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# GROSS PRESUMPTIONS: DETERMINING GROUP ELIGIBILITY FOR FEDERAL PROCUREMENT PREFERENCES

George R. La Noue\* & John C. Sullivan\*\*

## I. INTRODUCTION

While there has been substantial administrative reformulation of federally-sponsored Minority Business Enterprise (MBE) programs<sup>1</sup> after the Supreme Court's decision in *Adarand Constructors, Inc. v. Peña*,<sup>2</sup> the key premise upon which all these programs rest remains unchanged. Despite frequently voiced judicial skepticism about the broad use of racial classifications, all federal MBE programs are based on the "presumption" that every member of certain racial and ethnic groups is "socially," and to some degree "economically," "disadvantaged."<sup>3</sup> This article explores the historical origins, administrative applications,

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1. The major federal MBE programs are the Small Business Administration's ("SBA") 8(a) program, 15 U.S.C. § 637(a) (2000), the Socially Disadvantaged Business (SDB) program, 13 C.F.R. pt 124 covering all federal procurement, and the U.S. Department of Transportation's Disadvantaged Business Enterprise (DBE) program, Pub. L. No. 105-178, 112 Stat. 107 (1998), although there are many other smaller programs. See Congressional Research Serv., Library of Congress, *Compilation and Overview of Federal Laws and Regulations Establishing Affirmative Action Goals or Other Preferences Based on Race, Gender, or Ethnicity* (1995). In each of these programs, the SBA determines the particular racial and ethnic groups which the law considers presumptively disadvantaged. Some preference programs, as required by statute, also include women business enterprises (WBEs), but the SBA found in 1982 that women were not a presumptively disadvantaged group. See George R. La Noue & John C. Sullivan, *Presumptions for Preferences: The Small Business Administration's Decisions on Groups Entitled to Affirmative Action*, 6 J. POLY HIST. 452-53 (1994).

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

3. See 15 U.S.C. § 637(d)(1) (Supp. IV 1994).

contemporary social science research, and constitutional law related to this presumption.

Since the Supreme Court decided *Adarand v. Peña* in June 1995, it is clear that the constitutional standard for evaluating race conscious policies in federal procurement is strict scrutiny. The Court stated: "Taken together, these three propositions lead to the conclusion that any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny."<sup>4</sup>

The *Adarand* Court went on to quote Justice Powell's conclusion in *Regents of the University of California v. Bakke*<sup>5</sup> about the need for strict scrutiny:

Political judgments regarding the necessity for the particular [racial or ethnic] classification may be weighed in the constitutional balance, but the standard of justification will remain constant. This is as it should be, since those political judgments are the product of rough compromises struck by contending groups within the democratic process. When they touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest.<sup>6</sup>

In response to *Adarand*, the Department of Justice issued its "Proposed Reforms to Affirmative Action in Federal Procurement." This document recognized that:

In *Adarand*, the Supreme Court had extended strict judicial scrutiny to federal affirmative action programs that use racial or ethnic criteria as a basis for decision-making. In procurement, this means that any use of race in the decision to award a contract is subject to strict scrutiny. Under strict scrutiny, any federal program that makes race a basis for contract decision-making must be narrowly tailored to serve a compelling governmental interest.<sup>7</sup>

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4. *Adarand Constructors*, 515 U.S. at 224.

5. 438 U.S. 265 (1978).

6. *Id.* at 299, quoted in *Adarand Constructors*, 515 U.S. at 224-25.

7. 61 Fed. Reg. 26,042 (1996).

With regard to this two-prong test of compelling interest and narrow tailoring, the "Proposed Reforms" adopted a status quo position regarding compelling interest: "The Justice Department takes as a constitutionally justified premise that affirmative action in federal procurement is necessary and that the federal government has a compelling interest to act on that basis in the award of federal contracts."<sup>8</sup>

The document conceded, however, that federal procurement rules needed to be altered to meet the narrow tailoring test:

The structure of affirmative action in contracting set forth herein will not be simple to implement and will undoubtedly be improved through further refinement. Agencies will have to make judgments and observe limitations in the use of race-conscious measures, and make concentrated race neutral efforts that are not required under current practice. The Supreme Court, however, has changed the rules governing federal affirmative action.<sup>9</sup>

After the declaration, the Federal Register was published, but it took more than two years for the publication of the new regulations covering the 8(a),<sup>10</sup> SDB,<sup>11</sup> and DBE programs. While these regulations sought to narrowly tailor

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8. *Id.* The Department supported its position by publishing a 14 page document called, "The Compelling Interest for Affirmative Action in Federal Procurement: A Preliminary Survey." 61 Fed. Reg. 26,042 app. (1996). The federal government has relied on this preliminary survey in all of the post-*Adarand* cases challenging federal MBE programs. In two cases, courts accepted with caveats that the survey created a compelling interest, but then found the MBE program unconstitutional on narrow tailoring grounds. See *Adarand Constructors, Inc. v. Pena*, 965 F. Supp. 1556 (D. Colo. 1997) (*Adarand II*), *vacating as moot* 169 F.3d 1292 (10th Cir. 1999). The Tenth Circuit decision was vacated and remanded in a per curiam Supreme Court decision. *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216 (2000). See also *In re Sherbrooke Sodding Co.*, 17 F. Supp. 2d 1026 (D. Minn. 1998).

In *Rothe Dev. Co. v. U.S. Dep't of Defense*, 49 F. Supp 2d 937 (W.D. Tex. 1999), however, a district court upheld the National Defense Authorization Act § 1207, 10 U.S.C.S. § 2323 (2000), 10% DBE price preference on both compelling interest and narrow tailoring grounds. The Fifth Circuit entered a stay on that decision, 194 F.3d 622 (5th Cir. 1999), and the case is now on appeal to the federal circuit court of appeals.

9. 61 Fed. Reg. 20,646, 20,650 (1996).

10. 63 Fed. Reg. 35,726 (1998).

11. 63 Fed. Reg. 35,767 (1998).

the use of race and ethnicity in federal procurement in several respects, they did not examine or propose for future examination any consideration of the particular groups entitled to the presumption of social and economic disadvantage. In fact, there has been no post-*Adarand* review of which groups should receive racial and ethnic preferences in federal contracting by any part of the federal government. For many groups, decisions were made more than two decades ago and there has never been a subsequent review.<sup>12</sup>

In federal MBE programs, persons identifying with the designated racial and ethnic groups do not need to be actually "disadvantaged" based on their individual experiences and characteristics. Instead, they are presumed disadvantaged and the firms they own are eligible to be certified to receive the benefits of federal MBE programs.<sup>13</sup> If a particular firm owner is certified by the Small Business Administration or by another federal agency as identifying with a designated racial and/or ethnic group, government administrators awarding prime contracts and prime contractors awarding subcontracts are instructed to presume that the owner is socially and economically disadvantaged.<sup>14</sup> A firm owned by that person is entitled to preferential treatment in competing for a variety of federal contracts.

The presumption of social disadvantage is in practice absolute,<sup>15</sup> while there are some limits on the economic presumption. Firms cannot exceed a certain size measured by gross revenues and owners cannot exceed certain limits of personal net worth. As a measure of disadvantage, however,

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12. See Defendants' Response to Plaintiff's First Set of Amended Requests for Admission (Jan. 15, 1998), *DynAlantic Corp. v. U.S. Dep't of Defense*, 937 F. Supp. 1 (D.D.C. 1996), request Nos. 13-14.

13. See 15 U.S.C. § 637(a) (2000).

14. See 15 U.S.C. § 637(d) (2000).

15. The presumption of social disadvantage is theoretically rebuttable, but in fact that virtually never occurs. Calvin Jenkins, SBA Administrator, could not remember any instance when a challenge to an individual presumption had occurred. See Deposition of Calvin Jenkins at 32-41, 141 (Mar. 18, 1996), *C.S. McCrossan Constr. Co. v. Cook*, No. CIV. 95-1345, 1996 U.S. Dist. LEXIS 14721 (D.N.M. 1996). Furthermore the challenge could only be made to whether an individual was properly identifying with a particular group. There is no right to challenge the selection of a group after the SBA has made a finding that the group has qualified for the presumption.

the firm and net worth limitations are exceedingly generous. In construction, for example, the firm size limitations of \$16,000,000 to \$18,000,000 of annual revenues make 98% of the construction businesses in the country eligible as "small" businesses.<sup>16</sup>

In the 8(a) program, the definition of economic disadvantage encompasses individuals whose personal net worth does not exceed \$250,000 (not counting the worth of the owner's residence or business) to enter the program and \$750,000 to remain in the program.<sup>17</sup> The Small Disadvantaged Business (SDB) and Department of Transportation (DBE) programs use the \$750,000 limit for both entry and remaining in the program. The 1998 SDB regulations explain how the presumption works:

The presumption of disadvantage for Federal SDB is based on the authority set forth in Section 8(d) of the Small Business Act, 15 U.S.C. Sec. 637(d). Section 8(d)(3)(C)(ii) clearly authorizes a presumption of both social and economic disadvantage for members of certain designated groups. When members of the designated groups represent that they are disadvantaged, as a part of a firm's application for SDB status, they represent to SBA that they meet the \$750,000 net worth requirement for economic disadvantage. Absent credible evidence to the contrary, SBA will accept this representation because of the statutory presumption.<sup>18</sup>

The SBA does not know how many citizens qualify as "economically disadvantaged" under the net worth limits.<sup>19</sup> The Department of Justice has conceded that it was aware of no studies by either Congress or the SBA about the percentage of Americans who would qualify under either of the economic disadvantage income limits.<sup>20</sup>

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16. See Letter from Patricia L. Horning, Chief, Construction and Mineral Census Branch, Bureau of the Census, to John Sullivan, Associate Director of the Project on Civil Rights and Public Contracts (Jan. 23, 1996) (on file with John Sullivan).

17. See 13 C.F.R. 124.106 (2000).

18. 8(a) Business Development/Small Disadvantaged Business Status Determination, 63 Fed. Reg. 35,767, 35,770 (1998).

19. See Deposition of William Fisher at 133-35 (Mar. 16, 1998), *McCrossan*, 1996 U.S. Dist. LEXIS 14721.

20. See Responses to Requests for Admission, *McCrossan*, 1996 U.S. Dist. LEXIS 14721, responses to request Nos. 23-24.

The question was asked, however, during a Congressional hearing in 1995. Philip Lader, administrator of the Small Business Administration, provided a proximate answer. He testified:

Information abstracted from the Federal Reserve Board Finance Survey (1992) indicates that 19.4% of the families that own businesses in the United States exceed the entry level ceiling (\$250,000, excluding primary residence and business equity) for participating in the 8(a) program as defined by SBA regulations. In terms of continuing 8(a) program eligibility criteria (\$750,000 with the aforementioned exclusions) 8.4% of families owning businesses in the United States would exceed the net worth ceiling as defined by the SBA. It should be noted that the federal reserve data is based on family net worth, while the SBA definition refers to individual net worth.<sup>21</sup>

As Mr. Lader demonstrated, even using family net worth rather than individual net worth, more than 91% of all business owners would be considered economically disadvantaged because they were below the \$750,000 limit.

In short, according to the regulations almost all businesses are defined as "small" and considerably more than 80-90% of all Americans are considered "economically disadvantaged" by the net worth limits. Thus, the actual screening criteria for entrance into the federal preference programs for almost everyone are the racial and ethnic presumptions of social disadvantage.

Presumptive eligibility involves a very large presumption indeed. Put simply, it assumes that the federal government should classify American business owners into two groups on the basis of their race and ethnicity. Owners in the first group are presumed to be socially disadvantaged and entitled to benefits. Owners in the second group are presumed to be socially advantaged and excluded from these benefits. In practice, presumptive eligibility in federal MBE programs means that two business owners with identical economic status, who have gone to the same schools, live in the same communities, and have the same business histories are

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21. *The Small Business Administration's Minority Business Development Program, Hearing Before the Senate Comm. on Small Bus.*, 104th Cong. 42 (1995).

treated very differently in competition for federal contracts if they have different racial and/or ethnic identities.

For the business owner who is in a presumptively eligible group and meets the economic criteria, certification in the 8(a), SDB or DBE programs is a major competitive advantage in accessing billions of contracting dollars annually. Until 1998, for the business owner in the non-presumptively eligible groups, admission to these programs required proof by "clear and convincing evidence" that he or she has suffered "chronic racial or ethnic prejudice or cultural bias."<sup>22</sup> This was a major barrier guarded by a very unsympathetic bureaucracy. In 1996, only 10 of the 6,115 firms in the 8(a) portfolio of firms (0.16%) were white owned.<sup>23</sup> Even in the case of the O'Donnell Construction company which proved to the Court of Appeals for the District of Columbia that as a white male-owned company it had been discriminated against by the district's MBE program,<sup>24</sup> the SBA refused to concede the firm had suffered from racial prejudice. O'Donnell finally received 8(a) status when an administrative law judge overturned the SBA administrators.<sup>25</sup>

The 1998 post-*Adarand* regulations reduced the barrier for persons not identified with presumptively eligible groups who must individually demonstrate discrimination from a "clear and convincing" evidence standard to a "preponderance" of evidence standard.<sup>26</sup> Since the presumption of disadvantage for members of some racial and ethnic group members remains, there is still a double standard. Neither Congress nor the courts have suggested that this double standard solves the legal problem. No legislative history or law was cited for the changes. Perhaps the SBA believed that by adding a few firms whose owners actually demonstrated personal disadvantage to these programs that the programs would be more politically

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22. 13 C.F.R. § 124.105(c)(1).

23. See U.S. SMALL BUSINESS ADMINISTRATION, OFFICE OF MINORITY ENTERPRISE DEVELOPMENT, A REPORT TO THE U.S. CONGRESS ON MINORITY SMALL BUSINESS AND CAPITAL OWNERSHIP DEVELOPMENT FOR FISCAL YEAR 1996 at 23.

