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REVISITING CLASS-BASED AFFIRMATIVE ACTION IN GOVERNMENT CONTRACTING

I. INTRODUCTION

“Unlike a private buyer, the government is interested, as the sovereign, in achieving a wide variety of social and economic goals.”¹ Indeed, government contracting has been a means of effectuating socioeconomic policy in the United States for nearly half of a century.² But these sorts of programs, particularly those that classify based on race, are extremely controversial³ and face a variety of legal challenges. The Supreme Court of the United States has severely limited the contexts in which race-based affirmative action may be used,⁴ and five states—California, Washington, Michigan, Nebraska, and Arizona—have banned such programs by ballot initiative.⁵ Despite this backdrop, government contracting can still be used to further socioeconomic policy, but to do so, the focus must move away from race. Politicians across the country have recognized this and are looking for ways to continue affirmative action—like contracting programs that comport with the developing law.⁶

1. John Montague Steadman, “Banned in Boston—and Birmingham and Boise and . . .”: *Due Process in the Debarment and Suspension of Government Contractors*, 27 HASTINGS L.J. 793, 799 (1976).

2. See Christopher R. Noon, *The Use of Racial Preferences in Public Procurement for Social Stability*, 38 PUB. CONT. L.J. 611, 612 (2009) (“The use of government procurement to address these inequities rapidly grew in popularity in the years following the civil rights movement [of the 1960s].”).

3. See *infra* notes 17–22 and accompanying text.

4. See *infra* note 24 and accompanying text.

5. See *infra* note 26 and accompanying text.

6. See, e.g., Matthew Hansen, *Steering City Work to Small Firms?*, OMAHA WORLD-HERALD, July 1, 2009, at A1 (describing a committee formed by Omaha’s mayor to redesign the Protected Business Enterprise program after a ballot initiative made the city’s use of race and gender unconstitutional in Nebraska); Jim Harger, *City Backs off “Bid Discounts.”* GRAND RAPIDS PRESS, Apr. 13, 2007, at B3 (describing a challenge to a Michigan city’s use of race and gender in a contract preference program as redesigned after the ban took effect); Marisa Schultz, *Panel Tells Michigan How to Bypass Prop 2*, DETROIT NEWS, Mar. 8, 2007, at A1 (quoting the spokeswoman for Michigan’s governor, stating that she would “review [a report interpreting Michigan’s ban] and decide what, if any, steps [the state] need[s] to take”); Memorandum from Don Richards, Senior Research Analyst, Wyo. Legislative Serv. Office, to Representative-Elect Quarberg, Wyo. State Legislature 1 (Dec. 23, 2004), available at <http://legisweb.state.wy.us/PubResearch/2004/04TM078.pdf> (noting the interest of an incoming state representative in Wyoming, a state that does not have an affirmative action ban, in whether any states have such programs). Some lawmakers are explicit about their desire to continue minority participation through these alternative programs. See *Omaha Eyes Minority Contract Incentives*, KETV (Oct. 15, 2009), <http://www.ketv.com/news/21311491/detail.html> (describing a city councilman who advocates targeting government contracts to disadvantaged census tracts to “quadruple the number of minority-owned firms doing business with the city”).

This Note focuses on existing class-based alternatives to race-based affirmative action in government contracting. Part II describes the history of affirmative action,⁷ the state-by-state anti-affirmative action movement,⁸ and the theory of class-based affirmative action.⁹ Then, three existing programs intended to encourage job development in disadvantaged areas through government contracting will be described, analyzed, and assessed to demonstrate the myriad ways of structuring such a program.¹⁰ Part III synthesizes this analysis, the literature analyzing the effect of these programs, and the theories behind class-based affirmative action into recommendations for public policy makers who wish to continue to use government contracting as a means of impacting socioeconomic policy in the face of the anti-affirmative action movement.¹¹ This Note is not, however, intended to give due consideration to state-by-state peculiarities such as the differences in state and local contracting law,¹² state constitutional law,¹³ and variations in voter

7. See *infra* Part II.A.

8. See *infra* Parts II.B & II.C.1.

9. See *infra* Part II.C.2.

10. See *infra* Part II.B.

11. See *infra* Part III.

12. Many governments are required to award contracts to the “lowest and best” bidder, “lowest responsible bidder,” or some variation thereof. 10 MCQUILLIN MUNICIPAL CORPORATIONS § 29:81 (3d ed. 2009). Even where required to award the contract to the “lowest” bidder, some courts refuse to apply a literal construction. *Id.* (citing *Thompson Elecs. Co. v. Easter Owens/Integrated Sys., Inc.*, 702 N.E.2d 1016 (Ill. App. Ct. 1998)). The term “responsible” may include evaluation of compliance with affirmative action programs that were in the bidding requirements. MCQUILLIN MUNICIPAL CORPORATIONS, *supra*, § 29:82 (citing *Associated Gen. Contractors of Cal., Inc. v. City & Cnty. of S.F.*, 619 F. Supp. 334 (N.D. Cal. 1985)). It may even include considerations of the bidder’s social responsibility. See MCQUILLIN MUNICIPAL CORPORATIONS, *supra*, § 29:82 (citing *Sw. Wash. Chapter, Nat’l Elec. Contractors Ass’n v. Pierce Cnty.*, 667 P.2d 1092, 1096 (Wash. 1983)). The general rule is that “lowest and best” bidder can be defined by legislation to include consideration of factors such as minority group representation. MCQUILLIN MUNICIPAL CORPORATIONS, *supra*, § 29:84. Some courts, however, hold that only concerns of quality and cost can be considered. See, e.g., *Arrington v. Associated Gen. Contractors of Am.*, 403 So. 2d 893, 898–99 (Ala. 1981) (invalidating a set-aside requirement by only allowing bid specifications “reasonably related to contract requirements or the quality of the product or service in question”); *Ga. Branch, Associated Gen. Contractors of Am., Inc. v. City of Atlanta*, 321 S.E.2d 325, 328 (Ga. 1984) (holding that a set-aside program based on sex and race conflicts with “lowest and/or best bidder” standard). This debate mainly centers on the goals of public contracting. Certain courts are concerned only with price and quality. See *Atlanta*, 321 S.E.2d at 327–28. A competing conceptualization of the goals of government contracting is “[p]rotection of the general public from fraud, collusion, and favoritism; and . . . [p]rovision of a fair forum for those interested in bidding on public contracts.” *Pierce Cnty.*, 667 P.2d at 1096. The traditional definition of affirmative action is more in line with the second conceptualization of public contracting. See *id.* (noting that affirmative action presents no danger of fraud and encourages a fair forum by encouraging bids by those disadvantaged from past discrimination).

13. State constitutions may impose stricter equal protection requirements than the federal constitution. See, e.g., *State ex rel. Dep’t of Transp. & Labor v. Enserch Alaska Constr., Inc.*, 787 P.2d 624, 631–32 (Alaska 1989) (invalidating a hiring preference for residents of economically

approval of government preferences, although these are essential concerns that public policy makers should bear in mind.

II. THE HISTORY, THEORY, AND STATUTORY EMBODIMENT OF CLASS-BASED AFFIRMATIVE ACTION

A. *The Evolving Status of Race-Based Affirmative Action*

President John F. Kennedy brought affirmative action programs to the forefront when he issued an executive order requiring that contractors of the federal government “take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin.”¹⁴ This required federal contractors to do more than prohibit discrimination in their businesses; it required active attempts to encourage the employment of minorities.¹⁵ Since then, affirmative action has been incorporated into a variety of social programs outside of government contracting, including education and government employment.¹⁶

Even a casual observer of American politics will recognize that affirmative action is “one of the most controversial and divisive issues ever placed on the national agenda in the United States.”¹⁷ The matter has been contentious from the beginning¹⁸ and remains so to this day.¹⁹ Many

disadvantaged areas on public works projects under Alaska’s equal protection clause, which “provides greater protection to individual rights than does the U.S. Constitution”).

14. Exec. Order No. 10,925, 3 C.F.R. 86, 88 (1962). The early history of government-sponsored affirmative action is largely one of executive orders. President Kennedy is thought to have “coined the term” affirmative action. Noon, *supra* note 2, at 612. Kennedy built on previous executive orders by President Franklin D. Roosevelt, who outlawed discrimination by companies involved in the defense industry, Exec. Order No. 8802, 3 C.F.R. 109 (1941), and President Harry Truman, who established a Fair Employment Board to review complaints of discrimination under the program, Exec. Order No. 9980, 3 C.F.R. 720 (1948).

15. See J. EDWARD KELLOUGH, UNDERSTANDING AFFIRMATIVE ACTION: POLITICS, DISCRIMINATION, AND THE SEARCH FOR JUSTICE 7 (2006).

16. Affirmative action, broadly defined, is “a variety of strategies designed to enhance employment, educational, or business opportunities for groups, such as racial or ethnic minorities and women, who have suffered discrimination.” *Id.* at 3.

17. *Id.*; see also W. ROBERT GRAY, THE FOUR FACES OF AFFIRMATIVE ACTION: FUNDAMENTAL ANSWERS AND ACTIONS 1 (2001) (observing that affirmative action is “one of the most controversial, contradiction-riddled, and confusing public issues of our day”).

