-minorities from competing for work and governmental actions that compel employers to merely permit minorities to compete for work. See \textit{Lutheran Church-Missouri Synod v. FCC}, 154 F.3d 487, 497 (D.C. Cir. 1998) (Edwards, C.J., dissenting), 502-03 (Tatel, J., dissenting).

\textsuperscript{184.} See supra notes 161-63 and accompanying text.


\textsuperscript{186.} See \textit{id}.
as well as in other increasingly important media such as cable television.\textsuperscript{187}

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