24. See *O'Donnell Constr. Co. v. District of Columbia*, 963 F.2d 420 (D.C. Cir. 1992) (Ginsburg, J., concurring).

25. See *In re. O'Donnell Constr. Co.*, No. MSBE-94-9-26-43 (May 15, 1995).

26. See, e.g., 63 Fed. Reg. 35,726-35,728 (1998).



palatable or that the change would camouflage the fact that these programs are still dependant on racial classifications.

## II. THE CONSTITUTIONALITY OF PRESUMPTIVE ELIGIBILITY

Which are the presumptively eligible groups? Any American citizen or legal resident who can show ancestry or identify with the following groups is presumptively eligible under federal regulations:

Black Americans; Hispanic Americans; Native Americans (American Indians, Eskimos, Aleuts or Native Hawaiians); Asian Pacific Americans (persons with origins from Burma, Thailand, Malaysia, Indonesia, Singapore, Brunei, Japan, China (including Hong Kong), Taiwan, Laos, Cambodia (Kampuchea), Vietnam, Korea, The Philippines, U.S. Trust Territory of the Pacific Islands (Republic of Palau), Republic of the Marshall Islands, Federated States of Micronesia, The Commonwealth of the Northern Mariana Islands, Guam, Samoa, Macao, Fiji, Tonga, Kiribati, Tuvalu, or Nauru); Subcontinent Asian American (persons with origins from India, Pakistan, Bangladesh, Sri Lanka, Bhutan, the Maldives Islands or Nepal).<sup>27</sup>

As will be shown, Congress initiated this list,<sup>28</sup> but the SBA has been delegated and has actively applied the authority to decide whether to add groups.<sup>29</sup> Being a designated disadvantaged group is the first step in determining presumptive eligibility. The second step is the individual firm owner's claim of identification with one of the groups. Sometimes that is simple, but in modern America where many persons have multiple ethnic identifications, it may be complex. The SBA alone decides which criteria are to be used in determining whether a firm owner has properly claimed identification with a presumptively eligible group.

While a history of discrimination against some of the designated groups is well known, the SBA list is certainly not exhaustive of all groups that have suffered discrimination or social disadvantage in the United States. Many of the groups

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27. 13 C.F.R. § 124.103(b) (2000).

28. See 15 U.S.C. § 637(d)(3)(c) (2000); 10 U.S.C. § 2323(a)(1) (2000).

29. See Deposition of Calvin Jenkins at 30-32 (Mar. 18, 1998), *Rothe Dev. Co. v. U.S. Dep't of Defense*, 49 F. Supp. 2d 937 (W.D. Tex. 1999).

on the SBA list are relatively recent arrivals to this country and there is little, if any, evidence of any systematic bias directed against them. It is not apparent that any person from some of the micro-states on the list has formed a business in the United States or even lives here.<sup>30</sup> Nevertheless, any American business owner who can claim identity with any listed group is legally considered socially and economically disadvantaged.

This fact can be seen by examining the instructions in the SDB application form which states: "In accordance with 13 C.F.R. Sec. 124.1002, designated group members are presumed to be socially and economically disadvantaged. Designated group members are individuals who hold themselves out to be and are identified by others as Black Americans, Native Americans, Hispanic Americans, Subcontinent Asian Americans and Asian Pacific Americans."<sup>31</sup>

In its post-*Adarand* statement on public contracting, the Justice Department avoided discussing the issue of why certain groups are presumed disadvantaged, while others are not. The Department's post-*Adarand* memorandum to general counsels of federal agencies on employment, however, correctly states that race and ethnic conscious programs must be group specific: "Treating minorities as a single group raises concerns; remedial action in federal employment can be targeted only at specific groups determined to have a need for special focus."<sup>32</sup>

The political sensitivities involved are readily understood. If a group currently considered presumptively eligible for contracting preferences was to be excluded because there was no basis for inclusion or because there is

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30. In 1989, SBA added persons from Nauru and Tuvalu to the presumptively eligible list, 54 Fed. Reg. 34,717 (1989), even though there are only about 10,000 residents on each of these islands. See CIA, *THE WORLD FACTBOOK* 297, 432 (1995).

31. 1998 SDB application form, at 1.

32. Memorandum from John R. Schmidt, Associate Attorney General, to the U.S. Department of Justice, "Post-*Adarand* Guidance on Affirmative Action in Federal Employment," Office of the Associate Attorney General Memo 17 (1996) (on file with the U.S. Dep't of Justice). There is no logical or constitutional reason to believe that the strict scrutiny requirement is any different in preferential public employment and public procurement programs.

no longer such a basis, that might undermine the political coalition supporting the program. There is no doubt that the equal protection standard requires that there be justification for the inclusion of each specific group in a program that is race or ethnic conscious.

In 1980, dissenting Justices of the Supreme Court first raised this issue in *Fullilove v. Klutznick*<sup>33</sup> but were ignored by the majority. Justices Stewart and Stevens dealt specifically with the issue of the fairness of the manner in which groups were chosen for preferences. Justice Stewart commented:

In today's society, it constitutes far too gross an oversimplification to assume that every single Negro, Spanish-speaking citizen, Oriental, Indian, Eskimo, and Aleut potentially interested in construction contracting currently suffers from the effects of past or present racial discrimination. Since the MBE set-aside must be viewed as resting upon such an assumption, it necessarily paints with too broad a brush. Except to make whole the identified victims of racial discrimination, the guarantee of equal protection prohibits the government from taking detrimental action against innocent people on the basis of the sins of others of their own race.<sup>34</sup>

Justice Stevens was specifically critical of the way Congress had approached the problem:

The statutory definition of the preferred class includes "citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos and Aleuts." All aliens and all nonmembers of the racial class are excluded. No economic, social, geographical or historical criteria are relevant for exclusion or inclusion. There is not one word in the remainder of the Act or in the legislative history that explains why any Congressman or Senator favored this particular definition over any other or that identifies the common characteristics that every member of the preferred class was believed to share. Nor does the Act or its history explain why 10% of the total appropriation was the proper amount to set aside for

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33. 448 U.S. 448 (1980) (upholding the use of racial and ethnic classifications in the Public Works Employment Act of 1976).

34. *Id.* at 530.

investors in each of the six racial subclasses.<sup>35</sup>

It was not until *City of Richmond v. J.A. Croson*<sup>36</sup> in 1989, that a majority of the Supreme Court adopted the position that the Constitution required justification for the inclusion of each separate group granted preferences.<sup>37</sup> Justice O'Connor wrote:

The random inclusion of racial groups, that, as a practical matter, may never have suffered from discrimination in the construction industry in Richmond suggests that perhaps the city's purpose was not in fact to remedy past discrimination . . . . The gross overinclusiveness of Richmond's racial preferences strongly impugns the city's claim of remedial motivation.<sup>38</sup>

The Court noted that Richmond's adoption of the federal group categories for presumptive eligibility created a situation in which "There is *absolutely no evidence* of past discrimination against Spanish-speaking, Orientals, Indians, Eskimos, or Aleut persons in any aspect of the Richmond construction industry . . . . It may well be that Richmond has never had an Aleut or Eskimo citizen."<sup>39</sup>

After the Supreme Court's decisions in *City of Richmond v. Croson* and *Adarand v. Peña*, any governmental use of racial or ethnic classifications must be based in a factual identification of the particular discrimination against the groups favored. As the Supreme Court declared in *Adarand*: "All racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental

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35. *Id.*

36. 488 U.S. 469 (1989).

37. *See id.* at 506. Earlier Justice Powell, who cast the decisive vote in *Bakke*, was concerned that "the University [was] unable to explain its selection of only four favored groups - Negroes, Mexican-Americans, American Indians and Asians - for special treatment. The inclusion of the last group [was] especially curious in the light of the substantial numbers of Asians admitted through the regular admissions process." *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 309 (1978).

38. *Croson*, 488 U.S. at 506.

39. *Id.*

interests.”<sup>40</sup>

A number of lower courts have applied the strict scrutiny standard to racial and ethnic classifications in cases involving local public contracting where the groups in the affirmative action program showed it was not narrowly tailored.<sup>41</sup> In 1991 in *Milwaukee County Pavers Association v. Fielder*,<sup>42</sup> a pre-*Adarand* case, the Seventh Circuit upheld the use of racial classifications in the federal portions of a highway program, but struck down the use of these classifications where local funds were used.<sup>43</sup> Circuit Judge Richard Posner stated regarding presumptive eligibility:

To trigger the presumption of disadvantage in the Wisconsin state programs, a subcontractor need only establish that 51 percent of its owners fall into one of four racial-ethnic groups (black, Hispanic, Asian, American Indian) or is a woman. Anyone who is not a member of one of these groups must prove that he is socially and economically disadvantaged in fact. The presumption can be rebutted, but given the difficulty of establishing whether a particular individual is socially and economically disadvantaged the availability of the presumption is likely to be decisive. This means that the state is conferring a significant benefit – access to a

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40. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

41. See *Contractors Assoc. of E. Pa. v. Philadelphia*, 6 F.3d 990 (3rd Cir. 1993) (in which the Third Circuit found no basis in evidence for extending preferences to firms owned by Asian Americans, Hispanics, Native Americans, and women, while preserving for trial the issue of discrimination against African American owned firms). Also see *Prior Tire v. Atlanta Pub. Schs., Order Granting in Part Plaintiff's Motion for Summary Judgment*, Civ. No. 1:95-CV-825-JEC (N.D. Ga.), where the federal district court struck down the public contracting program for Hispanics, Asian Americans, Native Americans, and women-owned firms and preserved for trial African American-owned firms declaring: “[T]he Court is required by *Croson* to examine under the strict scrutiny standard the inclusion of each minority group in the affirmative action plan.” *Id.* at 27. Similarly, the Eleventh Circuit made separate evaluations of preferences for Hispanic, African American, and women-owned firms, the three groups given preferences in Dade County's public contracting program, before ruling the preferences in construction unconstitutional. *Engineering Contractors of S. Fla. v. Metropolitan Dade County*, 122 F.3d 895 (11th Cir. 1997). See also *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), where the court declared, “A broad program that sweeps in all minorities with a remedy that is in no way related to past harms cannot survive constitutional scrutiny.” *Id.* at 951.

42. 922 F.2d 418 (7th Cir. 1991).

43. See *id.*

presumption of social and economic disadvantage that is the key to a valuable entitlement – on grounds that *Croson* forbids a state to use without establishing that the purpose is to rectify discrimination. The state can if it wants redistribute wealth in favor of the disadvantaged, but it cannot get out from under *Croson* by pronouncing entire racial and ethnic groups to be disadvantaged. The whole point of *Croson* is that disadvantage, diversity, or other grounds for favoring minorities will not justify governmental racial discrimination other than by the federal government; only a purpose of remedying discrimination against minorities will do so.<sup>44</sup>

After *Adarand*, courts have criticized presumptive eligibility in evaluating federal programs. On remand in *Adarand v. Pena*, the district court ruled, “I find it difficult to envisage a race based classification that is narrowly tailored. By its [sic] very nature, such a program is both underinclusive and overinclusive. This seemingly contradictory result suggests that the criteria are lacking in substance as well as in reason.”<sup>45</sup>

The statutes and regulations governing the Subcontracting Compensation Clause (“SCC”) program are overinclusive in that they presume that all those in the named minority groups are economically and in some acts and regulations, socially disadvantaged. The presumption is false, as is its corollary, namely that the majority (Caucasians) as well as members of other (unlisted) minority groups are not socially and/or economically disadvantaged. By excluding certain minority groups whose members are economically and socially disadvantaged due to past and present discrimination, the SCC program is underinclusive.<sup>46</sup>

In *Houston Contractors Association v. Houston Metro*,<sup>47</sup> the court, commenting on the concept of presumptive

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44. *Id.* at 422.

45. 965 F. Supp. 1556, 1580 (1997).

46. *See Adarand Constructors, Inc. v. Pena*, 965 F. Supp. 1556, 1580 (D. Colo. 1997). On appeal, the Tenth Circuit found the constitutional challenge to the SCC moot since *Adarand Constructors* had been subsequently granted DBE status by the state of Colorado. *See Adarand Constructors, Inc. v. Slater*, 169 F.3d 1292 (10th Cir. 1999). The Tenth Circuit decision was vacated and remanded in a per curiam decision by the Supreme Court. *See Adarand Constructors, Inc. v. Slater*, 528 U.S. 216 (2000).

47. 945 F. Supp. 1013 (S.D. Tex. 1996).

eligibility used in the administration of federal transit funds by the Metro Transit Authority which was following federal regulations, declared:

Like all distinctions based on race and sex, Metro's classification of disadvantaged business enterprises is a blunt instrument. It is both over- and under-inclusive. The program designates groups and defines control and ownership, fixing the groups who win and lose in its allocation of public resources. The judiciary reviews distinctions by race and sex meticulously because none of them has been found to have a rational basis, except in political preference and social convention. The eradication of barriers is a noble goal, but it will not be achieved by creating new barriers.<sup>48</sup>

The court concluded:

While it is true that statistically members of these groups are more likely to be unable to participate fully in the economy because they suffer from the effects of past discrimination, *Metro* presumes that all bidders associated with "disadvantaged" groups are actually disadvantaged. Legislative presumptions are at best a convenience and at worst a cloak.<sup>49</sup>

In 1998, a third federal district court found that the concept of presumptive eligibility and the long list of groups entitled to that presumption failed the narrow tailoring test. In *In re Sherbrooke Sodding Co.*,<sup>50</sup> the plaintiffs argued that the inclusion of almost all non-white people did not reflect a "narrow tailored" focus to the DBE program. The district court agreed and quoted the Supreme Court language in *Crosby* criticizing Richmond's "random inclusion of racial groups"<sup>51</sup> in its MBE program, "that as a practical matter may

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48. *Id.* at 1018.