18. See KELLOUGH, *supra* note 15, at 3.

19. See Jeffrey M. Jones, *Race, Ideology, and Support for Affirmative Action*, GALLUP POLL (Aug. 23, 2005), <http://www.gallup.com/poll/18091/Race-Ideology-Support-Affirmative-Action.aspx>. In 2005, 50% of Americans favored “affirmative action programs for racial minorities,” while 42% opposed them. *Id.* Blacks supported the programs at a rate of 72%, while 44% of whites were supportive. *Id.* Blacks supported the programs at rates over 70% regardless of political ideology, while

opponents of affirmative action label it “reverse discrimination.”²⁰ The power of this critique is exemplified by a “reverse discrimination” case²¹ being one of the most significant issues in the recent confirmation of Justice Sonia Sotomayor to the Supreme Court of the United States.²²

As the public has struggled with the policy rationales underlying affirmative action, the Supreme Court has struggled with how such programs comport with equal protection jurisprudence.²³ After a period of doctrinal development,²⁴ the Supreme Court now applies strict scrutiny to any government classification based on race, including race-based affirmative action.²⁵ Meanwhile, a group of committed opponents of

liberal whites were more likely to be more supportive of the programs than were conservative whites. *See id.*

20. *See* REVERSE DISCRIMINATION 3 (Barry R. Gross ed., 1977). Reverse discrimination has been defined as “giving special or preferred treatment to persons who are members of racial or religious or ethnic groups or a sex against whose membership generally unjust discrimination was or is being practiced.” *Id.*

21. *Ricci v. DeStefano*, 530 F.3d 87 (2d Cir. 2008) (per curiam), *rev'd*, 129 S. Ct. 2658 (2009). Then-Circuit Judge Sotomayor served on the panel that decided *Ricci*. *Id.* at 87. While *Ricci* dealt with “reverse discrimination,” it was not about affirmative action per se. *See* 129 S. Ct. at 2677. The Supreme Court distinguished “an employer’s affirmative efforts to ensure that all groups have a fair opportunity to apply for promotions and to participate in the process by which promotions will be made,” which is essentially an affirmative action program, from “intentional discrimination for the asserted purpose of avoiding or remedying an unintentional disparate impact” after the fact. *See id.* Despite the ex post versus ex ante contextual difference, both approaches are considered reverse discrimination, as the emphasis of the critique is not on time, but rather “unfair treatment” to whites just “because other white males have so discriminated.” *See* Lee Nisbet, *Affirmative Action—A Liberal Program?*, in REVERSE DISCRIMINATION, *supra* note 20, at 50, 52–53.

22. *See* Ramesh Ponnuru, Editorial, *When Judicial Activism Suits the Right*, N.Y. TIMES, June 24, 2009, at A29 (noting that the “two biggest controversies” in Justice Sotomayor’s confirmation were *Ricci* and comments about the impact of a judge’s ethnicity in her decision making).

23. The Supreme Court’s first review of an affirmative action program was in *DeFumis v. Odegaard*, 416 U.S. 312 (1974). KENT GREENAWALT, DISCRIMINATION AND REVERSE DISCRIMINATION 173 (1983). The court avoided the merits because the challenger of the program was set to graduate regardless of the outcome, mooting the case. 416 U.S. at 319–20. Subsequent to *DeFumis*, the Supreme Court has debated the standard of judicial review that should be applied to classifications based on race. *See infra* note 24.

24. By 1990, a series of fractured decisions had produced a two-tiered approach to the judicial review of affirmative action programs: federal government programs received intermediate review, and state and local government programs received strict scrutiny. *See Metro Broad., Inc. v. FCC*, 497 U.S. 547, 565–66 (1990) (synthesizing precedent to justify imposition of different levels of scrutiny on different levels of government). In a sign of just how controversial affirmative action programs are, the Supreme Court explicitly overruled this tiered approach in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

25. *Adarand* held that “all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny.” 515 U.S. at 227. And although the Supreme Court has reaffirmed a limited role for affirmative action in higher education to further diversity interests, that right was extremely cabined. *See Grutter v. Bollinger*, 539 U.S. 306, 334 (2003) (explaining the tailoring analysis in cases raising the diversity interest); *id.* at 343 (suggesting that diversity will no longer be a compelling interest in twenty-five years).

affirmative action has succeeded in persuading the voters in the states of California, Washington, Michigan, Nebraska, and Arizona to ban such programs by ballot initiative.²⁶ As will be seen, affirmative action has literally become illegal “[w]ithout a [c]ase”²⁷ in the states where these ballot initiatives have passed.

B. Ward Connerly and The Modern Anti-Affirmative Action Movement

Today, the “the most high-profile crusader against affirmative action” is Ward Connerly.²⁸ Connerly was a member of the University of California Board of Regents, where he successfully led an initiative to ban the University’s use of race in admissions.²⁹ He is the founder and president of the American Civil Rights Institute, which describes itself as “a national, not-for-profit organization aimed at educating the public about the need to move beyond race and, specifically, racial and gender preferences.”³⁰ Connerly has successfully led ballot initiatives in five states to end race-based affirmative action.³¹

Connerly believes that “the Supreme Court’s politically correct decisions” have made “Congress and state legislatures . . . reluctant to take the necessary steps to enforce the Civil Rights Act or to remove ‘affirmative action’ programs granting preferential treatment on the basis of race, sex, color, ethnicity, or national origin.”³² He also believes that blacks “have become addicted” to affirmative action.³³ He frames his views not as opposition to affirmative action, which is an “amorphous

26. See *infra* Part II.B; see also Richard Kahlenberg, *Arizona’s Affirmative Action Ban*, CHRON. OF HIGHER ED. (Nov. 3, 2010), <http://chronicle.com/blogs/innovations/arizona’s-affirmative-action-ban/27794>.

27. Alexander S. Elson, Note, *Disappearing Without a Case—The Constitutionality of Race-Conscious Scholarships in Higher Education*, 86 WASH. U. L. REV. 975, 975 (2009).

28. Dan Frosch, *Vote Results are Mixed on a Ban on Preference*, N.Y. TIMES, Nov. 8, 2008, at A19.

29. *About the American Civil Rights Institute*, AM. CIV. RTS. INST., http://www.acri.org/ward_bio.html (last visited May 1, 2011).

30. *Id.* Each state Connerly targets in this movement adopts an analogous organization. See, e.g., ARIZ. CIV. RTS. INITIATIVE, <http://www.adversity.net/supertuesday2008/arizona.htm> (last visited May 1, 2011); MICH. CIV. RTS. INITIATIVE, http://www.adversity.net/michigan/mcri_mainframe.htm (last visited May 1, 2011); NEB. CIV. RTS. INITIATIVE, <http://www.nebraskacri.org/media.html> (last visited May 1, 2011).

31. See Kahlenberg, *supra* note 26.

32. Ward Connerly, *Achieving Equal Treatment Through the Ballot Box*, 32 HARV. J.L. & PUB. POL’Y 105, 108 (2009).

33. George Skelton, *After 209, What’s Next for Connerly?*, L.A. TIMES, Nov. 18, 1996, at 3. Connerly also stated, “I sense this yearning among white people just to really become color blind. They want black people to assimilate. And black people are fighting it with every fiber of their being.” *Id.*

term” that “means different things to different people,” but rather as opposition to discrimination.³⁴ This explanation of his beliefs has led some who support affirmative action, including people who have benefited from it, to sign Connerly’s petitions, leaving them to later realize that they would not have signed the petitions had they understood the implication of their signatures.³⁵ A federal court found that Connerly’s tactics in one state amounted to “systematic voter fraud by telling voters that they were signing a petition supporting affirmative action,” but the court ultimately found no violation of federal law because Connerly’s organization “appears to have targeted all . . . voters for deception without regard to race.”³⁶

Connerly began his movement in California,³⁷ where in 1996, 54.55% of voters³⁸ approved a constitutional amendment requiring that the state “not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.”³⁹ The ballot initiative, Proposition 209, was followed and debated nationally, with both President Bill Clinton and then-presidential candidate Bob Dole taking public positions.⁴⁰ For his influential role in passing this ban, a Republican fundraising group labeled Connerly “the greatest hero of the 1996 elections.”⁴¹

Opponents of Proposition 209 challenged its validity under the Equal Protection Clause and Title VII.⁴² A federal district court judge entered a preliminary injunction barring the implementation of Proposition 209

34. See Dan Frosch, *Colorado Petition Draws Charges of Deception*, N.Y. TIMES, Apr. 1, 2008, at A16. Connerly does not see himself as rejecting diversity, but rather “diversity as an excuse to discriminate.” See Skelton, *supra* note 33. This definition of discrimination is an example of the “reverse discrimination” critique described in Part II.A.

35. See Frosch, *supra* note 34.

36. *Operation King’s Dream v. Connerly*, No. 06-12773, 2006 WL 2514115, at *1 (E.D. Mich. Aug. 29, 2006).