49. *Id.* The court permanently enjoined the use of race and ethnic classifications for anything other than reporting purposes in Metro's federally financed transportation programs. This decision was reversed and remanded by the Fifth Circuit on the grounds that the contractors had not proved damages and that to the extent federal funds were involved, the federal government should have been permitted to intervene. See *Houston Contractors Ass'n. v. Metropolitan Transit Auth.*, 1999 U.S. App. LEXIS 15100 (5th Cir. 1999).

50. 17 F. Supp. 2d 1020 (D. Minn. 1998).

51. *Id.* at 1037.

never have suffered discrimination.”<sup>52</sup> The district court then concluded that the federal government defendants “have been singularly unable to demonstrate the connection between those individuals upon which DBE status has been conferred by the Congress and the regulations, and any present or past discrimination against the races or gender of those individuals.”<sup>53</sup>

Criticism of the federal list of presumptively eligible groups has continued to appear when that list has been used to define eligibility in state and local programs. In *Drabik v. Ohio*,<sup>54</sup> the federal district court, in striking down the state of Ohio MBE program as applied to construction, endorsed the state trial judge’s opinion about the arbitrary nature of the definitions of presumptive eligibility as applied to Asians. Noting that Asian Indians and Pakistanis were eligible but many other Asians were not, the court quoted the trial judge:

The Court can think of few things more repugnant to our constitutional system of governments than the construction of a statute that would exclude a group of United States’ [sic] citizens and residents of Ohio from a State program, the sole criteria for exclusion being the side of the river, a mountain range or a desert their ancestors decided to settle.<sup>55</sup>

In *Association for Fairness in Business, Inc. v. New Jersey*,<sup>56</sup> the federal court faulted the state’s dependence on the federal presumptively eligible list noting that the court had not been presented with any evidence that “qualified Hawaiian-owned and native Alaskan-owned contractors even exist in New Jersey, let alone that these minority-businesses are discriminated against by casino licensees in the purchase

52. *Id.*

53. *Id.* *Sherbrooke* was appealed to the Eighth Circuit which returned the case to the district court to address changes implemented by the Department of Transportation Disadvantaged Business Enterprise program. These regulatory changes appeared in 64 Fed. Reg. 5,097-5,148 (1998). The district court dismissed the appeal, however, on grounds that its decision was based on the program prior to the regulatory changes and that it would not issue an advisory opinion regarding the new program. *In re Sherbrooke Sodding Co.*, No. 6-96-CV-41 (JMR) (D. Minn. Oct. 8, 1999).

54. 214 F.3d 730 (6th Cir. 2000).

55. *Associated Gen. Contractors v. Drabik*, 50 F. Supp. 2d 741, 770 (S.D. Ohio 1999), *aff’d* 214 F.3d 730 (6th Cir. 2000).

56. 82 F. Supp. 2d 353 (S.D.N.J. 2000).



of goods and services.”<sup>57</sup> Moreover, the court criticized the concept that once a group was on the list, it was given equivalent status with the other eligible groups even though its history of discrimination and size might be entirely different. The court criticized setting a single 15% goal as over-inclusive because the program does not “differentiate between the discrimination experienced by minority group businesses and women owned businesses,”<sup>58</sup> and “allows casino licensees to satisfy the set-aside program’s goals in a way that could bestow a windfall of remedial benefits on one group while depriving another group of any such benefit.”<sup>59</sup> A casino licensee “could meet its obligation by contracting with a Hawaiian-owned company even though there was no evidence of discrimination against such businesses”<sup>60</sup> and stated, “. . . a program that allows such a result is clearly not narrowly tailored.”<sup>61</sup>

The most recent case to comment on presumptive eligibility is *Concrete Works v. City and County of Denver*.<sup>62</sup> In striking down the Denver MWBE contracting program, the judge said:

The most fundamental flaw in this effort to support Denver’s preferential use of race, ethnicity and gender by statistical evidence is that no objective criteria define who is entitled to the benefits of the program and who is excluded from those benefits. Presumptive eligibility for preferential treatment through certification as MBEs is given to those identifying themselves as African Americans, Hispanics, Asian Americans and Native Americans.<sup>63</sup>

Denver’s definitions of those groups was taken verbatim from the federal definitions, but the court complained: “One group is defined by race [African American], another by culture [Hispanic], another by country of origin [Asian American] and another by blood [Native American]. . . . The

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57. *Id.* at 360.

58. *Id.* at 362.

59. *Id.*

60. *Id.*

61. *Association for Fairness in Bus., Inc. v. New Jersey*, 82 F. Supp. 2d 353, 362 (S.D.N.J. 2000).

62. 86 F. Supp. 2d 1042 (D. Colo. 2000).

63. *Id.* at 1068.

aggregation of them as equally victimized by discrimination and equally entitled to preferential remedies is particularly problematic for Fourteenth Amendment equality analysis.<sup>64</sup>

Though there seems to be a clear legal trend of skepticism regarding the federal list of presumptively eligible minority groups in these opinions,<sup>65</sup> no appellate court has ruled on whether the federal list of racial and ethnic groups entitling owners to the presumption of social and economic disadvantage meets either the compelling interest or narrow tailoring test.

### III. HISTORICAL ORIGINS OF PRESUMPTIVE ELIGIBILITY

Discovery in recent federal cases have demonstrated that relevant SBA officials did not remember and could not reconstruct the criteria or standards used to determine which groups were considered socially and economically disadvantaged for the purposes of granting presumptive eligibility to business owners and which were not.<sup>66</sup> In a deposition for the *McCrossan Construction Company v. Cook*,<sup>67</sup> the SBA official, who the government identified as knowledgeable about the origins of presumptive eligibility, conceded it would be sheer speculation as to the criteria his agency used in the past.<sup>68</sup> Since it appears the SBA has

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64. *Id.* at 1069 (citing *City of Richmond v. J.A. Croson*, 488 U.S. 469, 506 (1989)). Though decided on Fifteenth Amendment grounds, the Supreme Court in *Rice v. Cayetano*, 145 L.Ed. 2d 1007 (2000), struck down a preference for Native Hawaiians, a group defined identically in voting preference disallowed as in federal contracting preferences. *Id.* In Justice Breyer's concurrence, joined by Justice Souter, he questioned the blood quantum aspect of the Native Hawaiian definition, which includes, "anyone with one ancestor who lived in Hawaii prior to 1778, thereby including individuals who are less than one five-hundredth original Hawaiian [which] . . . goes well beyond any reasonable limit." *Id.* at 1061-62.

65. The single exception is *Rothe Dev. Corp. v. U.S. Dep't of Defense*, 49 F. Supp. 2d 937 (W.D. Tex. 1999), where the court held the plaintiffs had offered "no evidence that Asian-Americans have not been discriminated against in the award of government contracts," and, unlike *Croson* and other cases, there was no issue of whether various minorities actually lived in the jurisdiction creating the program. *Id.* at 996-97. The case is on appeal to the federal circuit court of appeals.

66. See discussion *infra* Part V.B.1.

67. No. Civ. 95-1345-HB, 1996 U.S. Dist. LEXIS 14721 (D.N.M. 1996).

68. Deposition of Calvin Jenkins at 64-65 (Mar. 18, 1996), *C.S. McCrossan Constr. Co. v. Cook*, No. Civ. 95-1345-HB, 1996 U.S. Dist. LEXIS 14721 (D.N.M. 1996).

developed institutional amnesia on these issues, it is useful to try to reconstruct the history of presumptive eligibility.

The SBA was created in 1953 to "aid, counsel, assist, and protect, insofar as is possible, the interest of small-business concerns in order to preserve free competitive enterprise."<sup>69</sup> For the first fifteen years of its existence, the SBA focused on assisting all small businesses, regardless of the race or ethnicity of the owner. The SBA operates by creating agreements with other federal agencies which then contract with small businesses which supply the services or materials.

After the Kerner Commission's 1967 report examining the urban riots of the preceding year,<sup>70</sup> the SBA made an important change in its race-neutral policies. The Commission concluded that "special encouragement" was needed to guide blacks into the economic mainstream,<sup>71</sup> so the SBA decided administratively to construe its Section 8(a) authority to establish set-asides for small businesses owned by "socially or economically disadvantaged" individuals.<sup>72</sup>

The term "disadvantaged" remained formally undefined until 1973 when the SBA published in the Federal Register a list of five groups "presumed" to be socially or economically disadvantaged: "blacks, American Indians, Spanish-Americans, Asian-Americans, and Puerto Ricans."<sup>73</sup> There were no hearings or formal findings and the announcement did not explain why the SBA had gone beyond the "special encouragement" of blacks recommended by the Kerner Commission to grant preferential status to other groups. Nor was there any explanation as to why these particular groups had been included.

In 1978, Congress passed the Small Business Investment Act,<sup>74</sup> providing a statutory basis to what had been for a decade a purely administratively based 8(a) program and generating a three track system for participation in set-asides. In the first track were small businesses owned by

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69. 15 U.S.C. § 631(a) (1971).

70. See REPORT ON THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (Bantam Books 1968).

71. See *id.* at 424.

72. See Shelly Green & Paul Pryde, BLACK ENTREPRENEURSHIP IN AMERICA 42 (1990).

73. 13 C.F.R. 124.8(c) (1973).

74. Pub. L. 95-507, 92 Stat. 1757-73 (1978).

individuals identifying with designated groups (blacks, Hispanics, and Native Americans) who were considered presumptively “socially and economically disadvantaged.”<sup>75</sup> The Act defined socially disadvantaged individuals “as those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities.”<sup>76</sup> “Economically disadvantaged individuals” were defined as “those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired . . . as compared to others in the same business area who are not socially disadvantaged.”<sup>77</sup> In the second track, persons not from a presumptively disadvantaged group had to go through a rigorous process to individually prove they were “disadvantaged because of discrimination.”<sup>78</sup> In the third track were businesses owned by members of groups who could petition the SBA for presumptive eligibility for the

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75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* Even under the current regulations which require that individuals prove their social disadvantage by a preponderance of the evidence rather than the clear and convincing evidence standard, individuals not from designated racial and ethnic groups must prove they have personally suffered social disadvantage based on at least one objective factor and they must attach a “specific” and “detailed” narrative where each statement of alleged discrimination

should be supported by documented evidence such as affidavits, denials of loan applications, denials of employment opportunities (including non-selection for particular jobs, denials of promotions, or unequal work environments or treatment), and documents to support any formal action taken by you because of the alleged discrimination. You must demonstrate how your identification as described in the paragraph stated above, has negatively impacted on your entry into or advancement in the business.

SDB application, Section B at 3.

Individuals from non-designated groups must also demonstrate economic disadvantage by

document[ing] how [their] ability to compete in the free enterprise system has been impaired by such things as inability to obtain adequate bonding, credit or financing; inability to obtain licenses or leases; restrictions of [their] markets to certain racial, ethnic or social groups; underemployment or unemployment, etc., as compared to others in the same or similar line of business who are not socially disadvantaged.

*Id.* at 4. Persons identifying with SBA designated groups need only check a box indicating that designation.

entire group.

Groups petitioning for 8(a) presumptively eligible status were theoretically evaluated by the SBA on several measures. Petitioners had to make an "adequate showing" that the group had suffered racial, ethnic, or cultural bias by demonstrating:

- (1) The group has suffered the effects of prejudice, bias, or discriminatory practices;
- (2) Such conditions have resulted in economic deprivation for the group of the type which Congress has found exists for the groups named in P. L. 95-507, and
- (3) Such conditions have produced impediments in the business world for members of the group over which they have no control and which are not common to all small business owners.<sup>79</sup>

As this article will show, no consistent standards were applied by the SBA in making the presumptively eligible group decisions.

In addition to eligibility for 8(a) set-aside contracts, groups were motivated to seek inclusion in the SBA's list of designated groups because that list was copied in other affirmative action programs around the country.<sup>80</sup> The SBA's selection of a group influenced acceptance into other federal affirmative action programs, hundreds of state and local programs, and even private sector programs, such as those voluntarily established by corporations and universities.<sup>81</sup>

It was the clear Congressional intent that the SBA not confine 8(a) benefits solely to the groups listed by Pub. L. No. 95-507. The House Committee report accompanying the new law stated "[t]here is sufficient discretion . . . to allow SBA to

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79. 13 C.F.R. § 124.105(d)(2)(i-iii).

80. See, for example, the groups awarded preferences in the cities of Richmond and Denver, and by the states of California, Ohio, and New Jersey. See *City of Richmond v. Croson*, 488 U.S. 469, 506 (1989); *Concrete Works of Denver, Inc. v. City and County of Denver*, 86 F. Supp. 2d 1042, 1068 (D. Colo. 2000); *Monterey Mechanical Co. v. Wilson*, 138 F.3d 1270, 1273 (9th Cir. 1998); *Associated Gen. Contractors v. Drabik*, 50 F. Supp. 2d 741, 770 (S.D. Ohio) *aff'd* 214 F.3d 730 (6th Cir. 2000); *Association for Fairness in Bus. v. New Jersey*, 82 F. Supp. 2d 353, 360 (S.D.N.J. 2000).

81. See George R. La Noue, *Split Visions: Minority Business Set-Asides*, 523 THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCES 104 (Sept. 1992).

designate any other additional minority group or persons it believes should be afforded the presumption of social and economic disadvantage.”<sup>82</sup> The final Conference Committee report specifically referred to a “poor Appalachian white person” as an example of cultural bias that might justify inclusion.<sup>83</sup> Since Congress had neither the political will nor the information to draw clear-cut lines of inclusion/exclusion, it delegated the task to the administrative agency.

The SBA expressed the breadth of its legislative mandate in the following policy memo entitled, “Meaning of Socially or Economically Disadvantaged:”

Except to recommend the elimination of any suggestion that only members of minority groups are eligible for assistance under this program and to specify that the program is to aid all who are hampered in achieving full citizenship in our economic system by virtue of their social or economic disadvantages, Congress has not fully defined the words “socially or economically disadvantaged.” This lack of precise legislative definition suggests that a precise definition is inappropriate, and that flexibility is warranted. . . .

In determining whether the owners of small business concerns are “disadvantaged,” consideration may be given to the following factors:

- (a) low income;
- (b) unfavorable location such as urban ghettos or depressed rural areas and areas of high unemployment or under-employment;
- (c) limited education;
- (d) physical or other special handicap;
- (e) inability to compete effectively in the marketplace because of prevailing or past restrictive practices; and
- (f) Vietnam era service in the Armed Forces, (August 5, 1964 to May 7, 1975),

or such other factors as contribute to a disadvantaged

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82. H.R. REP. NO. 95-949, *reprinted in* LEGISLATIVE HISTORY OF THE SMALL BUSINESS ACT AND SMALL BUSINESS INVESTMENT ACT OF 1958, Amendment, vol. 1, Comm. Print at 56 (1978).

83. Legislative History, Pub. L. 95-507, 92 Stat. 1757-73, at 3882 (1978).

condition in the ordinary (dictionary) meaning of that word: lacking in basic resources or conditions necessary to achieve an equal position in society.<sup>84</sup>

A test of the SBA's authority regarding group status came almost immediately. In the Pub. L. No. 95-507 reformulation of the definition of the groups presumptively eligible for the 8(a) program, Congress specifically left out Asians Americans or as they were then called "Orientals." It is not certain why this occurred. The law was a product of efforts by the Congressional Black Caucus and blacks were not enamored by the inclusion of other groups in MBE programs. Eugene Baker, the president of the National Association of Black Manufacturers which represented more than half of the manufacturing and service firms receiving 8(a) contracts at that time, testified:

The only true claim to being socially and economically disadvantaged can be expressed by those Americans who did not come to this country seeking the "American dream." That excludes all but Black Americans, who were brought in chains and bondage, and the Native Americans, who were here when this country was "discovered."<sup>85</sup>

As will be demonstrated later, there are good reasons not to make a blanket inclusion of Asian Americans among the socially and economically disadvantaged groups, but Congress did not publicly debate the issue. Congressman Parren Mitchell, the leader of the Black Caucus and the principal advocate of federal MBE programs, never mentioned the original exclusion of Asian Americans or engaged in any discussion of which groups should be included in his account of the birth of these programs.<sup>86</sup> Nor do the other historical accounts of federal MBE programs discuss this issue.<sup>87</sup>

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84. *Determination of "Disadvantaged Small Business Concern,"* 2017 SBA POLICY AND PROCEDURAL RELEASE pt. IV-V (1980).

85. *Testimony Before the House Committee on Small Businesses, Subcommittee on General Oversight and Minority Enterprise Task Force on Minority Enterprise*, 96th Cong. 21 (1979).

86. See Parren J. Mitchell, *Federal Affirmative Action for MBE's: A Historical Analysis*, IX NAT'L BAR ASSOC. L.J. 1.

87. See Jess H. Drabkin, *Minority Enterprise Development and the Small Business Administration's Section 8(a) Program: Constitutional Basis and*

The procedure the SBA had created to consider whether additional groups should be presumptively included did not satisfy Asian American interest groups who began to pressure the agency and Congress to include them in the immediately presumptive category. Diane Wong, executive director of the Washington State Commission on Asian American Affairs, wrote:

The people in Senator Matsunaga's office have informed me that several federal agencies are watching the progress of SBA regulations [regarding exclusion of Asian/Pacific Americans] very closely. If SBA can succeed then it is highly likely that they will try to follow suit. Thus, it is extremely important that we nip this in the bud.<sup>88</sup>

The offensive quickly began to have an impact. On May 22, 1979, Congressman Norman Mineta (Dem. Cal.) proposed an amendment giving Asian Pacific Americans automatic qualification as a "socially disadvantaged group" to a bill providing low-interest disaster loans for small businesses.<sup>89</sup> Congressman Mineta pointed out that most Asian businesses were small with receipts of less than \$25,000 and fewer than five employees. No comparisons were made to other groups, even though most businesses owned by any ethnic group in the United States were small and had few employees.

Congressman Robert Matsui (Dem. Cal.) joined in and

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*Regulatory Implementation*, 49 BROOK. L. REV. 433 (1983) (avoiding the group issue); Gary Lee Hopkins, *Contracting with the Disadvantaged, Sec. 8(a) and the Small Business Administration*, 7 PUB. CONT. L.J. 169 (1975) (criticizing the use of racial and ethnic classifications in 8(a) but failing to comment on the inclusion of particular groups). The most definitive study of federal MBE programs mentions the specific exclusion of Hasidic Jews, but otherwise does not comment on the inclusion/exclusion issue. See Daniel Levinson, *A Study of Preferential Treatment: Evolution of Minority Business Enterprise Assistance Program*, 49 GEO. WASH. L. REV. 1 (1980).

88. Letter from Diane Wong, Executive Director of the Washington State Commission on Asian-American Affairs, to Louis Hayaska (June 20, 1979) reprinted in *COMPETING IN THE MARKETPLACE: A LOOK AT MINORITY BUSINESS ENTERPRISE IN THE STATE OF WASHINGTON*, WASHINGTON ADVISORY COMMITTEE TO THE UNITED STATES COMMISSION ON CIVIL RIGHTS (December 1979).

89. See *COMPETING IN THE MARKETPLACE: A LOOK AT MINORITY BUSINESS ENTERPRISE IN THE STATE OF WASHINGTON*, WASHINGTON ADVISORY COMMITTEE TO THE UNITED STATES COMMISSION ON CIVIL RIGHTS (December 1979).



explained that:

Absent immediate congressional intervention Asian Pacific Americans will be confronted with the arduous task of proceeding through the regulatory process to convince the Small Business Administration of the need for designation as a presumptively qualified minority group. This regulatory burden, coupled with time delays and preparation costs, is simply unfair and it violates the Congressional intent that this program be implemented expeditiously.<sup>90</sup>

No one wished to debate the matter so Congress accepted the Amendment without a vote.

Before the Senate could act, however, the SBA announced on June 27, 1979, that it would make its own determination on the matter. Six working days later, on July 6, the SBA decided that certain groups of Asian Pacific Americans were socially disadvantaged and therefore presumptively 8(a) eligible. The groups were U.S. citizens from: Japan, China, the Philippines, Vietnam, Korea, Samoa, Guam, the U.S. Trust Territory of the Pacific, Northern Marianas, Laos,<sup>91</sup> Cambodia, and Taiwan.

But what of other Asians or other groups that thought of themselves as socially and economically disadvantaged? They would have to petition group-by-group. Between 1979 and 1989, the SBA considered eight groups. The result was that petitions from Hasidic Jews [1980], women [1982], service disabled veterans [1987] and Iranians [1989] were rejected, while petitions from Asian Indians [1982], and Sri Lankans [1988] were accepted. The SBA originally rejected Tongans and Indonesians but later accepted them in 1989. In a decade those groups presumptively eligible for preferences in federal business programs underwent considerable expansion. Table A indicates this progression. Groups added are underlined, groups deleted or rejected are in parenthesis and nomenclature changes are indicated in italics.

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90. *Id.* at 7.

91. To illustrate how haphazard the process was, in August 1989, the SBA had to reinstate Laos as an Asian-Pacific country since it had been inadvertently deleted five months earlier. 54 Fed. Reg. 34,692, 34,717 (1989) (codified at 13 C.F.R. pt. 124).

Table A  
Chronology of Groups Presumptively Eligible for MBE  
Preference

Source	Date	Changes to Groups	Comment
President Nixon's Exec. Order No. 11,625	10/13/71	Negroes, Puerto Ricans, Spanish-speaking Americans, American Indians, Eskimos, Aleuts	Possibly the earliest listing of groups.  Superseded E.O. 11,458, which did <i>not</i> list any groups.
38 Fed. Reg. 13,729	5/25/73	<i>Black Americans, American Indians, Spanish-Americans, Oriental Americans, (Puerto Ricans)</i>	The SBA's first listing. Earlier regulations simply stated "socially or economically disadvantaged" persons.
Pub. L. 95-98, Public Works Employment Act	5/13/77	Negroes, Spanish-speaking, Orientals, Indians	Parren Mitchell's Amendment which set aside 10% of a \$4 billion Public Works Employment Act (PWEA) for the listed groups.
Pub. L. 95-507, Amendments to Small Business Act	10/24/78	<i>Black Americans, Hispanic Americans, Native Americans including Indians, Eskimos, Aleuts</i>	Congress passed this law to reform the 8(a) program; Asian-Americans were left out.
44 Fed. Reg. 30,673	5/29/79	<u>Hawaiians</u>	Added Hawaiians to Native Americans.
SBA ruling	7/6/79	<u>Asian Pacific Americans from Japan, China, Philippines, Vietnam, Korea, Samoa, Guam, U.S. Territory of the Pacific Islands, Northern Mariana Islands, Laos, Cambodia, Taiwan</u>	The SBA interim rule which, for the first time, defined an entire group – Asian Pacific Americans.
SBA 45 Fed. Reg. 42,832	4/9/80	(Hasidic Jews)	Decision to reject Hasidic Jews based on First Amendment.

Source	Date	Changes to Groups	Comment
Pub. L. 96-302, Small Business Admin. Act of 1980	7/2/80	<u>Asian Pacific Americans</u>	Legislative approval to the groups administratively added by the SBA.
SBA ruling	5/11/82	(Women)	The SBA was unwilling to extend traditional ethnic and racial coverage group to the broader class of women.
SBA ruling	7/26/82	<u>Asian Indians</u>	Accepted petition, later all Indian Subcontinent persons added
SBA ruling	11/3/86	(Tongans) <u>Tongans</u> 1989	In first ruling, Tongans had not made a case. They were added in 1989.
SBA ruling	12/16/87	(Disabled Veterans)	Prejudice against disabled veterans was caused by their handicaps, not veterans' status.
SBA ruling	7/25/88	<u>Indonesians</u>	The SBA never ruled on initial petition; Indonesians added in March 1989 as part of Asian Pacific expansion.
SBA ruling	3/15/88	<u>Sri Lankans</u>	Sri Lankans considered Subcontinent Asian Americans.
SBA ruling	1/6/89	(Iranians)	Prejudice against Iranian-Americans not sufficiently long-standing.

Source	Date	Changes to Groups	Comment
SBA 54 Fed. Reg. 12,054, 12,057	3/23/89	Asian Pacific Americans from <u>Burma, Thailand, Malaysia, Indonesia, Singapore, Brunei,</u> Japan, China, Taiwan, Kampuchea, Vietnam, Korea, the Philippines, <i>Trust Territory of the Pacific Islands (Republic of Palau.)</i> <u>Republic of the Marshall Islands, Federated States of Micronesia,</u> the Commonwealth of the Northern Mariana Islands, Guam and Samoa; <u>Subcontinent Asian-Americans: India, Pakistan, Bangladesh, Sri Lanka; Subcontinent Asians: Bhutan and Nepal.</u> (Laos)	Rule added eight countries to Asian Pacific Americans and added a new category, "Subcontinent Asian Americans." Most of these changes reflected existing SBA rules.
SBA 54 Fed. Reg. 34,717	8/21/89	Asian Pacific Americans: <u>Cambodia (Kampuchea), Macao, Hong Kong, Fiji, Tonga, Kiribati, Tuvalu, Nauru);</u> Subcontinent Asian Americans, the <u>Maldives</u>	Reinstated Laos, which had been inadvertently deleted; added eight countries.

The historical record shows some very active lobbying and the intervention of prominent members of Congress and the Carter White House for and against certain groups.<sup>92</sup> What it does not show is any principled basis for decision-

92. The unpublished documents related to SBA decisions regarding the petitions of particular groups were obtained through a Freedom of Information Act request and are in the possession of the Project on Civil Rights and Public Contracts at the University of Maryland Baltimore County. For an article discussing the political history of this process, see La Noue & Sullivan, *supra* note 1.

making or use of any objective data to determine which groups should be on the presumptively eligible list and which should be excluded. Some groups included on the list are at the socio-economic bottom of our society, while others, measured by income, education, and business formation rates are at the top. Facts about specific group socio-economic characteristics were irrelevant to the SBA's decision.

#### IV. SOCIAL SCIENCE EVIDENCE

In their petition to the SBA, some Asian groups and other groups attempted to make an argument for relative socio-economic deprivation. Was that a correct appraisal? In simple terms, there was a higher proportion of Asian Americans living in households with incomes over \$100,000 (25.0%) than non-Hispanic whites (22.1%) (the non-presumptively eligible category).<sup>93</sup> However, there are other indicators of socio-economic status that should have been examined as well, and it is possible to examine these indicators for various Asian American ethnic groups.

Table B shows the relative educational and income rankings of various Asian American groups during the period the SBA was making decisions about groups entitled to presumptive eligibility. No single measure was comprehensive, but since preferential treatment was intended to redistribute educational and economic benefits, the most appropriate data are from those areas.

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93. See Timothy Bates, *An Analysis of Korean Immigrant-Owned Small Business Start-Ups with Comparisons to African-American and Non-Minority Owned Firms*, 30 URB. AFF. Q. 227, 245 (1994) (citing Timothy Bates & C. Dunham, *Facilitating Upward Mobility Through Small Business Ownership*, in URBAN LABOR MARKETS AND INDIVIDUAL OPPORTUNITY 239 (G. Peterson and W. Vroman eds., Urban Institute, 1992)).