37. See Tamar Lewin, *Colleges Regroup after Voters Ban Race Preferences*, N.Y. TIMES, Jan. 26, 2007, at A1 (noting that Connerly thought California was “ahead of its time”).

38. BILL JONES, CALIFORNIA SEC’Y OF STATE, STATEMENT OF VOTE 13 (1996), available at <http://www.sos.ca.gov/elections/sov/1996-general/1996-general-sov.pdf>.

39. See CAL. CONST. art. I, § 31(a).

40. See B. Drummond Ayres, Jr., *Affirmative Action Measure Nears a High-Profile Finish*, N.Y. TIMES, Nov. 4, 1996, at B6 (noting that Proposition 209 received more national attention than any of the other ninety ballot initiatives on California’s ballot that year). President Clinton opposed Proposition 209, while Senator Dole supported it. *Id.*

41. See Skelton, *supra* note 33.

42. See Reynolds Holding, *Prop. 209 Is Blocked A 2nd Time: State likely to appeal U.S. judge’s injunction*, S.F. CHRON., Dec. 24, 1996, at A1 (noting suit filed day after election).

based on the likelihood of the challenge's success on the merits.⁴³ Ultimately, the United States Court of Appeals for the Ninth Circuit found that the amendment was constitutional and that Title VII did not preempt the amendment, so the preliminary injunction was vacated.⁴⁴ Subsequent challenges to these state bans on affirmative action have failed without exception.⁴⁵

Connerly's decision to next target the state of Washington surprised many observers.⁴⁶ The state had a history of electing minorities to important positions and had some of the "most inclusive" preference programs, even preferring white men in certain contexts.⁴⁷ Before Connerly signed on to the Washington movement, the organization leading it was "foundering" to achieve the 180,000 signatures needed to place the issue on the ballot.⁴⁸ After Connerly's American Civil Rights Initiative donated more than \$178,000 and lent its support, the requisite signatures were gathered.⁴⁹ The measure, Initiative 200, ultimately passed with 58% of the vote.⁵⁰ The significance of Connerly's involvement with such a movement was becoming increasingly clear.⁵¹

43. *Coal. for Econ. Equity v. Wilson*, 946 F. Supp. 1480 (N.D. Cal. 1996). Connerly believed this "[ma]de] no sense, and will go down in history as one of the most perverse examples of jurisprudence." Tim Golden, *U.S. Judge Blocks Enforcing of Law Over Preferences*, N.Y. TIMES, Dec. 24, 1996, at A1.

44. *Coal. for Econ. Equity v. Wilson*, 122 F.3d 692, 710–11 (9th Cir. 1997).

45. See *infra* notes 58, 63 and accompanying text.

46. See Steven A. Holmes, *Washington State is Stage for Fight Over Preferences*, N.Y. TIMES, May 4, 1998, at A1.

47. *Id.* However, preferences for white males may be the least "inclusive" preferences as, historically speaking, most government-sponsored discrimination was in favor of white males. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 781–82 (2007) (Thomas, J., concurring) ("Can we really be sure that the racial theories that motivated *Dred Scott* [*v. Sandford*, 60 U.S. (19 How.) 393 (1857)] and *Plessy v. Ferguson*, 163 U.S. 537 (1896)] are a relic of the past or that future theories will be nothing but beneficent and progressive? That is a gamble I am unwilling to take, and it is one the Constitution does not allow."). This underscores the conceptual difficulty of determining what is "inclusive," particularly in the race context. Cf. *supra* note 20 and accompanying text (discussing similar issues in the context of the "reverse discrimination" debate).

48. *Id.*

49. *Id.* The American Civil Rights Institute donated more than half of the total funds that the Washington organization collected. Connerly's influence is further demonstrated by the fact that he did not become involved with a similar measure in Florida, where less than 40,000 of the required 435,000 signatures were gathered. See *id.* When the Washington organizers were experiencing similar difficulties, Connerly was able to help them achieve their objectives. *Id.*

50. Steven A. Holmes, *Victorious Preference Foes Look for New Battlefields*, N.Y. TIMES, Nov. 10, 1998, at A25. Unlike California, the measure passed as a statute rather than a constitutional amendment because legislative action is required to amend the Washington constitution. *Id.*; cf. WASH. REV. CODE § 49.60.400 (2008) (codifying Initiative 200).

51. See Holmes, *supra* note 50 (observing shortly after Initiative 200 was approved that "[w]hichever state Mr. Connerly . . . and his allies decide to make their next target, liberal civil rights organizations that favor affirmative action will face a daunting task").

The next stop for Connerly was Michigan, where he tapped into the controversy surrounding *Gratz v. Bollinger*⁵² and *Grutter v. Bollinger*,⁵³ two Supreme Court cases that further defined the permissible bounds of affirmative action through challenges to the admissions processes at the University of Michigan. Jennifer Gratz herself led the effort with assistance from Connerly.⁵⁴ Support for this measure was thought to be high because of the tough economic conditions in Michigan, which was plagued with “high unemployment, high migration of young people and a wrenching transition away from manufacturing.”⁵⁵ The media reported that voters who felt that the measure would have a negative economic impact for their race in particular would be less supportive of race-conscious measures.⁵⁶ Against this backdrop of Supreme Court cases, racial tension, and a struggling economy, Proposal 2 passed with 58% of the vote.⁵⁷ Although this initiative was challenged in federal court, it was ultimately upheld.⁵⁸

52. 539 U.S. 244 (2003) (finding that the University of Michigan’s admissions process for undergraduates violated the Equal Protection Clause).

53. 539 U.S. 306 (2003) (finding that the University of Michigan’s admissions process for law students did not violate the Equal Protection Clause).

54. Tamar Lewin, *Campaign to End Race Preferences Splits Michigan*, N.Y. TIMES, Oct. 31, 2006, at A1. Gratz contacted Connerly shortly after the Supreme Court heard her case, and the two of them began their multiyear effort to ban affirmative action in Michigan. *Id.*

55. *Id.*

56. *See id.* (noting that areas with a high percentage of whites and a “somber economic picture” tend to support the ban, while majority black areas oppose the ban). Such an effect might not occur if the preferences were based on economics rather than race. *See* Catherine Rampell, *Support Builds For A Tax Credit to Help Hiring*, N.Y. TIMES, Oct. 7, 2009, at A1 (noting that an increasing number of policymakers are considering financial assistance to companies that can create jobs in the face of economic downturn). *Compare* Laura D’Andrea Tyson, *Needed: Affirmative Action for the Poor*, BUS. WK., July 7, 2003, at 24 (indicating that “two-thirds of Americans support preferences in college admissions” based on economic background), *with* Jones, *supra* note 19 (noting that Americans are almost evenly divided on their support of affirmative action). If economic hardship does indeed increase support for these kinds of programs, Michigan should have one of the highest levels of support. *See* Susan Saulny, *Michigan Lawmakers Face Deadline on Budget Deal*, N.Y. TIMES, Sept. 29, 2009, at A28 (“Michigan is suffering from a protracted economic downturn that predates the national recession.”). Of course, the more the economy struggles, the more state budgets struggle, leaving less money for these programs. *Cf.* Erik Eckholm, *Sharp Reversal For California Over Welfare*, N.Y. TIMES, Oct. 7, 2009, at A1 (describing California’s budget shortfall’s negative effects on anti-poverty programs). For a more detailed discussion of issues affecting political practicability, *see infra* Part III.

57. *See* Tamar Lewin, *Michigan Rejects Affirmative Action, and Backers Sue*, N.Y. TIMES, Nov. 9, 2006, at P16. Proposition 2 has been codified in Michigan’s state constitution at article I, section 26.

58. *See* Operation King’s Dream v. Connerly, No. 06-12773, 2006 WL 2514115, at *1 (E.D. Mich. Aug. 29, 2006). Despite his technical compliance with voter fraud laws, the judge criticized Connerly in dicta for what he perceived to be unfair tactics in the collection of signatures. *Id.*; *accord supra* note 36 and accompanying text.

In 2008, Connerly targeted Nebraska, where a similar ban passed with over 57% of the vote.⁵⁹ In response to fraud allegations similar to those raised in Michigan, Connerly contended that “any fraud was isolated and shouldn’t affect the vote.”⁶⁰ These fraud-based challenges suffered the same fate as the challenges in Michigan⁶¹ and California⁶² and were rejected by the courts.⁶³

Despite his success in Nebraska in 2008, that year also generated Connerly’s first noteworthy failures in his movement to ban affirmative action by ballot initiative.⁶⁴ His organization failed to get enough signatures in Missouri⁶⁵ and Arizona⁶⁶ to even place the initiative on the ballots. Connerly was also handed his first failure at the ballot box in the state of Colorado, where the initiative failed by less than a percentage point.⁶⁷ But Connerly did not leave these states for dead—he attempted to get a similar measure on the Missouri ballot in 2010⁶⁸ and succeeded in passing such a ban in Arizona.⁶⁹

59. See Frosch, *supra* note 28.

60. Matthew Hansen, *Nebraska Voters Back Affirmative Action Ban*, OMAHA WORLD-HERALD, Nov. 5, 2008, at 14W.

61. See *supra* note 58 and accompanying text.

62. See *supra* notes 42–44 and accompanying text.

63. See *State ex rel. Hall v. Gale*, No. CI08-4055 (Neb. D. Ct. Jan. 22, 2009). The court noted “in passing[] that those who support affirmative action believe that describing Initiative 424 as a ‘civil rights’ initiative is misleading, while those who believe that reverse discrimination is the result of affirmative action do not.” *Id.* at n.2.