**Table B**  
**Characteristics of Asian Americans by Origin: 1980**

	% college grads <sup>a</sup>	% managers / professionals <sup>b</sup>	% unem-ployed <sup>c</sup>	Relative median family income <sup>d</sup>	% who do not speak English well <sup>e</sup>	Poverty rate <sup>f</sup>
Americans	16.2	22.7	6.5	1.0	NA	9.6
Asian Americans	34.3	29.7	4.6	1.19	15	10.3
Pacific Islanders	9.3	15.6	7.3	.90	NA	16.1
Chinese	36.6	32.6	3.6	1.13	23	10.5
Filipino	37.0	25.1	4.8	1.19	6	6.2
Japanese	26.4	28.5	3.0	1.37	9	4.2
Asian Indian	51.9	48.5	5.8	1.25	5	10.6
Korean	33.7	24.9	5.7	1.03	24	12.5
Vietnamese	12.9	13.4	8.2	.65	38	33.5
Laotian	5.9	7.6	15.3	.26	69	67.2
Thai	32.3	23.4	5.5	.97	12	13.4
Cambodian	7.7	10.8	10.6	.45	59	46.9
Hmong	2.9	9.4	20.0	.26	63	65.5
Pakistani	58.4	45.2	5.7	1.08	10	10.5
Indonesian	33.3	24.2	6.1	1.06	6	15.2

Source: "Civil Rights Issues Facing Asian Americans in the 1990s," Washington D.C.: U.S. Civil Rights Commission, February, 1992, at 12-13.

a. Percentage of all persons age 25 and over who have completed 4 or more years of college.

b. Percentage of employed persons age 16 and over whose occupation is in a managerial or professional specialty.

c. Unemployed rate for persons age 16 and over.

d. Median family income as a fraction of the median family income for the entire U.S. population.

e. Source: U.S. Bureau of the Census, *We, the Asian and Pacific Islander Americans*, p. 11, table 7, and U.S. General Accounting Office, *Asian Americans: A Status Report*, p. 44, table 6.1.

f. Percentage of families with income below the poverty level.

As Table B shows, the Asian American groups entitled to the presumption of disadvantage are in fact very diverse. Some groups (Asian Indians, Pakistanis, Chinese, and Japanese) have substantial human capital in terms of income and managerial status and have achieved good incomes with low unemployment rates, while other groups who have come largely as recent refugees (Cambodians, Hmong, and Laotians) have language deficits, lower incomes, and higher unemployment. Table B demonstrates that Asian Americans should not be thought of as a single socio-economic group for affirmative action reasons. Furthermore, they are not a single group in terms of language, religion, and culture, or in terms of their historical experiences or the nature of their entrance into the United States. Creating the single label "Asian-Americans" for this diverse group is really a political artifice rather than a reflection of economic, social, or cultural realities.<sup>94</sup>

Asian Americans do not appear generally disadvantaged when business formation rates are measured. Logically, business formation rates by race and ethnic group might have been relevant data for the SBA's decision to exclude or include various groups from the 8(a) program, particularly since 8(a) is conceptualized as a business development program. Table C displays this data from the 1980 census, the most relevant data for the period in which the decisions about Asian American groups were made.

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94. See *Houston Contractors Ass'n v. Metropolitan Transit Auth.*, 993 F. Supp. 545, 552 (S.D. Tex. 1997) (The court found that "[e]thnic labels are as arbitrary as racial ones. Under the current census category of 'Asian' you find lumped together a Catholic Hispanic from Manila and a Hindu from Bombay, both of whom are Caucasian and each of whom has entirely different social histories.").

Table C  
Business Participation Rates of Selected Ethnic Groups

Ancestry Group	Business Formation per 1000 population	Mean Income from All Sources of Self Employed Persons
Korean	69.2	\$18,500
Japanese	64.8	\$19,680
Chinese	60.2	\$18,980
<b>U.S. Average</b>	<b>48.9</b>	<b>\$18,630</b>
Cubans	47.9	\$17,310
Filipinos	22.4	\$27,800
Asian Indians	47.1	\$29,800
American Indians	33.3	\$13,110
Sub-Saharan Africans	13.6	\$11,260
Puerto Ricans	10.6	\$11,490

The SBA was aware of these statistics because the information was compiled by the Office of Advocacy, Research and Information of the Minority Business Development Agency (MBDA) of the U.S. Department of Commerce in 1985. The study authors conceded:

These data suggest that many of the groups MBDA has traditionally served continue to need assistance because they remain markedly below the national average in business participation. However, other groups served by the agency have [rates] near or above average Asian Indians 47.1, Cubans 47.9, Chinese 60.2, Japanese 64.8, and Koreans 69.2.<sup>95</sup>

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95. FRANK A. FRATOE AND RONALD L. MEEKS, BUSINESS PARTICIPATION RATES OF THE 50 LARGEST U.S. ANCESTRY GROUPS: A PRELIMINARY REPORT, Research Div., Office of Advocacy, Research & Information, Minority Business Dev. Agency, U.S. Dep't of Commerce, June 1985.



Dr. Timothy Bates, a scholar who has compared the status of minority-owned firms has concluded:

From a policy standpoint, an essential factor stands out: Self-employed Asians are *not* a disadvantaged group: their eligibility for government minority business set-aside and preferential procurement programs, financial assistance, subsidized technical assistance, and so forth is completely inappropriate. Their status as a "disadvantaged minority group" is history and it is time to adjust public policy to reflect this new reality.<sup>96</sup>

The MBDA statistics were based on raw census data, but more recently social scientists have completed research using regression analysis to control the many relevant variables.<sup>97</sup> Some of the results of the research developed by Professors Robert Fairlie and Bruce Meyer are printed in Table D.

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96. Timothy Bates, *The Changing Nature of Minority Business: A Comparative Analysis of Asian, Non-Minority and Black-Owned Businesses*, 18 REV. BLACK POL. ECON. 25, 26 (1989).

97. See Robert W. Fairlie & Bruce D. Meyer, *Ethnic and Racial Self-Employment Differences and Possible Explanations*, 31 J. HUM. RESOURCES 757 (1996).

Table D  
 Regression-adjusted Business Formation Rates by Ethnicity  
 and Race (males) 1990 Census <sup>98</sup>

Groups with presumptively eligible status are in **bold face**.

<b>Top</b>	<b>Middle</b>	<b>Bottom</b>
<b>Korean</b> 23.7	<b>White S. American</b> 12.6	<b>Spanish C. American</b>
Israeli 23.5	Canadian 12.6	5.9
Russian 21.4	Czech 12.4	<b>Black Caribbean</b> 5.7
Greek 20.9	Dutch 12.4	<b>Pacific Islanders</b> 5.0
Armenian 20.1	Hungarian 12.3	<b>Other S. Asians</b> 4.8
	White British 12.1	<b>African American</b> 4.5
	White German 12.0	<b>Black C. American</b> 4.5
	Ukrainian 12.0	<b>Black S. American</b> 4.3
	Yugoslav 12.0	<b>Puerto Rican</b> 4.0
	<b>Cuban</b> 12.0	<b>Laotian</b> 2.6
	Finnish 11.2	
	Scottish 11.2	
	<b>Southwest Asian</b> 11.1	
	Belgian 11.0	
	White Nat. Am 10.9	
	<b>Chinese</b> 10.6	
	Slovak 10.6	
	<b>Spanish S. American</b>	
	10.6	
	Irish 10.5	
	French Canadian 10.3	
	Polish 10.3	
	<b>Japanese</b> 10.1	
	<b>Thai</b> 9.7	
	<b>Spaniard</b> 9.6	
	<b>Portuguese</b> 9.5	
	<b>Asian Indian</b> 9.3	

As the Fairlie-Meyer data show, there are major differences in business formation rates among ethnic groups. The SBA definition of presumptively eligible groups is both

98. See *id.* at 772-73.

over and under-inclusive. While all African American groups are below the mean of 10.8 self-employed persons per hundred adult male workers, several important Asian American groups (Chinese and Japanese) are near the mean, Koreans are substantially above, and Laotians are at the bottom. Hispanics, Cubans, and white South Americans are above the mean, while Central Americans and Mexicans are considerably below.<sup>99</sup>

Within the non-presumptively eligible group category, Armenians, Israelis, Russians, and Greeks are considerably above the mean, while Poles and French-Canadians are below. Between 1980 and 1990, the largest growth in self-employment for men occurred among Vietnamese (148%), Caribbean Spanish (88%), Slovaks (70%), and Laotian (67%). If these trends continue, the 2000 census will make the SBA's previous presumptions about social and economic conditions even less a reflection of actual business disadvantage.

Furthermore, no inquiry by the SBA has considered whether cultural factors, rather than discrimination, influence business formation decisions. In striking down a program of racial and ethnic preferences in public contracting, the Eleventh Circuit declared:

In a pluralistic and diverse society, it is unreasonable to assume that equality of opportunity will inevitably lead different groups with similar human and financial capital characteristics to make similar career choices . . . . "Similarly situated" women, men, blacks, whites, Native Americans, Italian-Americans, and every other group that might be listed all bring their own values and traditions to the socio-economic table, and may reasonably be expected to make voluntary choices that give effect to those values and traditions. As the Supreme Court recognized in *Croson*, the disproportionate attraction of a minority group to non-construction industries does not mean that

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99. This data has recently drawn the attention of courts. In striking down Denver's MWBE program in part because it was overinclusive, the judge noted:

The studies show that there are major differences between the business formation rates of different groups and within the same identified group. The leading group forming businesses in recent years . . . has been Korean Americans with formation rates almost twice as high as Chinese Americans who were exactly at the national average, and major differences also exist within the Hispanic category and within the European or white categories.

Concrete Works of Colorado, Inc. v. City and County of Denver, 86 F. Supp. 2d 1042, 1070 (D. Colo. 2000).

discrimination in the construction industry is the reason.<sup>100</sup>

Drawing the lines based on racial or ethnic group membership for the purposes of including or excluding persons as beneficiaries of public programs is one of the most dangerous powers a government can possess. Political polarization and group enmity are almost certain results. That is why the Supreme Court has required strict scrutiny when racial and ethnic classifications are employed.

#### V. THE ADMINISTRATIVE DEFENSE OF PRESUMPTIVE ELIGIBILITY

Often the reasons and factual support for legislative and bureaucratic decisions on controversial matters are difficult to discern unless the authors wish to make them public. In this instance, however, the litigation discovery process has added substantially to the information available.<sup>101</sup> Judicial skepticism about the connection between preferences based on presumptive eligibility and any findings of discrimination turns out to be well-founded.

Several depositions of SBA designated 30(b)(6) experts have been taken as a part of litigation discovery. Mr. Calvin Jenkins, Associate Director of the SBA, Minority Enterprise Program, and Mr. William Fisher, Associate Administrator of the SBA Office of Minority Enterprise Development were designated by the agency as knowledgeable on the following topics:

1. General administration of the 8(a) program;
4. Process and criteria for applying the concept of economic disadvantage;

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100. *Engineering Contractors Ass'n of S. Fla. v. Metropolitan Dade County*, 122 F.3d 895, 922 (11th Cir. 1997). See also *City of Richmond v. J.A. Croson*, 488 U.S. 469, 503 (1989); *Associated Gen. Contractors v. City of Columbus*, 936 F. Supp. 1363 (S.D. Ohio 1996).

101. This section of the article reflects documents obtained through pre-trial discovery in three 1998-1999 cases: *C.S. McCrossan Constr. Co. v. Cook*, No. CIV. 95-134-HB, 1996 U.S. Dist. LEXIS 14721 (D.N.M. Apr. 2, 1996); *Rothe Dev. Corp. v. Dep't of Defense*, 49 F. Supp. 2d 937 (W.D. Tex. 1999), decision stayed in 194 F.3d 622 (5th Cir. 1999); and *DynAtlantic v. Dep't of Defense* (D.D.C.). *McCrossan* has been dismissed for lack of standing. *Rothe* received a district court opinion, 49 F. Supp. 2d 937 (W.D. Tex. 1999), that was stayed by the Fifth Circuit. It is now on appeal to the federal circuit court of appeals. *DynAtlantic* is awaiting trial.

5. History and criteria used by the S.B.A. in establishing the racial or ethnic groups which the S.B.A. has determined by regulation are entitled to presumptive "social disadvantage" in the 8(a) program;

6. The standards, procedures, and criteria for rebutting the ethnic or racial presumption for "social disadvantage" in the 8(a) program;

7. The process and criteria for applying the concept of social disadvantage.<sup>102</sup>

Also, a series of requests for admission were asked of the Justice Department to clarify the congressional and administrative record. The only reasonable conclusion from a review of this material is that either the SBA does not know why some groups have been included as presumptively disadvantaged or the agency is being purposely evasive about the standards used in determining the presumption.

To participate in the Small Business Administration's 8(a) program, the SDB program, or DOT DBE programs, an individual must be both socially and economically disadvantaged. But social disadvantage is the initial screen. As Mr. Fisher, Acting Associate Administrator of the SBA's Office of Minority Enterprise Development, testified: "You can't be economically disadvantaged unless you're also socially disadvantaged."<sup>103</sup>

Nevertheless, when the SBA made the racial and ethnic decisions to determine presumptive eligibility, it gathered no statistical data, sought no uniform measurement of educational or economic attainment,<sup>104</sup> commissioned or completed no studies on the history of discrimination regarding the groups included, and supplied no consistent

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102. Notice of Deposition subpoena to Phillip Lader, Administrator for the Small Business Administration, or his designee(s), at 2, C.S. McCrossan Constr. Co. v. Cook, No. Civ. 95-134-HB, 1996 U.S. Dist. LEXIS 14721 (D.N.M. Apr. 2, 1996).

103. Deposition of William Fisher at 123 (Mar. 16, 1998), *McCrossan*, 1996 U.S. Dist. LEXIS 14721.

104. Most businesses owned by members of any group are small. In 1982, around the period when the presumptive eligibility decisions were crystallizing, 64% of all businesses owned by white males had net receipts of less than \$25,000, compared to 69% for Hispanics, 70% for blacks, and 65% for other minorities (mostly Asian). Similarly, 81% of all businesses owned by white males had no paid employees compared to 84% Hispanic, 87% black, and 81% other minorities. See Bureau of the Census, 1982 Characteristics of Business Owners, Table 3b at 12 and Table 4c at 22.

definition of group eligibility standards. Indeed, the SBA's designated representatives cannot even remember why some of these decisions were made.<sup>105</sup> Whether the SBA's amnesia is convenient or simply a reflection of the passage of time about decisions never based on a firm record is ultimately not relevant. Neither explanation satisfies strict scrutiny.

Presumptive eligibility in the 8(a) program was not intended as a remedy for any identified pattern or practice of discrimination in federal contracting. No such record existed. Nor can the racial classifications in the 8(a) program be intended to remedy discrimination in any particular industry since 8(a) contracts potentially cover everything the government buys. If based on any theory at all, presumptive eligibility was intended to compensate for societal discrimination. But that has been an invalid justification for the use of a racial classification since the Supreme Court decision in *Wygant v. Jackson Board of Education*,<sup>106</sup> which made the distinction between "societal discrimination" (an inadequate basis for race conscious classifications) and the type of identified discrimination that can support and define the scope of race-based relief.<sup>107</sup>

Since *Wygant* and *Croson*, the judiciary has become much more critical of the use of racial classifications in a variety of settings and has specifically expanded strict scrutiny to federal programs.<sup>108</sup> In *Adarand*, the Court recalled that racial classifications were considered "odious," "pernicious" and constitutionally suspect and can only be justified if their use passes the strict scrutiny test.<sup>109</sup> Therefore it is important to examine whether presumptive eligibility meets either the compelling interest and narrow tailoring components of strict scrutiny.

### A. *Compelling Interest*

While a program must meet both prongs to pass the strict scrutiny test, it must first pass the compelling interest

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105. See, e.g., Deposition of Calvin Jenkins at 72 (Mar. 18, 1996), *McCrossan*, 1996 U.S. Dist. LEXIS 14721; Deposition of William Fisher at 41 (Mar. 16, 1998), *McCrossan*, 1996 U.S. Dist. LEXIS 14721.

106. 476 U.S. 267 (1986).

107. See *City of Richmond v. J.A. Croson*, 488 U.S. 469, 497 (1989).

108. See, e.g., *Webster v. Fulton County*, 51 F. Supp. 2d 1354 (N.D. Ga. 1999), *aff'd* 2000 U.S. App. LEXIS 17310 (11th Cir. July 19, 2000).

109. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 214-15, 219.

test. The Eleventh Circuit recently offered this nautical metaphor:

The existence of each of the programs, including all of its component parts, must withstand the appropriate level of constitutional scrutiny if that program is to be upheld. Either a *program* is grounded on a proper evidentiary factual predicate or it is not. If it is, then that program sails on to the next stage of the analysis, where each component contract measure is tested against the "narrow tailoring" and "substantial relationship" requirements. On the other hand, if a program is not grounded on a proper evidentiary basis, then all of the contract measures go down with the ship, irrespective of any narrow tailoring or substantial relationship analysis.<sup>110</sup>

The Department of Justice has determined that the federal government has established a general compelling interest for race conscious procurement programs in its generic statement, "The Compelling Interest for Affirmative Action in Federal Procurement: A Preliminary Survey"<sup>111</sup> published as an appendix in the Federal Register.<sup>112</sup> The appendix, however, was never approved by Congress although it purports to reflect Congressional findings. The appendix does not purport to provide a predicate for any particular program. Much of what is cited in the appendix is several decades old or has never actually been considered by Congress.<sup>113</sup>

The Justice Department does not consider these problems relevant. Instead the Justice Department has asserted in litigation that: "Further, Congress is not required to specify what particular factors or matters it considered or rejected in reaching a decision to fund, enact, or maintain the

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110. *Engineering Contractors Ass'n of S. Fla. v. Metropolitan Dade County*, 122 F.3d 895, 906 (11th Cir. 1997).

111. In *In re Sherbrooke Sodding Co.*, 17 F. Supp. 2d 1026, 1034, the judge described the Survey as recounting "Congress's debates and examinations of discrimination and its possible remedies. . . . Congress has clearly visited this issue, and has consistently found that effects of discrimination remain."

112. 61 Fed. Reg. 26,050 (1996). See discussion *supra* Part I for the chronological sequence of the Department of Justice's post-*Adarand* publications.

113. See 61 Fed. Reg. 26,050 (1996). For example, the appendix relies extensively on local disparity studies and a Department of Justice commissioned meta-study by the Urban Institute based on these local studies, but Congress has never held hearings or made any findings on either the local studies or the Institute's report.

[8(a) program at issue.”<sup>114</sup> It is hard to imagine a more sweeping assertion of federal power than to make rules preferring one race, ethnicity, or gender over another than this statement. It is also hard to imagine a clearer challenge to the judicial role in applying strict scrutiny. If the Department of Justice assertion is good law, then the statistical accuracy or legal relevance of Congressional findings regarding various MBE programs is irrelevant because Congress need not specify anything before granting racial preferences. Congress, according to this view, does not have to specify any particular factors or matters considered at all. This is not deference to Congress, but abdication, which the *Adarand* court described as the “rough compromises struck by contending groups” in the political process.<sup>115</sup>

The Justice Department’s assertion came in response to a number of requests for admission that various documents cited in the federal government’s survey on compelling interest were not, in fact, “relied upon by Congress as a basis for originally enacting the 8(a) program or during any other re-enactment of the program.”<sup>116</sup> The documents in question were (1) the Urban Institute report, “Do Minority Businesses Get a Fair Share of Government Contracts?”<sup>117</sup> (2) the disparity studies cited in the survey,<sup>118</sup> and (3) the social science evidence cited in the survey.<sup>119</sup> All of these documents were created after the enactment of the 8(a) program, so the Justice Department admitted that Congress did not rely on any of the above documents at that time. Nor did the Justice Department assert that Congress relied on any of these documents for actions taken after their publication either, but responded that the documents “have been available to Congress since their publication for Congress’ consideration in determining whether to maintain the 8(a) program and

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114. Defendants’ Response to Requests for Admission (Mar. 10, 1996), C.S. McCrossan v. Cook, No. CIV. 95-1345-HB, 1996 U.S. Dist. LEXIS 14721 (D.N.M. April 2, 1996), responses to request Nos. 2-4.

115. *Adarand*, 515 U.S. at 224 (1995) (quoting *Regents of the University of California v. Bakke*, 438 U.S. 265, 299 (1978)).

116. Requests for Admission, *McCrossan*, 1996 U.S. Dist. LEXIS 14721, request No. 3.

117. *See id.*, request No. 2.

118. *See id.*, request No. 3.

119. *See id.*, request No. 4.



other similar programs.”<sup>120</sup> This answer evades the question of whether Congress relied on any of these documents. It is hard to think of any document about any subject that would not be “available” to Congress in considering legislation. Surely documents “available” to Congress would encompass anything in the Library of Congress or indeed anything on the Internet. In its responses, the Justice Department appeared to deny the importance of any factual basis as a prerequisite for federal legislation establishing racial or ethnic preferences.

Nor did the Justice Department, when specifically asked, claim that the 8(a) program is a response to discrimination by federal or state procurement officers.<sup>121</sup> Nor did the Justice Department in its admission claim that either Congress or the Justice Department has ever sought to objectively validate or substantiate any of the anecdotal claims cited in the survey.<sup>122</sup>

In short, the government’s position on compelling interest is that almost anything said in Congressional hearings or debate or anything consistent with a hypothesis of discrimination generally in the American economy or any document that might have been “available” to Congress is sufficient to establish a compelling interest. But as courts have found, unless discrimination is specifically identified, no narrowly tailored remedy is possible.<sup>123</sup>

### B. Narrow Tailoring

As the Ninth Circuit declared in its *en banc* affirmation of *Monterey Mechanical Co. v. Wilson*:

The Constitutional requirement of “narrow tailoring” is an

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120. *Id.*, request Nos. 2, 3a-d, 4.

121. *See id.*, request No. 5.

122. *See* Requests for Admission, *McCrossan*, 1996 U.S. Dist. LEXIS 14721, request Nos. 27-31.

123. *See Phillips & Jordan, Inc. v. Watts*, 13 F. Supp. 2d. 1308, 1314 (N.D. Fla. 1998) (The court stated, “An affirmative action program that is not focused on ‘those who discriminate’ may well serve the illegitimate purpose of providing certain racial or ethnic groups with compensation for some ill-defined social wrong, but it probably will not serve the legitimate purpose of dismantling a closed business system.”). *See also Brewer v. West Irondequoit Cent. Sch. Dist.* 32 F. Supp. 2d 619, 631 (W.D.N.Y. 1999), *injunction vacated, remanded for trial*, 212 F.3d 738 (2d Cir. 2000) (“Absent findings of actual discrimination, there is a danger that a racial classification is merely the product of unthinking stereotypes or a form of racial politics.”) (quoting *City of Richmond v. J.A. Croson*, 488 U.S. 469, 510).

instrument of justice, not a mere technicality. It has been a delicate affair for the courts to reconcile the principle that each individual is entitled to equal protection of the laws, with the principle that persons in groups that have been discriminated against deserve a leg up in order to have equal opportunity. Past discrimination sometime, somewhere is not enough. Many of us are of peoples who have suffered oppression, some recently, some long ago, some in America, some in foreign lands.<sup>124</sup>

If the concept of presumptive eligibility can ever be narrowly tailored as the basis for preferential procurement policy, it must be limited to groups that have been identified as victims of relevant discrimination: assertions of general societal discrimination are not sufficient. The Ninth Circuit has recently summarized the law:

For a racial classification to survive strict scrutiny in the context before us, it must be a narrowly tailored remedy for past discrimination, active or passive, committed by the governmental entity making the classification. *City of Richmond v. J.A. Croson Co.*, 109 S. Ct.706, 716, 720 (1989). "Findings of societal discrimination will not suffice; the findings must concern prior discrimination by the government unit involved."<sup>125</sup>

Since the Justice Department's post-*Adarand* documents on procurement and the new regulations for federal MBE programs avoid discussing the narrow tailoring issue of why certain groups are presumed socially disadvantaged while others are not, it is useful to recount the testimony of relevant federal officials on these matters.

### 1. *Calvin Jenkins Depositions*

Calvin Jenkins, Associate Director, Minority Enterprise Program of the Small Business Administration, was deposed in *McCrossan* on March 18, 1996 and in *Rothe v. Department of Defense*<sup>126</sup> on February 22, 1999 as the SBA expert on the history and administration of the SBA 8(a) program. When asked about the issue of group selection by the SBA, however, Mr. Jenkins testified:

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124. *Monterey Mechanical Co. v. Wilson*, 138 F.3d 1270, 1273 (9th Cir. 1998).

125. *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702, 716-17 (9th Cir. 1997). See also *Associated Gen. Contractors v. City and County of San Francisco*, 813 F.2d 922, 930 (9th Cir. 1987).

126. 49 F. Supp. 2d 937 (W.D. Tex. 1999).

Q. As far as these racial classifications, would all of these groups be included in the 8(a) program at the same time? When they were first added to the program, did they all come in at the same time?

A. No.

Q. Which ones were most recently added, do you know?

A. I believe subcontinent Asians. And I believe there is a second group. I'm not sure which one it was.

Q. Why, for example, were subcontinent Asians added?

A. I'm not familiar with the decision that went in to that.

Q. Was it made by the SBA, or was it made by Congress?

A. It is my understanding that it was by both.

Q. Are you aware of any Congressional hearings to consider the presumptive eligibility of these 8(a) groups?

A. No, I'm not familiar.<sup>127</sup>

Later, Mr. Jenkins was asked about the general SBA role in selecting presumptively eligible groups:

Q. I guess, maybe, the best way to say this is: Do you know what role the SBA played in determining and defining these various groups?

A. No, I do not.<sup>128</sup>

Mr. Jenkins could not remember which groups requesting socially disadvantaged status had been turned down by the SBA and which groups had been accepted.<sup>129</sup> He stated:

Q. Are any, to your knowledge, of these groups selected by looking to geographic area?

A. No, not to my knowledge.<sup>130</sup>

Whatever Associate Director Jenkins's knowledge, his conclusion is wrong. Most of the Pacific island countries were included in the 8(a) program with very little information other than their geographical location.<sup>131</sup>

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127. Deposition of Calvin Jenkins at 64-65 (Mar. 18, 1996), *McCrossan*, 1996 U.S. Dist. LEXIS 14721.

128. *Id.* at 65-66.

129. *See id.* at 72.

130. *Id.* at 73.

131. *See La Noue & Sullivan, supra* note 1, at 444.

Finally, narrow tailoring does not permit designation of disadvantaged status to continue indefinitely; there must be periodic review of the appropriateness of retaining each presumptively disadvantaged group. However, the SBA has no administrative process to make such a review. Calvin Jenkins testified:

Q. Are the groups that are in there regularly reviewed by SBA to see if they are the right groups and deserving of a presumption under all the requirements of 13 C.F.R. Part 124?