64. See Frosch, *supra* note 28.

65. Kavita Kumar, *Affirmative Action Critic Vows He’ll Try Again*, ST. LOUIS POST-DISPATCH, May 6, 2008, at D1. Connerly attributed this failure to litigation regarding the wording of the ballot initiative and vowed to return in 2010. *Id.* The Missouri Secretary of State had written a description of the ballot initiative that a lower court found “insufficient or unfair.” See *Asher v. Carnahan*, 268 S.W.3d 427, 429 (Mo. Ct. App. 2008) (discussing the trial court’s findings); see also Kumar, *supra* (discussing this challenge and noting that the movement’s leaders blamed the Secretary of State’s wording and the subsequent challenge for the failure to collect signatures by not leaving them enough time). However, the movement’s challenge to the wording of the ballot initiative was dismissed as moot when the signatures were not turned in. See *Asher*, 268 S.W.3d at 429.

66. *Group Abandons Lawsuit Over Affirmative Action*, DESERET MORNING NEWS, Aug. 31, 2008, at A11. While the Arizona Civil Rights Initiative challenged the determination of insufficient signatures in court, it dropped that challenge due to time constraints and vowed to take the issue up again in 2010. *Id.*

67. See Frosch, *supra* note 28. Polls conducted in the months leading up to the election indicated strong support of the measure. *Id.* Despite these early indications of probable success, Connerly downplayed the loss, saying that he was nervous about this state and that the polls showing him with an advantage “made [him] laugh,” but he vowed to carry on into other unidentified states. See Kevin Flynn, *Civil Rights Initiative Defeated: Amendment 46 Would Have Ended Affirmative Action*, ROCKY MTN. NEWS, Nov. 7, 2008, at 5.

68. See MO. SEC’Y OF STATE, APPROVED BALLOT INITIATIVE 2010–001 (2010), available at <http://www.sos.mo.gov/elections/2010petitions/2010-001.asp>.

69. See *supra* note 26 and accompanying text.

C. Class-Based Affirmative Action

The need for alternatives to race-based affirmative action became increasingly clear as Connerly continued to have success banning race-based affirmative action across the United States. This Part describes the history and theory of class-based affirmative action—one such alternative that allows the state to continue using government contracting to further socioeconomic policy.

1. Political Genesis

Government contracting policies targeting areas of high unemployment have existed since the 1950s, when the federal government instituted the Labor Surplus Area (LSA) program.⁷⁰ This program established preferences to encourage business development in areas of high unemployment.⁷¹ Concerns about the legality of set-asides, the interplay of different statutes authorizing different levels of set-asides for different programs, the lack of mandatory language, the fact that the program only required participants to *agree* to select subcontractors in line with the policy, and a lack of enforcement mechanisms made the LSA program “confusing and unclear.”⁷² As a result of these failures, the program was gutted and effectively discontinued by Congress in 1994.⁷³ But President Clinton was not ready to completely abandon the program; instead, he sought to “substantially revamp[]” it.⁷⁴

As the Supreme Court continued to articulate the constitutional limits to race-conscious affirmative action,⁷⁵ politicians who supported using public contracting as a means of effectuating socioeconomic policy generally adopted one of two approaches: (1) comply with the affirmative action decisions and look for “loopholes” contained in them, or (2) “[r]ethink the reasons for set-aside programs and, mindful of the imperative for color-blind policies, implement a different type of

70. See Deirdre Roney, Note, *HUBZones: The Class-Based Idea*, 32 PUB. CONT. L.J. 933, 938 & nn.39–40 (2003) (citing JOHN CIBINIC, JR. & RALPH NASH, JR., *FORMATION OF GOVERNMENT CONTRACTS* 628 (1st ed. 1982)).

71. Roney, *supra* note 70, at 938 & nn.39–40.

72. See *id.* (citing CIBINIC & NASH, *supra* note 70, at 628–31).

73. Pub. L. No. 103-355, § 7206(c), 108 Stat. 3243, 3382 (1994); Pub. L. No. 103-465, § 342(d), 108 Stat. 4809, 4953 (1994); see also Roney, *supra* note 70, at 938.

74. See Michael K. Frisby, *Labor-Surplus Preferences Endangered by Clinton's Affirmative Action Review*, WALL ST. J., June 2, 1995, at A10.

75. See *supra* notes 23–24 and accompanying text.

economic set-aside program.”⁷⁶ Both politicians who favored⁷⁷ and politicians who opposed⁷⁸ race-based affirmative action began to consider alternative programs out of the LSA mold. This reconsideration culminated in the adoption of the Historically Underutilized Business Zone (HUBZone) program.⁷⁹ And as ballot initiatives preclude more states and municipalities from considering race in crafting affirmative action programs,⁸⁰ local legislators are left to consider HUBZone-like proposals because the constitutional “loopholes”⁸¹ that previously permitted the consideration of race are now effectively closed.⁸²

2. Theoretical Goals and Concerns

The political rhetoric that focused on “replac[ing] group affirmative action . . . rather than . . . wiping out affirmative action by itself”⁸³ spawned an academic literature of class-based affirmative action that has attempted to set out the underlying theory and goals of such programs.⁸⁴ Class-based affirmative action plants its moral roots in the furtherance of equal opportunity, as “[c]lass preferences [are designed to] indirectly compensate for past discrimination, bring about a natural integration, and provide a bridge to a color-blind future.”⁸⁵ Because of this equal

76. See Edward I. Koch, *Equal Opportunity – Without Minority Set-Asides*, N.Y. TIMES, Feb. 20, 1989, at A19.

77. President Bill Clinton believed that affirmative action was “still needed,” but contemplated a program that would provide a preference to businesses in “distressed communities” regardless of the owner’s race or gender. Michael K. Frisby, *Clinton Sees Need for Affirmative-Action Plans but May Open Set-Aside Programs to Whites*, WALL ST. J., July 14, 1995, at A14. Clinton considered the pendency of *Adarand* in deciding when to release the details of his new program. See Frisby, *supra* note 74.

78. Speaker of the House Newt Gingrich framed the issue as preferring to “talk about how do we replace group affirmative action with effective help for individuals, rather than just talk about wiping out affirmative action by itself.” John F. Harris, *President May Appoint Panel to Study Preference Programs*, WASH. POST, Apr. 10, 1995, at A1. Gingrich was opposed to the traditional model of affirmative action. See Editorial, *A New Tack on Affirmative Action: Gingrich Rightly Warns Against Using the Issue to Divide Americans*, L.A. TIMES, Aug. 8, 1995, at B8 (noting that Gingrich opposed “racial quotas and set-asides”).

79. See *infra* Part II.D.

80. See *supra* Part II.B.

81. See *supra* note 76 and accompanying text.

82. See *supra* note 6 and accompanying text.

83. See Harris, *supra* note 78 (quoting Newt Gingrich).

84. Richard D. Kahlenberg has written extensively on the subject, driving its development in the legal literature. See RICHARD D. KAHLENBERG, *THE REMEDY: CLASS, RACE, AND AFFIRMATIVE ACTION* (1996) [hereinafter KAHLENBERG, *THE REMEDY*]; Richard D. Kahlenberg, *Class-Based Affirmative Action*, 84 CALIF. L. REV. 1037 (1996) [hereinafter Kahlenberg, *Class-Based Affirmative Action*].

85. See Kahlenberg, *Class-Based Affirmative Action*, *supra* note 84, at 1060.

opportunity outlook, class-based affirmative action “seek[s] to adjust for the latent potential of those who have faced obstacles and done fairly well nonetheless.”⁸⁶ In other words, it seeks to balance the view that a purely merit-based distribution results in inequality, because those who lack opportunity and education are frequently excluded, against the view that the greatest societal benefit is derived when the most qualified applicant is selected.⁸⁷

By attempting to strike this balance, class-based affirmative action seeks to redress the damage of relative class inequality, extending its focus beyond the damage done to the poorest of the poor.⁸⁸ This distinguishes class-based affirmative action from anti-poverty programs, which, as the name implies, are primarily intended to mitigate poverty.⁸⁹ Because anti-poverty programs are paid for out of general funds, the cost is distributed among the tax base according to the rate of taxation.⁹⁰ On the other hand, merit-based programs like class-based affirmative action “characteristically operate within, and supplement or modify the selection criteria of, programs or institutions designed to perform socially valued functions.”⁹¹ The lion’s share of the cost of these programs is borne not by the taxpayers, but by those who lost the opportunity they would have had but for the preference, which may result in a corresponding decrease in the quality of the performance.⁹²

One response to this higher-cost/lower-quality criticism is that a properly structured preference can lead “bidders [to] bid more aggressively [and] closer to their cost,” which allows “both minority representation and cost effectiveness [to] be enhanced simultaneously.”⁹³

86. *Id.* at 1061.