A. No. SBA does not have a procedure in which we re-review the groups once they have been approved there.

Q. Has there ever been any discussion within the SBA to develop such rules?

A. Not to my knowledge.

Q. Has any group ever been removed from the list?

A. Not to my knowledge.<sup>132</sup>

In addition to the designation of certain groups as carrying the presumption of an individual's social disadvantage, the 8(a) program must determine which individuals will be permitted to designate themselves as members of those benefited groups. In essence, the SBA permits self-designation. Mr. Jenkins testified:

Q. When someone holds themselves out as a member of one of these groups... is there any further inquiry, generally speaking as to, whether they are in fact a member of that group?

A. No.<sup>133</sup>

Mr. Jenkins could not remember any instance when anyone had challenged the presumption of social disadvantage,<sup>134</sup> but because the SBA regards the 8(a) application information as confidential, it would be difficult for anyone to acquire the facts to offer any challenge.

Mr. Jenkins testified that having a college education

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132. Deposition of Calvin Jenkins at 20 (Feb. 22, 1999), *Rothe Dev. Co. v. U.S. Dep't of Defense*, 49 F. Supp. 2d 937 (W.D. Tex. 1999). See also Deposition of William Fisher at 41 (Mar. 16, 1998), *McCrossan*, 1996 U.S. Dist. LEXIS 14721.

133. Deposition of Calvin Jenkins at 30-31 (Mar. 18, 1996), *McCrossan*, 1996 U.S. Dist. LEXIS 14721.

134. See *id.* at 32-33, 141.

would not affect whether a person was considered socially disadvantaged. The SBA does not inquire, and therefore, would not know whether an applicant's family was wealthy, so family wealth is not a factor in considering social disadvantage.<sup>135</sup> Even a recent immigrant with no possible history of discrimination in the United States, if now a citizen, would still be considered socially disadvantaged by the 8(a) program if the applicant claimed identification with a designated racial or ethnic group.<sup>136</sup>

The SBA would not know if an applicant had actually suffered societal discrimination or any other form of discrimination. No fact about discrimination is ever verified by the agency; discrimination is presumed whether or not the person even claims it. While the SBA may review whether a person continues to be economically disadvantaged, there is no periodic review of social disadvantage.<sup>137</sup> The premise of the federal MBE programs, then, is that once a person has identified with a group that is presumptively socially disadvantaged, that person will always be socially disadvantaged regardless of their personal achievement. That premise constitutes a governmental racial and ethnic stereotype of the worst sort.

The SBA does not require that a presumptively eligible person have suffered discrimination by the federal government.<sup>138</sup> Mr. Jenkins knew of no instance of any discrimination by any federal contracting officer against an 8(a) firm. Nor was he aware of any discrimination by any federal contracting officer against any person connected with any "designated minority groups that are entitled to a [presumption] of social disadvantage." In fact, Mr. Jenkins knew of no instance of any discrimination by any federal contracting officers or any procedures used by federal contract officers that the SBA believed even had a "disparate impact on minorities."<sup>139</sup>

## 2. *William Fisher Deposition*

Because Mr. Jenkins knew so little about the key issues,

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135. *See id.* at 35.

136. *See id.* at 78-79, 142.

137. *See id.* at 133.

138. *See id.* at 144.

139. *See Deposition of Calvin Jenkins at 52-53 (Mar. 18, 1996), McCrossan, 1996 U.S. Dist. LEXIS 14721.*

plaintiffs in the *McCrossan* case deposed William Alvin Fisher, Acting Associate Administrator of the SBA's Office of Minority Enterprise Development, on March 16, 1998, two years after the Jenkins deposition. Mr. Fisher was sent the list of questions quoted above<sup>140</sup> about the administration of the 8(a) program and particularly about "the history and criteria used by the SBA in establishing the racial or ethnic groups which the SBA has determined by regulation are entitled to presumptive 'social disadvantage' in the 8(a) program."<sup>141</sup> In his deposition, Mr. Fisher made a number of statements which combined with those by Mr. Jenkins suggests that the SBA either never had policies on a number of constitutionally significant issues in the 8(a) program or has forgotten what they are or where they came from.

Though designated as the government's 30(b)(6) expert on the history and criteria used by the SBA to determine group disadvantage, Mr. Fisher had no idea how certain groups came to be designated as presumptively disadvantaged.

Q. Do you have any knowledge about how these subcategories [Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, subcontinent Asian Americans] came to be included in section 124.105(B) of the Small Business Administration's regulations?

A. I do not.

Q. You do not have any knowledge about how they came to be included?

A. That predated me. I have no knowledge.<sup>142</sup>

When Mr. Fisher was questioned about the inclusion or exclusion of the groups within these subcategories, he was no more knowledgeable.

Q. What about the specific subgroups that are listed after the term Asian Pacific Americans. Do you have any information about how those subgroups came to be added to the list?

A. I do not.

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140. See Notice of Deposition to William Fisher (Mar. 16, 1998), *McCrossan*, 1996 U.S. Dist. LEXIS 14721.

141. *Id.*

142. *Id.* at 41.

Q. Do you know why certain countries were included in the list of subgroups, but not other countries?

A. I don't know. . . .<sup>143</sup>

Q. Do you know why the former Soviet, now-independent Asian republics are not included on the list of countries entitled—countries in 124.105(B)?

A. No.

Q. Do you know why persons from Asia Minor or the Middle East are not included in this list?

A. I don't know.<sup>144</sup>

Not only did Mr. Fisher not know how various nationalities came to be considered disadvantaged, he did not know how the SBA defined whether a person was properly identified with a presumptively eligible group.

Q. I don't think I asked you whether there is a working definition of Asian Pacific Americans. Is there?

A. Not that I'm aware of.<sup>145</sup>

Nor did Mr. Fisher know the definition for Native Americans or how it was applied:

Q. Is the term Native American, to your knowledge, defined in the SBA's regulations?

A. I don't know that it is.<sup>146</sup>

Q. Do you know how the SBA would have come up with this definition for native Hawaiian, if you know?

A. I don't.

Q. Do you have any idea why the date 1778 is used? [In order to qualify as a Native Hawaiian, an individual must be able to trace his lineage back at least as far as 1778, the year Captain Cook arrived in the Islands.]

A. I don't.<sup>147</sup>

Nor was Mr. Fisher aware of whether his agency conducted any investigation into the accuracy of an

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143. *Id.* at 88.

144. *Id.*

145. *Id.* at 90.

146. Deposition of William Fisher at 91 (Mar. 16, 1998), *McCrossan*, 1996 U.S. Dist. LEXIS 14721.

147. *Id.* at 97.

applicant's claims of belonging to a particular group. Mr. Fisher testified:

Q. If a person applying to the 8(a) program states on the application form that they identify themselves as Hispanic American, does your office conduct any additional inquiry into whether or not they are in fact a Hispanic American on a routine basis?

A. I don't know.<sup>148</sup>

Of course, such an inquiry would be difficult since Mr. Fisher testified he was not aware of any working definition of the term Hispanic American.<sup>149</sup> Mr. Fisher was not aware of whether the term Hispanic American was a racial category,<sup>150</sup> reflected persons whose ancestors came from certain countries,<sup>151</sup> required a person to speak Spanish,<sup>152</sup> or have a Spanish surname.<sup>153</sup> He believed "Hispanic American" did not require that the person belong to any Hispanic organizations.<sup>154</sup>

The defendant's unwillingness or inability to investigate claims of disadvantaged status extends beyond Hispanics. Mr. Fisher testified:

Q. In your experience as the associate administrator, have you ever had cause to question an individual's status as a group member when that individual has represented themselves as a group member on an application for admittance into the 8(a) program?

A. I do not recall an instance where any of my offices have questioned that and requested the individual to do so.<sup>155</sup>

He went on:

Q. Can you tell me, sir, hypothetically any situation you

148. *Id.* at 55.

149. *See id.* at 59. The failure to have a working definition of "Hispanics," even though that group is eligible in almost all affirmative action programs has troubled other courts. *See Concrete Works of Colorado, Inc. v. City and County of Denver*, 86 F. Supp. 2d 1042, 1069 (D. Colo. 2000). ("[T]here is no agreed working definition of Hispanic persons since they may be of different races and may have very different cultural, religious and geographic origins.") *See also Hernandez v. State*, 742 A.2d 952, 964-65 (Md. 1999).

150. Deposition of William Fisher at 61 (Mar. 16, 1998), *McCrossan*, 1996 U.S. Dist. LEXIS 14721.

151. *See id.* at 65.

152. *See id.* at 71.

153. *See id.*

154. *See id.* at 75.

155. *Id.* at 62.



can think of under which you might question someone's identification with one of the designated groups?

A. I cannot.<sup>156</sup>

Not only could Mr. Fisher not specify any SBA initiated challenges, there have not apparently been any third party challenges.

Q. Are you aware of any outside challenges to a person—to an applicant's claiming identification with a certain designated group?

A. I'm not.<sup>157</sup>

This concession was made despite Mr. Fisher's recognition that he was the final authority on 8(a) applications.

Q. For each applicant to the 8A program, you make the final decision; is that correct?

A. That's correct.<sup>158</sup>

The bureaucratic reality for both the 8(a) and SDB programs is that all an applicant needs to do be accepted as socially disadvantaged is check a box stating the applicant was entitled to the presumption of social disadvantage by identifying with the preferred groups.

Q. And if that box is checked, would there be any further inquiry at any of the levels you previously described into whether that person in fact was a member of the group they indicated they identified with?

A. I don't know. That has not occurred since I've been here.

Q. There hasn't been any additional investigations since you've been there?

A. No, not that I'm aware of.<sup>159</sup>

There is no requirement that a person belonging to the 8(a) designated groups actually demonstrate social disadvantage. Mr. Fisher testified:

Q. But members who identify themselves with groups that are entitled to a presumption of social disadvantage

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156. Deposition of William Fisher at 63 (Mar. 16, 1998), C.S. McCrossan Constr. Co. v. Cook, No. Civ. 95-1345-HB, 1996 U.S. Dist. LEXIS 14721 (D.N.M. Apr. 2, 1996).

157. *Id.* at 77.

158. *Id.* at 59.

159. *Id.* at 71-72.

are not required to make an individualized showing: is that correct?

A. That is correct.<sup>160</sup>

Nor apparently have persons made a voluntary showing of social disadvantage.<sup>161</sup>

According to Mr. Fisher, if a person clearly belonged or identified with the designated group,<sup>162</sup> personal attributes (a doctorate, leadership in a trade or professional association or even elected office) would not effect the presumption of social disadvantage, if it were clear the person belonged or identified with the designated group.<sup>163</sup> Furthermore, the presumption is a national one and applies to a person living in a geographical area where the group identity might be a disadvantage or an area where it is definitely an advantage, such as Cuban Americans in Miami, Florida, for example.<sup>164</sup>

Nor was Mr. Fisher knowledgeable about the standards used to determine whether individuals were appropriately identified with a group presumptively disadvantaged. The number of Americans who are descendants of more than one race and ethnic group is growing rapidly. The 2000 Census contains a multi-racial category for the first time recognizing the changing American demographic realities. However, the SBA does not have any rules for determining what a multi-racial individual needs to qualify as a member of a presumptively eligible group. The plaintiffs tried to ascertain if any rules exist by asking a number of *hypothetical* questions.

Q. Would it be sufficient if a person held themselves out or identified themselves as a Hispanic American for one generation, or would they have had to identify for the previous generations; in other words, my parents were also Hispanic American, my grandparents were also Hispanic American, or would it be sufficient for some lesser period of time?

A. I don't know.<sup>165</sup>

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160. *Id.* at 33.

161. *See id.* at 81.

162. *See* Deposition of William Fisher at 115-18 (Mar. 16, 1998), *McCrossan*, 1996 U.S. Dist. LEXIS 14721.

163. *See id.*

164. *See id.* at 119-20.

165. *Id.* at 82.

Nor did Mr. Fisher know how the SBA would determine the presumptive eligibility of a person with one parent from a presumptively eligible group (e.g., Chile) and another parent from a non-presumptively eligible group (e.g., Ireland).<sup>166</sup> Mr. Fisher did not know whether a person with one great-grandparent from a presumptively eligible group and seven great grandparents from non-presumptively eligible groups would be entitled to the presumption.<sup>167</sup> Mr. Fisher was equally unaware of whether a person of Scottish ancestry whose family lived in India for several generations could claim identification as an Asian Pacific American,<sup>168</sup> but that was because there is no working definition of an Asian Pacific American at all.<sup>169</sup>

### 3. *Requests for Admissions*

In *McCrossan*, the plaintiff additionally asked a number of group-specific questions in its requests for admission. For example, plaintiffs asked whether the SBA used “any particular measure of education or economic group attainment” in determining whether particular groups were entitled to the presumption of social and economic disadvantage. The defendants responded that “defendants admit that the SBA does not rely upon any particular measure of educational attainment in isolation or any particular measure of economic group attainment in isolation to other factors but evaluates them along with the totality of the circumstances.”<sup>170</sup>

The phrase “totality of the circumstances” serves to obscure the fact that there were no standards applied across the board to determine whether a group should be considered presumptively socially disadvantaged. The fact is that the SBA has never required any specific educational or economic data or any other consistent or appropriate criteria in its review of group eligibility. It has never even examined census data easily available to the agency. Furthermore the defendants conceded that “the totality of the circumstances”

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166. *See id.* at 83.

167. *See id.* at 105-06.

168. *See* Deposition of William Fisher at 90 (Mar. 16, 1998), *McCrossan*, 1996 U.S. Dist. LEXIS 14721.

169. *See id.*

170. *Requests for Admission* (Mar. 10, 1998), *McCrossan*, 1996 U.S. Dist. LEXIS 14721, request No. 9.

are those brought to the SBA's "attention by the group seeking inclusion."<sup>171</sup> In short, the SBA made no independent analysis, but simply responded to those facts and allegations the group or individual members of the group submitted.