87. See Richard H. Fallon, Jr., *Affirmative Action Based on Economic Disadvantage*, 43 UCLA L. REV. 1913, 1919–20 (1996).

88. See Kahlenberg, *Class-Based Affirmative Action*, *supra* note 84, at 1085–86.

89. Fallon, *supra* note 87, at 1918–19. Such programs are not antithetical to class-based affirmative action; they simply rest on different justifications. See *id.* at 1919.

90. See *id.* at 1919.

91. *Id.* at 1918. The meritocracy operating within class-based affirmative action is demonstrated by the requirement that its beneficiaries have enjoyed some amount of success in their endeavors despite being economically disadvantaged. See *supra* note 86 and accompanying text.

92. Fallon, *supra* note 87, at 1918–19 (“[B]ecause affirmative action programs involve benefits normally distributed according to merit criteria, affirmative action preferences often have the effect of denying benefits to potentially identifiable less preferred candidates.”). Another underlying assumption here is that the firms receiving preferences have higher costs because of societal barriers. See Allan Corns & Andrew Schotter, *Can Affirmative Action Be Cost Effective? An Experimental Examination of Price-Preference Auctions*, 89 AM. ECON. REV. 291, 293 (1999) (stating the assumption that high-cost firms are those that have faced societal barriers such as race).

93. See *id.* Corns and Schotter suggest that a 5% preference produces this result and that higher preferences “could increase [the] average price of purchasing and fail to reap the benefits that such

If the bidder that would have prevailed but for the preferences receives the bid regardless, the quality of the work will presumably be the same with a lower cost to the government.⁹⁴ But, if a preferred firm that would not have won without the preference wins because of the preference, the quality of performance may be decreased.⁹⁵ If the cost efficiency of bidding does in fact increase under such a program,⁹⁶ the increased cost effectiveness could be perceived as offsetting the drop in quality that may result.

Another response focuses on the broader function of government, recognizing that the state plays an active role in promoting equality and incentivizing economic development through social programs.⁹⁷ Here, the argument goes, the added benefit of promoting the goals underlying social programs that comes with a class-based affirmative action program should be seen as a cost savings to the state in its role as social program provider, which may in turn justify a corresponding decrease in contractor quality suffered by the state in its role as consumer.⁹⁸ This response is in line with the prevailing legal understanding of public contracting, which allows governments to define by legislation what they seek from bidders, both in terms of quality of performance and hiring standards.⁹⁹

price-preferences rules offer.” *Id.*

94. If cost is correlated to merit, as suggested *supra* by note 92 and its accompanying text, there should be no reduction in the quality of performance when the bidder who would have prevailed based solely on merit prevails under a preference regime.

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

96. This is not a forgone conclusion, as some scholars have suggested that lower participation rates by large firms may in fact hurt cost efficiency. See Justin Marion, *Are Bid Preferences Benign? The Effect of Small Business Subsidies in Highway Procurement Auctions*, 91 J. PUB. ECON. 1591, 1593 (2007); see also Fallon, *supra* note 87, at 1918–19 (“A visible compromise of the commitment to merit-based distribution and a corresponding decline in efficiency or excellence may also exist [under affirmative action programs].”).

97. See KAHLBERG, *THE REMEDY*, *supra* note 84, at 179–80 (arguing that such preferences are less expensive than anti-poverty programs and are more effectively focused on the evil that is sought to be remedied).

98. See Tomer Blumkin, Yoram Margalioth & Efraim Sadka, *Incorporating Affirmative Action Into the Welfare State*, 93 J. PUB. ECON. 1027, 1027–28, 1032 (2009) (advocating for a reduced focus on race by envisioning affirmative action as a way of “supplementing the redistributive tax-transfer system,” rather than “merely as a tool designed to redistribute across population groups,” and arguing that “once affirmative action policy is in place[] the tax-transfer system is redundant . . . leaving no redistributive role for the tax-and-transfer system”); cf. KAHLBERG, *THE REMEDY*, *supra* note 84, at 179 (alluding to interaction of the “continuing conundrum of welfare” and class preferences in the education context).

99. See *supra* note 12 (discussing legislative and judicial approaches to bidding requirements); cf. Jimmy Chan & Erik Eyster, *Does Banning Affirmative Action Lower College Student Quality?*, 93 AM. ECON. REV. 858, 858 (2003) (arguing that affirmative action does not necessarily decrease the quality of students admitted to universities when one considers the larger role of universities and their ability to define what they seek in a student as a part of quality).

Another moral justification for class-based affirmative action is that it avoids the anomalous situation observed with race-based affirmative action whereby benefits go to the minorities who are in many ways more privileged than the people to whom they are being preferred.¹⁰⁰ The genesis of this incongruity is metaphorically represented by race-based affirmative action advantaging Bill Cosby's children over children of other races who have faced "very real class-based obstacles."¹⁰¹ Under a program of class-based affirmative action, the preferences would be distributed based on need, so the perceived inequality resulting from the consideration of race would be eliminated.¹⁰² The inescapable corollary is that class-based affirmative action is not a perfect substitute for race-based affirmative action.¹⁰³ Nevertheless, the theory of class-based affirmative action remains attractive because it focuses on social utility and barriers to equal opportunity rather than a historical proxy for economic disadvantage.¹⁰⁴ Of course, to the extent that race is a barrier to equal opportunity for an individual, it will be taken into account under such a class-based program because race will likely have resulted in diminished class status.¹⁰⁵

But one of the most significant criticisms of class-based affirmative action is that, because it focuses on merit, it is "inherently limited by its aspiration to confer opportunities only on those who can be expected to meet competitive performance standards."¹⁰⁶ Known as the principles of

100. See Kahlenberg, *Class-Based Affirmative Action*, *supra* note 84, at 1061 & n.133 (citing MICHAEL LIND, *THE NEXT AMERICAN GENERATION* 168 (1995)).

101. See Kahlenberg, *Class-Based Affirmative Action*, *supra* note 84, at 1061 & n.133.

102. See Fallon, *supra* note 87, at 1947; see also Deborah C. Malamud, *Assessing Class-Based Affirmative Action*, 47 J. LEGAL EDUC. 452, 465 (1997) (noting that minorities are called minorities because there are less of them and that "[m]ost of the poverty based affirmative action slots will go to whites, by simple force of numbers").

103. See Fallon, *supra* note 87, at 1947.

104. See KAHLBERG, *THE REMEDY*, *supra* note 84, at 178 (arguing that this reality will result in less opposition than race-based programs because class-based programs "moot the entire question of intergenerational justice"); Fallon, *supra* note 87, at 1948–49 (noting that the partial "ameliorating effects of economically based affirmative action [on race are] a significant additional consideration supporting such programs" for those who continue to advocate for race-based affirmative action); see also Kahlenberg, *Class-Based Affirmative Action*, *supra* note 84, at 1062 (citing MARTIN LUTHER KING, JR., *WHY WE CAN'T WAIT* 147, 152 (1963) for the proposition that Dr. King thought that America should focus not only on blacks, who "entered at the starting line in a [figurative] race three hundred years after" whites, but also on the "large stratum of the forgotten white poor").

105. See KAHLBERG, *THE REMEDY*, *supra* note 84, at 101–02 (noting that "class-based preferences implicitly compensate[] those groups that have been historic victims of discrimination by addressing the ongoing legacy of discrimination"); see also Fallon, *supra* note 87, at 1948–49 (noting that class-based affirmative action will have at least some "ameliorating effects" that race-based programs seek to address).

106. See Fallon, *supra* note 87, at 1935.

the “top of the bottom” and the “close swap,” the basic critique is that affirmative action only helps the best qualified among the group advantaged by the program, meaning the least qualified among the otherwise qualified group are the most likely to suffer.¹⁰⁷

Politically, these programs are attractive because they “decrease public consciousness of race and increase public consciousness of class.”¹⁰⁸ This, in effect, decreases the social costs under the aforementioned balancing framework by eliminating the use of race, which is an extremely divisive issue.¹⁰⁹ Another political consideration weighing in favor of class-based programs is that they are cheaper than full-scale anti-poverty programs.¹¹⁰ Legally, the attraction to such programs is that, unlike many race-based programs, they are less likely to be held unconstitutional.¹¹¹

Three guiding principles should be considered in establishing a class-based preference.¹¹² The first is to provide “genuine equality of opportunity, where natural talents may flourish to their full potential.”¹¹³

107. See Malamud, *supra* note 102, at 458; see also Fallon, *supra* note 87, at 1918–19 (noting that affirmative action “den[ies] benefits to potentially identifiable less preferred candidates”). These criticisms are the logical consequences of two other criticisms: the principle of least cost and the principle of the return of the repressed. Malamud, *supra* note 102, at 458. The principle of least cost recognizes that “affirmative action programs tend to be designed to increase the representation of the target group at the minimum cost to the institution’s other stated goals and values.” *Id.* at 455. The principle of the return of the repressed assumes that “the designers of programs will aim for simplicity and will therefore leave much of what in fact constitutes economic disadvantage unaccounted for” because “it is impossible—or at least highly impracticable—to measure each and every socioeconomic variable that might affect students’ performance on traditional entry criteria.” *Id.* at 457–58.

108. Kahlenberg, *Class-Based Affirmative Action*, *supra* note 84, at 1063.

109. See Fallon, *supra* note 87, at 1949; see also *supra* notes 17–19, 56 and accompanying text (discussing divisive nature of racial preferences).

110. See KAHLBERG, THE REMEDY, *supra* note 84, at 179.

111. See Kahlenberg, *Class-Based Affirmative Action*, *supra* note 84, at 1064 (citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509–10 (1989); *id.* at 526–28 (Scalia, J., concurring)); see also 488 U.S. at 509–10 (O’Connor, J., announcing the judgment of the Court) (noting that “financial aid for disadvantaged entrepreneurs of all races would open the public contracting market to all those who have suffered the effects of past societal discrimination or neglect” and is accordingly permissible “[e]ven in the absence of evidence of discrimination”); *id.* at 526–28 (Scalia, J., concurring) (noting that local governments can adopt preferences for small or new businesses that “may well have racially disproportionate impact, but [that] are not based on race” without triggering strict scrutiny). This also comports with the Supreme Court’s recent suggestion that “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race.” See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007). Using geography in this calculus also appears constitutional. *Cf. id.* at 789 (Kennedy, J., concurring in part and concurring in the judgment) (explaining that school district boundaries drawn with recognition of racial segregation can comply with the Equal Protection Principle); *Pyke v. Cuomo*, 567 F.3d 74, 78 (2d Cir. 2009) (indicating that geographical classifications that are not “insidious proxies for suspect racial classifications” are not suspect classifications); *St. John’s United Church of Christ v. City of Chi.*, 502 F.3d 616, 638 (7th Cir. 2007) (holding that geography is not a suspect classification).

112. Kahlenberg, *Class-Based Affirmative Action*, *supra* note 84, at 1066.

113. *Id.*

The point is to reward people who have “faced serious obstacles and been relatively successful anyway.”¹¹⁴ The ideal program would apply at “‘meritocratic crisis points’ relatively early in life.”¹¹⁵ In the realm of public contracting, “race-neutral class-based preferences can . . . be framed to give a leg up in contracting to those companies headed by individuals who are disadvantaged *relative* to the competition, and/or companies that employ workers who are disadvantaged and are located in disadvantaged census tracts.”¹¹⁶

Moreover, the program should be administrable.¹¹⁷ The emphasis is on verifiable information, objective criteria, and stiff fraud penalties to deter potential abusers.¹¹⁸ Although deciding upon what objectively verifiable measures get at class and how to take them into account is a complex and difficult task,¹¹⁹ similar problems exist in both race-based affirmative action and other social programs.¹²⁰

Finally, the system should be “politically palatable,” meaning that it “can actually be adopted in our nation’s republican form of government.”¹²¹ While race-based remedies have been imposed by the Supreme Court where constitutional violations have been found, it is unlikely that similar remedies will be imposed on the basis of class.¹²²

114. *Id.*; accord Fallon, *supra* note 87, at 1921 (arguing that “powerful, equality based arguments hold that, other things being equal, those born with relatively less talent should be given more opportunities, not fewer, than those who are better endowed by the natural lottery”).

115. Kahlenberg, *Class-Based Affirmative Action*, *supra* note 84, at 1067 (emphasis omitted); see also Fallon, *supra* note 87, at 1927 (noting that “many of the disadvantaging conditions associated with poverty specifically involve childhood poverty, not present economic status”).

116. Kahlenberg, *Class-Based Affirmative Action*, *supra* note 84, at 1071. Kahlenberg discusses a location-based program that New York City used for a short period and the genesis of the HUBZone program out of proposals by President Clinton and Senator Christopher Bond. See *id.* at 1072–73; see also *infra* Part II.D.1 (providing further discussion).

117. Kahlenberg, *Class-Based Affirmative Action*, *supra* note 84, at 1066; see also Fallon, *supra* note 87, at 1927–28 (noting that class-based affirmative action programs may suffer from “large problems of definition and administration”).

118. Kahlenberg, *Class-Based Affirmative Action*, *supra* note 84, at 1066.

119. This difficulty may be a significant roadblock to achieving the goals of such programs. See *supra* note 107 (discussing the “return of the repressed” concept). This informs the recommendations made in Part III, *infra*.

120. See KAHLENBERG, *THE REMEDY*, *supra* note 84, at 139 (discussing line-drawing problems with race-based affirmative action and problems of administration associated with “student loans, food stamps, social security,” and “any number of existing programs”).

121. Kahlenberg, *Class-Based Affirmative Action*, *supra* note 84, at 1066.

122. *Id.* “[I]t is important to remember that judicial powers may be exercised only on the basis of a constitutional violation.” *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971). The “central meaning” of the Fourteenth Amendment is to prevent the government from engaging in invidious racial classifications. See *Loving v. Virginia*, 388 U.S. 1, 12 (1967). But classifications in traditional social welfare programs are generally far less suspect. See *Weinberger v. Salfi*, 422 U.S. 749, 770 (1975) (noting that classifications in social welfare statutes normally receive rational basis

D. Existing Class-Based Contracting Programs Focusing on Disadvantaged Areas

1. Programs

The most prominent existing program steering government contracts to businesses located in and employing residents of disadvantaged areas is HUBZone, administered by the federal government's Small Business Administration.¹²³ Although President Clinton considered the "place-not-race concept"¹²⁴ as one way to restructure federal government contracting programs,¹²⁵ the program finally adopted by Congress was authored by Republican Senator Christopher Bond of Missouri.¹²⁶ The stated purpose of the program is "to provide federal contracting assistance for qualified [small businesses] located in historically underutilized business zones in an effort to increase employment opportunities, investment, and economic development in such areas."¹²⁷ In general terms, the program authorizes sole-source procurements, set-asides for restricted competition, and price preferences after full and open competition to businesses with their principal offices in HUBZones, which are owned and controlled by United States citizens, and which employ at least 35% of their labor force from HUBZones.¹²⁸

The state of California maintains the Target Area Contract Preference Act (TACPA) program with similar goals of

encourag[ing] and facilitat[ing] job maintenance and job development in distressed and declining areas of cities and towns in the state by providing appropriate preferences to California based companies submitting bids or proposals for state contracts to be performed at worksites in distressed areas by persons with a high

review); *St. John's United Church of Christ v. City of Chi.*, 502 F.3d 616, 638 (7th Cir. 2007) (holding that geography is not a suspect classification). Therefore, courts are unlikely to order this type of program since it is unlikely that any constitutional violation would exist that would justify such a program as a remedy.

123. See 15 U.S.C. § 657a (2006) (establishing HUBZone program under Small Business Administration and defining eligible contracts).

124. See Paul M. Barrett & Michael K. Frisby, "Place, Not Race" Could Be Next Catch Phrase in Government's Affirmative-Action Programs, *WALL ST. J.*, Oct. 19, 1995, at B16.

125. Roney, *supra* note 70, at 939 (citing Exec. Order No. 13,005, 61 Fed. Reg. 26,069 (May 21, 1996)). This continued the tradition of many affirmative action programs beginning with executive orders. See *supra* note 14.

126. See Roney, *supra* note 70, at 940.

127. 13 C.F.R. § 126.100 (2006).

128. See 13 C.F.R. § 126.200 (2006). There are a variety of alternate ways to qualify for the program. These and other aspects of the program are discussed more fully in Part II.D.2.

risk of unemployment when the contract is for goods or services in excess of one hundred thousand dollars (\$100,000).¹²⁹

The state of Minnesota also maintains a program to provide contract preferences to businesses located in economically disadvantaged areas (EDA).¹³⁰

Despite their similar goals, these programs operate in different ways. As the general philosophy underlying HUBZone, TACPA, and EDA continues to become more attractive to legislators who are facing constitutional restraints on their ability to target government contracting to businesses based on race and gender,¹³¹ a more complete understanding of these existing programs is merited.¹³² The following section undertakes such an analysis.

2. *Analysis of Program Requirements*¹³³

a. *Ownership and Control*

A feature common to all three programs is a requirement that the ownership of any business receiving a preference be either connected to the United States or the territory of the relevant local government. HUBZone and EDA approach ownership in fairly similar ways: at least 51% of the enterprise must be owned by people with specific immigration statuses in the United States.¹³⁴ This 51% requirement can be met only by

129. See CAL. GOV'T CODE § 4531 (West 2008).

130. See MINN. STAT. § 16C.16(7) (2004).

131. See *supra* note 6 and accompanying text (noting lawmaker concerns); see also *supra* Part II.B (describing state-by-state anti-affirmative action movement).

132. Cf. Memorandum, *supra* note 6, at 1 (noting interest of incoming state representative in Wyoming, a state that does not have an affirmative-action ban, in whether any states have programs similar to HUBZone and concluding that various programs not analyzed in this Note are similar “in name only”). Little scholarly attention has been paid to any of these three programs. However, two student-authored pieces have examined certain aspects of the HUBZone program. See Kendall L. Miller, Comment, *HUBZones: Moving from the Racial Battleground to the Economic Common Ground*, 3 J. SMALL & EMERGING BUS. L. 367 (1999); Roney, *supra* note 70. TACPA and EDA appear to have received even less attention.