The plaintiffs then asked whether the SBA has made any studies of the history of discrimination suffered by presumptively disadvantaged groups in America. The defendants admitted that:

The SBA has not independently made or sponsored, nor was it legally required to make or sponsor, any specific studies regarding the history of discrimination suffered by groups in America in making decisions to designate and identify, or deny such designation and identification to racial and ethnic groups as presumptively eligible for "social disadvantage."<sup>172</sup>

The government was then asked about the inclusion or exclusion of specific groups from the category of presumptively eligible groups. Some countries on the Asian continent were included on the SBA list and others were not. For example, Afghanistan, Azerbaijan, Iran, Kazakhstan, Kyrgyzstan, Turkmenistan, Uzbekistan, and Tadjikistan are not included and the SBA specifically rejected Iran in 1989.<sup>173</sup> The government conceded persons from some Asian countries, but not others, were considered socially disadvantaged.<sup>174</sup> It was then asked whether these inclusion/exclusion decisions were based on any federally-sponsored studies of the question. The defendant responded by repeating "the totality of the circumstances" language and admitted:

[D]efendants have made reasonable efforts to seek information responsive to this request, are unaware of and therefore cannot admit or deny that no federally-sponsored study has ever been conducted to determine for the purposes consistent with 13 C.F.R. §124.105(d) which racial and ethnic groups whose origins are on the Asian continent should be identified by the SBA as

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171. *Id.*

172. Response to Requests for Admission (Mar. 10, 1998), *McCrossan*, 1996 U.S. Dist. LEXIS 14721, response to request No. 10.

173. See Letter from Joseph O. Montes, Associate Administrator, Minority Small Business and Capital Ownership Development to Gary J. Gasper, Attorney, Sidley & Austin 3 (Jan. 6, 1989) (on file with authors).

174. See Requests for Admission (Mar. 10, 1998), *McCrossan*, 1996 U.S. Dist. LEXIS 14721, request No. 11.

presumptively eligible for "social disadvantage" and those which should not.<sup>175</sup>

The government was next asked about the Hispanic category, beginning with whether Congress had ever made specific findings that "persons whose racial and ethnic origins is from Portugal or Spain are deserving of the social disadvantage designation or that other persons whose origins are from other European countries are not."<sup>176</sup> The defendants responded that after "reasonable inquiries" they were unaware of whether Congress made any specific findings about whether persons from Spain and Portugal were deserving of the social disadvantaged designation, but that "Defendants further admit that the SBA has interpreted that American individuals from Portugal and Spain are of Hispanic descent and are entitled to the same presumption of Hispanic Americans."<sup>177</sup>

There is no explanation in any document about why that bureaucratic decision was made. Mr. Fisher did not know when the SBA made the decision to include Portuguese on the presumptively eligible list or why they were added.<sup>178</sup>

Persons from Portugal speak Portuguese, not Spanish, and have had their own national history since the 12th century when Alfonso Henriques became the first king of Portugal in 1150. The U.S. Census Bureau Survey of Hispanic-owned businesses does not list Portugal as an appropriate country of origin for inclusion. Actually, the SBA has produced no evidence that demonstrates that persons from European backgrounds from Spain or Portugal (who are presumed socially disadvantaged) are in fact any more socially disadvantaged than European persons from Bosnia or Ukraine (who are not presumed socially disadvantaged).

The government was also asked for admissions regarding Congressional or SBA findings concerning other Hispanic sub-groups (Mexican American, Puerto Rican, Cuban, Central

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175. *Id.*, response to request No. 12.

176. Requests for Admission (Mar. 10, 1998), *McCrossan*, 1996 U.S. Dist. LEXIS 14721, request No. 14.

177. *Id.*

178. Deposition of William Fisher at 85-85 (Mar. 16, 1998), *McCrossan*, 1996 U.S. Dist. LEXIS 14721. See also *Ass'n for Fairness in Bus., Inc. v. New Jersey*, 82 F. Supp. 2d 353 (D.N.J. 2000) (striking down a state MWBE requirement for New Jersey casino licensees on both compelling interest and narrow tailoring grounds and questioning why Portuguese were included among the favored ethnic groups).

or South American, or other Spanish or Portuguese origin) considered presumptively eligible.<sup>179</sup> The defendants replied that the SBA did not “make any findings of ‘social disadvantage’” using the requirements specified by 13 C.F.R. 124.105(c) for all or substantially all persons in each of the above-designated subgroups of Hispanic American when it designated or identified each group as “socially disadvantaged’ for the purposes of the 8(a) program.”<sup>180</sup> Further, with regard to Congress, the defendants admitted:

They have made reasonable inquiry and that, based upon information known and reasonably available, they are unable to admit or deny the remaining portion of this Request for Admission, that is whether Congress obtained any factual basis for any findings of “social disadvantage” using the requirements specified by 13 C.F.R. §124.105(c) for all or substantially all persons from each of the above-designated subgroups when the SBA designated or identified each Hispanic American subgroup as “socially disadvantaged” for the purposes of the 8(a) program.<sup>181</sup>

The plaintiffs next turned to requesting admissions about findings regarding the particular groups from Africa that are entitled to presumptive eligibility. The concept the SBA uses is that the person must be from one of the “original racial groups of Africa,”<sup>182</sup> thus excluding persons from Morocco, Algeria, and possibly Egypt. Since many anthropologists believe the origins of the human species are in Africa, it might be argued that we are all descendants of the “original racial groups of Africa.”<sup>183</sup> The defendants translate this concept into the term “Black American” which they do not further define, although they admit as they did with requests about previous groups, that neither Congress nor the SBA was required to make any findings of “social disadvantage for Black Americans.”<sup>184</sup>

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179. See Requests for Admission (Mar. 10, 1998), *McCrossan*, 1996 U.S. Dist. LEXIS 14721, request Nos. 17-18.

180. See Response to Requests for Admission (Mar. 10, 1998), *McCrossan*, 1996 U.S. Dist. LEXIS 14721, response to request No. 10.

181. Requests for Admission (Mar. 10, 1998), *McCrossan*, 1996 U.S. Dist. LEXIS 14721, request No. 18.

182. See *id.*, request No. 20.

183. See Natalie Angier, *Do Races Differ? Not Really, Genes Show*, N.Y. TIMES, Aug. 22, 2000, at F1.

184. See Requests for Admission (Mar. 10, 1998), *McCrossan*, 1996 U.S. Dist. LEXIS 14721, request Nos. 19-20.

Regarding each group, all that the defendants asserted was that there was evidence "available" to Congress that "direct federal procurement and federally-assisted procurement were being disproportionately denied to businesses owned by socially and economically disadvantaged individuals."<sup>185</sup> The government cited no basis for the determination of disproportion. No study has been released which compares the receipt of federal procurements by qualified small businesses owned by persons presumptively socially and economically disadvantaged and qualified small businesses owned by persons without that designation.<sup>186</sup> Further, the government possesses no evidence about the receipts from federal contracting broken out by specific group.

## VI. CONCLUSION

The Administration's current position is that there does not need to be a separate justification for the inclusion of each specific group granted the presumption of disadvantage.<sup>187</sup> That position is contrary to the historical development of the concept of presumptive eligibility and to the current law. *Croson*, for example, concluded that it was necessary to justify the inclusion of Eskimos and Aleuts specifically in the Richmond program.<sup>188</sup> Generalizations about the larger

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185. *Id.*, request No. 2.

186. On June 23, 1998, long after the SBA made its decisions about groups, the federal government released the so-called "benchmark limits" study which shows that SDBs were underutilized in some SIC codes and overutilized or appropriately utilized in others. 63 Fed. Reg. 357,114 (1998). On the basis of this study, the SDB program will not be applicable in SICs where there is no evidence of underutilization; neither the 8(a) nor the DOT DBE programs is bound by the study results. The study contains serious methodological flaws. See George R. La Noue, *To the "Disadvantaged" Go the Spoils?*, 138 THE PUBLIC INTEREST 91 (2000). See also John Sullivan & Roger Clegg, *More Preferences for Minority Businesses*, WALL ST. J., Aug. 24, 1998, at A13. Furthermore, the study is not group specific and treats SDBs as a single category.

187. In its motion for summary judgment in *Rothe* the Justice Department argued, "Strict scrutiny does not require Congress or Defendants to make specific findings of discrimination with respect to each of the hundreds of racial, national, and ethnic subgroups that live in the United States before taking action to remedy discrimination against the larger groups into which those subgroups fall." Motion for Summary Judgment at 7, *Rothe Dev. Corp. v. Dep't of Defense*, 49 F. Supp. 2d 937 (W.D. Tex. 1999).

188. *City of Richmond v. J.A. Croson*, 488 U.S. 469, 506. See also *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702 (9th Cir. 1997). *Monterey Mechanical* discusses the Aleuts, "a distinct people native to the western part of the Alaska peninsula and the Aleutian Islands, [who] have suffered brutal oppression repeatedly in their history." *Id.* at 714. Nevertheless, the Ninth Circuit

category of Native Americans, of which Eskimos and Aleuts are a part, were not enough. The historical record shows that, in fact, there were separate decisions made by Congress and the SBA about the groups which should be granted the presumption based on national or racial origin over a period of two decades. Since the decision to grant or deny presumptive eligibility was made separately for each group, it follows that evidence must exist to establish a predicate for each separate group. If persons from some Asian and European countries, but not others, are considered socially disadvantaged, that decision has to be based on evidence to survive strict scrutiny. Similarly, if the only African Americans entitled to the presumption are descendants of the "original peoples," but not others who have populated the continent for centuries, there has to be a documented predicate. Finally, consistent definitions of what it means to be identified with a particular group are essential in multicultural America, if group based preferences are to meet strict scrutiny.

Federal regulations are quite clear about which particular racial and ethnic group identifications create the presumption of social disadvantage. The regulations list forty-six different groups. For example, if a person identifies as a Nepalese American, he or she is entitled to the presumption of social disadvantage, while a person identifying as an Afghani American is not. A Basque from Spain is eligible; a Basque from France is not. Congress added some groups; the SBA added others.

As this review shows, no consistent rationale for favoring the groups enjoying the presumption exists. No statistical measure of the comparative social disadvantage of included and excluded groups has ever been made by the government during the more than two decades the concept of presumptive eligibility has existed. No measure of actual discrimination against particular groups has ever been attempted. All decisions on group eligibility were made before *Croson* and not even the *Adarand* decision has prompted any review of the preferred groups. There has never been a review of whether groups, once granted preferred status, should

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declared it would be frivolous to suggest that the State of California had actively or passively discriminated against Aleuts in the awarding of construction contracts. *Id.*



continue to have it although there have been enormous demographic changes in the United States in the recent years. For the federal procurement preferences, the operative guidelines have been "once in, always in."

For a firm owner to be considered socially disadvantaged, the person must be "identified" with one of the presumptively eligible groups. But what does that identification actually mean? SBA officials testified that the agency has no working definition of either the Hispanic or Asian American category. To be a Hispanic, a person need not speak Spanish, have a Spanish last name or have any particular identification with Hispanic organizations. There are no rules or policies that would determine whether persons of mixed parentage, an increasingly common situation in the United States, are considered socially disadvantaged. Nor apparently is there any social achievement, no matter how distinguished, that would render a person identified with one of the listed groups as no longer socially disadvantaged. Thus, no combination of education, civic or cultural attainment or recognition renders a person no longer socially disadvantaged. Movie stars and cabinet officers identifying with any of the listed groups belonging to one of the listed groups are still considered "socially disadvantaged," while no amount of personal hardship could be used by a person from an unlisted group to claim social disadvantage. That person must undertake the bureaucratic burden that very few have successfully lifted to prove that, as an individual, he or she has been discriminated against. In contrast, those presumptively socially disadvantaged have only to check a box indicating racial or ethnic status. They do not have to prove anything about their social status. In particular, they do not have to prove that they or their company have suffered from discrimination by the federal government or anyone else.

While it might have been reasonable to assume that some place in the federal administrative process there must be studies or at least a set of rules for making the decision of which groups should receive the preference and which should not, that is not the case. For an issue of such huge economic importance, affecting billions of dollars of federal contracting and major constitutional significance after *Croson* and *Adarand*, it is extraordinary that there are no such study or rules. It has been only after the discovery process in

*McCrossan*, *Sherbrooke*, and now *Rothe*, that it is clear that the government does not have this information. The process from beginning to end has been political and now the government officials administering the program cannot even remember how the decisions were made. Even more surprising, in the light of the hostile reception the concept of presumptive eligibility has received from the courts and the extensive post-*Adarand* review about other related issues, the government has announced no plans to re-examine the list of included and excluded groups at any time in the future.

Perhaps if the decisions about group social disadvantage had been made after *Croson*, the decisions would have been based on some objective measures. Still in modern America, group measures of social disadvantage will be crude and over-inclusive. In any event, the concept of presumptive eligibility as used by the SBA and relied on by many other agencies is trapped in a time warp without any social science basis. It reflects no demographic reality and its presumptions are really stereotypes, inconsistent with the development of law in the post-*Croson* and post-*Adarand* era.<sup>189</sup> The courts have made it clear that rights belong to individuals, not groups. Presumptive eligibility should be replaced with a policy that targets aspiring entrepreneurs of any race or ethnicity who have endured measurable disadvantage.

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189. The most recent pronouncement of the Supreme Court regarding racial classifications was in *Rice v. Cayetano*, 120 S.Ct. 1044 (2000), as follows:

One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own personal merit and essential qualities. An inquiry into ancestral lines is not consistent with respect based on the unique personality each of us possesses, a respect the Constitution itself secures in its concern for persons and citizens.

*Id.* at 1057.

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