133. Although the defining characteristics of these programs are fairly obvious on the face of the relevant statutes and regulations, the general delineation of requirements used in Miller, *supra* note 132, and Roney, *supra* note 70, in discussing HUBZone is followed in this subpart for the purposes of comparing HUBZone with TACPA and EDA.

134. See 13 C.F.R. § 126.200 (2006); MINN. R. 1230.0150 (2008). Although HUBZone now only requires 51% ownership, see 13 C.F.R. § 126.200, as originally conceived it required the entire business to be owned by U.S. citizens, see Small Business Reauthorization Act of 1997, Pub. L. No. 105-135, § 602(a)(3)(A), 111 Stat. 2592, 2627 (requiring ownership by “1 or more persons, each of whom is a United States citizen”). This requirement was later relaxed. See Consolidated Appropriations Act, 2005, Pub. L. 108-447, § 151(a)(1)(A), 118 Stat. 2809, 3456 (2004).

citizens under HUBZone,¹³⁵ while EDA is somewhat more inclusive, counting lawfully admitted permanent residents toward the requirement in addition to citizens.¹³⁶

TACPA approaches ownership in a markedly different way, providing two ways to be certified as a “California based company,” which is a threshold to certification.¹³⁷ The domicile method of certification is more similar to HUBZone and EDA, requiring, among other conditions discussed below, that the owners of the business be domiciled in California.¹³⁸ The harshness of the requirement that all owners live in California is somewhat mitigated by the alternative connection method of certification:

ha[ving] a major office or manufacturing facility located in California and [having] been licensed by the state on a continuous basis to conduct business within the state and ha[ving] continuously employed California residents for work within the state during the three years prior to submitting a bid or proposal for a state contract.¹³⁹

Therefore, under TACPA, ownership is merely one element of one method of showing the required relationship with the state of California.

A closely related requirement that all three programs impose to some degree is that control of the business must be in the hands of people who would satisfy the ownership requirements. As such, under HUBZone, 51% of the people who control the business must be U.S. citizens;¹⁴⁰ under

135. See 13 C.F.R. § 126.200(b)(1)(i) (requiring that 51% of the business be “unconditionally and directly owned . . . by persons who are United States citizens”). Ownership, under HUBZone, is any legal or equitable interest and is determined on a person-by-person basis; it includes shareholders, beneficiaries, trustees, holders of stock options, partners, and members, as applicable depending on the form of business association at issue. See 13 C.F.R. § 126.201 (2006). Ownership under HUBZone can also be satisfied by Indian Tribal Governments, see 13 C.F.R. § 126.200(a), and certain small agricultural cooperatives, see 13 C.F.R. § 126.200(c).

136. See MINN. R. 1230.0150(26). Under EDA, ownership must be “real, substantial, and continuing, and must go beyond the pro forma ownership of the firm as reflected in its ownership documents.” MINN. R. 1230.1700(5a)(B). This is determined by looking to the substance of the arrangement, not the form of organization. *Id.*

137. See CAL. GOV'T CODE § 4532(h) (West 2008) (defining California based company). To receive any preference under TACPA, the business must be a California based company. See CAL. GOV'T CODE §§ 4533–4534.1 (West 2008).

138. See CAL. GOV'T CODE § 4532(h)(1).

139. See CAL. GOV'T CODE § 4532(h)(2).

140. 13 C.F.R. § 126.200(b)(1)(i). Control relates to “both the day-to-day management and long-term decision-making authority for the HUBZone SBC.” 13 C.F.R. § 126.202. Those with control include officers, directors, general partners, managing partners, managing members, managers, and, on a case-by-case basis, “key employees who possess expertise or responsibilities related to the concern’s primary economic activity.” *Id.*

EDA, a majority of the control must be in the hands of U.S. citizens or lawfully admitted permanent residents;¹⁴¹ and under TACPA, control is effectively a requirement under the domicile method of being a California based company because TACPA requires that the owners of unincorporated businesses and the officers of corporations be domiciled in California.¹⁴²

b. Qualified Areas and Connection Thereto

A defining feature of each of these “place-not-race” programs is that businesses seeking the preferences must have some specified presence in a particular type of blighted area, defined alternatively as historically underutilized business zones,¹⁴³ distressed areas,¹⁴⁴ or economically disadvantaged areas.¹⁴⁵ The required level of connection to the blighted area varies quite significantly between the three programs. HUBZone’s presence requirement is the most stringent, requiring that the business’s principal office be located in the HUBZone.¹⁴⁶ While a business does not lose its eligibility merely because one or more offices are located outside of a HUBZone,¹⁴⁷ to be eligible, “the location where the greatest number of the concern’s employees at any one location perform their work” must be in a HUBZone.¹⁴⁸ TACPA is far more permissive in two critical

141. See MINN. R. 1230.0150 (requiring control be in the hands of described U.S. persons). Under EDA, control means “operationally controlled on a day-to-day basis.” MINN. R. 1230.0150. Referencing day-to-day, while not referencing long-term, decision making suggests that this control requirement is narrower than HUBZone’s. See *supra* note 140 (discussing requirement under HUBZone that both long-run and short-run control be in citizens’ hands).

142. See CAL. GOV’T CODE § 4532(h)(1) (West 2008). Because officers control corporations on a day-to-day basis, this is in substance a control requirement. See CAL. CORP. CODE § 312 (West 2008); DEL. CODE ANN. tit. 8, § 142 (2001); see also BLACK’S LAW DICTIONARY 1193 (9th ed. 2009) (officer: “a person elected or appointed by the board of directors to manage the daily operations of a corporation, such as a CEO, president, secretary, or treasurer”). Because other forms of business associations do not divide management and ownership, the requirement of ownership is also in substance a control requirement when applied to noncorporate businesses. Compare 18 AM. JUR. 2D *Corporations* § 44 (2004) (discussing separation of ownership and control in corporation), with BLACK’S LAW DICTIONARY, *supra*, at 1520 (sole proprietorship: “[a] business in which one person owns all the assets, owes all the liabilities, and operates in his or her personal capacity”).

143. See 15 U.S.C. § 657a(a) (2006) (referencing “HUBZones”).

144. CAL. GOV’T CODE §§ 4531–4532.

145. MINN. STAT. § 16C.16(7) (2009).

146. See 13 C.F.R. § 126.200 (2006).

147. 13 C.F.R. § 126.207 (2006).

148. See 13 C.F.R. § 126.103 (2006). This requirement is relaxed for business in the service or construction industries by excluding “the concern’s employees who perform the majority of their work at job-site locations to fulfill specific contract obligations” from the calculation. *Id.* In making this determination, an “employee” is defined as a person (or specific combination of persons) employed on a full-time, permanent basis. *Id.* There are two types of full-time employees: those who work thirty or

respects. First, neither method of being deemed a California based company requires that the principal office be in a distressed area, just that the business have a “major office or manufacturing facility located in California” under the connection method¹⁴⁹ or that the “principal office is located in California” under the domicile method.¹⁵⁰ The second distinction provides most of the substance of the connection requirement; under TACPA, the relevant “worksite” must be in a distressed area.¹⁵¹ This allows businesses with principal offices outside the distressed area to be eligible for TACPA preferences provided the work to be done under the contract is in the distressed area or is sufficiently close to one that the statute treats it as distressed.¹⁵² The connection requirement in EDA is only slightly more demanding than that of TACPA, requiring that the principal office be in Minnesota¹⁵³ and that the business be located in, or that the business’s owner reside in, an economically disadvantaged area.¹⁵⁴ EDA is notable for creating a preference based not only on where the business is located, but also based on where its owner resides.¹⁵⁵

Moreover, each program specifies both the relevant units of geography and the required level of economic disadvantage therein as a threshold requirement for certification. Geographically, although TACPA is limited

more hours per week, and a fictional full-time employee for each aggregation of employees who work less than thirty hours per week but whose total hours worked add up to forty. *Id.* Temporary and leased employees do not count in this determination. *Id.*

149. See CAL. GOV’T CODE § 4532(h)(2) (West 2008).

150. CAL. GOV’T CODE § 4532(h)(1).

151. See CAL. GOV’T CODE §§ 4533–4534.1 (West 2008) (imposing the worksite requirement). A worksite is either “[a] business located within a distressed area,” § 4532(i)(1), or “[a] business located in directly adjoining census tract blocks that when attached to the distressed area forms a contiguous boundary,” § 4532(i)(2). For a discussion of census tract blocks, see *infra* note 157 and accompanying text.

152. See *supra* note 151.

153. MINN. R. 1230.1700 (2009). A principal office is “the primary physical location at which or from which a business performs, is maintained, or operates.” MINN. R. 1230.0150 (2009). This requirement appears in a regulation, not in the statute, and is essentially imposed by negative implication. Section 1230.1700 applies to all programs created by Minnesota Statutes section 16C.16. See MINN. R. 1230.1700(1) (2009). Those programs include small business preferences, targeted group purchasing, veteran-owned small business preferences and, at issue here, preferences for economically disadvantaged areas. See MINN. STAT. § 16C.16 (2009). By the terms of the statute, only the small business preference requires that the “principal place of business be in Minnesota.” See *id.* § 16C.16(2). However, the regulation allows the Department of Administration to reject an application to any of these programs, including EDA, if “the applicant’s principal place of business is not in Minnesota.” See MINN. R. 1230.1700(5)(G).

154. See MINN. STAT. § 16C.16(7)(c). A business can also satisfy this connection requirement if it is “a certified rehabilitation facility or extended employer provider.” MINN. STAT. § 16C.16(7)(c)(3). These alternate means of certification are discussed more fully below. See *infra* notes 182–83 and accompanying text.

155. See MINN. STAT. § 16C.16(7)(c)(1).

to urban areas,¹⁵⁶ it takes the most nuanced approach to identifying blighted areas by focusing on very small geographic units known as block groups.¹⁵⁷ HUBZone applies in both rural¹⁵⁸ and urban¹⁵⁹ areas, but the relevant geographical classification for rural areas is the county, while the relevant geographical classification for urban areas is the census tract.¹⁶⁰ This can result in “discrepancies in eligibility between poor metropolitan counties and adjacent non-metropolitan counties.”¹⁶¹ EDA generally focuses only on civil jurisdictions such as cities and counties,¹⁶² although it also vests the state’s commissioner of administration with the authority to designate certain neighborhoods and other areas as economically distressed if it “would further the purposes of the” program.¹⁶³ To illustrate the import of the varying units of analysis employed under these programs, there are approximately 7,020,924 census block groups;¹⁶⁴ 62,276 census tracts;¹⁶⁵ 3068 counties and county equivalents;¹⁶⁶ and

156. See CAL. GOV’T CODE §§ 4533–4534.1 (West 2008) (limiting to distressed areas); see also CAL. GOV’T CODE § 4532 (West 2008) (defining distressed area, in operative part, as “a central city or cities and surrounding closely settled territory”).

157. See CAL. GOV’T CODE § 4532(a) (defining block groups); § 4532(c) (defining “cluster of block groups” as “one or more contiguous block groups”). A cluster must contain at least 3000 people to be eligible for the preference. CAL. GOV’T CODE § 4532(d) (imposing population requirement).

158. See 13 C.F.R. § 126.103 (2006) (defining HUBZone to include “[q]ualified non-metropolitan counties”).

159. *Id.* (defining HUBZone to include “[q]ualified census tracts”); see also 26 U.S.C. § 42(d)(5)(C)(ii) (2006) (defining “qualified census tract” differently depending on location in metropolitan statistical area or nonmetropolitan area).

160. See 13 C.F.R. § 126.103.

161. See HENRY BEALE & NICOLA DEAS, MICROECONOMIC APPLICATIONS, INC., THE HUBZONE PROGRAM REPORT 228 (2008), available at <http://www.sba.gov/advo/research/rs325tot.pdf>.

162. See MINN. STAT. § 16C.16(7)(c)(1)–(2) (2004). These two sections, read together, provide this limitation. Section 16C.16(7)(c)(1) focuses on counties alone, while section 16C.16(7)(c)(2) focuses on labor surplus areas as designated by the U.S. Department of Labor. “Labor surplus areas are classified on the basis of civil jurisdictions,” which are defined as “all cities with a population of at least 25,000[,] all counties,” and, in Michigan, New Jersey, New York, and Pennsylvania, “[t]ownships with a population of 25,000 or more.” See Emp’t & Training Admin., *Description of Labor Surplus Area*, U.S. DEP’T OF LABOR, <http://www.doleta.gov/Programs/laborsurplus02.cfm> (last updated Jan. 7, 2010). Thus, this program focuses on counties and cities alone.

163. See MINN. STAT. § 16C.16(7)(d).

164. U.S. CENSUS BUREAU, *Census Blocks and Block Groups, in GEOGRAPHIC AREAS REFERENCE MANUAL 11-1, 11-1* (1994), available at <http://www.census.gov/geo/www/GARM/Ch11GARM.pdf>. These units are “the smallest geographic area for which the Bureau of the Census collects and tabulates decennial census data.” *Id.*

165. This is the sum of the number of block numbering areas and census tracts in 1990. See U.S. CENSUS BUREAU, *Census Tracts and Block Numbering Areas, in GEOGRAPHIC AREAS REFERENCE MANUAL 12-1, 12-1* (1994), available at <http://www.census.gov/geo/www/GARM/Ch10GARM.pdf>. They have been combined because block numbering areas are now census tracts. See U.S. CENSUS BUREAU, *GEOGRAPHIC AREAS REFERENCE MANUAL* (1994), available at <http://www.census.gov/geo/www/garm.html>.

166. See *Overview of County Government*, NAT’L ASS’N OF CNTYS., <http://www.naco.org/>

39,044 cities, towns, and townships¹⁶⁷ in the United States. As an extreme example, there are about 2,288 times more block groups than counties;¹⁶⁸ so a TACPA-like focus on block groups is more likely, at least in theory, to identify isolated pockets of poverty than is an EDA-like focus on counties.¹⁶⁹ In that respect, holding all else equal, TACPA seems to be the best equipped to identify areas that are distressed despite their proximity to nondistressed areas.¹⁷⁰

The socioeconomic considerations that the areas described above must meet in order to be eligible are even more varied than the approaches taken to isolate the areas geographically. TACPA makes up for its liberal approach to isolating geographic areas by its strict approach to determining what makes those areas distressed.¹⁷¹ In order to qualify under TACPA, a cluster of block groups must satisfy five of the eight criteria specified under the statute.¹⁷² Seven of these criteria focus on whether the block group is within the upper quartile of all block groups with respect to

[t]he percentage of the block group's population over age 25 with less than a high school education . . .[,] [t]he unemployment rate of the block group . . .[,] [t]he percentage of the block group's households which were female-headed households in poverty with children present . . .[,] [t]he percentage of the block group's population over 65 who were in poverty . . .[,] [t]he percentage of the block group's households with more than 1.01 persons per room . . .[,] [t]he percentage of the block group's population younger than

Counties/Pages/Overview.aspx (last visited May 1, 2011) (noting that there are 3028 counties and 40 city-county governments in the United States).

167. See *Number of Local Governments & Population Distribution*, NAT'L LEAGUE OF CITIES, <http://www.nlc.org/build-skills-networks/resources/cities-101/number-of-local-governments--population-distribution> (last visited May 1, 2011).

168. This calculation is based on the numbers in notes 164 and 166 and accompanying text.

169. Cf. John Iceland & Erika Steinmetz, *The Effects of Using Census Block Groups Instead of Census Tracts When Examining Residential Housing Patterns*, U.S. CENSUS BUREAU 4 (2003), available at http://www.census.gov/hhes/www/housing/housing_patterns/pdf/unit_of_analysis.pdf (comparing use of census tracts and census block groups in study of residential housing patterns and finding that relative clustering indices are nearly twice as high at the block group level than the tract level).

170. See *id.*; cf. BEALE & DEAS, *supra* note 161, at 228 (describing related phenomenon under HUBZone whereby metropolitan counties are considered at the census tract level but nonmetropolitan counties are considered at the county level, resulting in certain metropolitan counties that would qualify if examined at the county level having large areas within them that do not qualify because the most severe poverty is contained in few census tracts).

171. See CAL. GOV'T CODE § 4532(d) (West 2008).

172. See *id.*

18 who were in poverty . . . [, or] [t]he percentage of the block group's population who were nonwhite or hispanic [sic].¹⁷³

The final criterion focuses on whether the block group is within the lower quartile of all block groups with respect to per capita income.¹⁷⁴

Both HUBZone and EDA emphasize some combination of unemployment,¹⁷⁵ poverty,¹⁷⁶ and income.¹⁷⁷ While TACPA focuses on these measures alone in two of the eight considerations,¹⁷⁸ and in conjunction with other measures in three more,¹⁷⁹ its conjunctive quartile approach has the potential to be highly arbitrary in the areas it excludes; being one percentage point off on four of the measures while highly disadvantaged on the remaining measures will result in complete exclusion.¹⁸⁰

In addition to the standard method of defining geographical boundaries and corresponding socioeconomic statuses, HUBZone and EDA have

173. *See id.* The intersection between the race and gender considerations in TACPA and article I, section 31(a) of the California constitution, which provides that “[t]he State shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting,” appears to have never been litigated.

174. *See id.*

175. *See* 13 C.F.R. § 126.103 (2006) (providing that nonmetropolitan counties qualify as HUBZones if “[t]he unemployment rate is not less than 140 percent of the average unemployment rate for the United States or for the State in which such county is located, whichever is less”); MINN. STAT. § 16C.16(7)(c)(2) (2004) (declaring labor surplus areas, as defined by the U.S. Department of Labor, to be economically disadvantaged). A labor surplus area is a civil jurisdiction whose

average unemployment rate was at least 20 percent above the average unemployment rate for all states, the District of Columbia and Puerto Rico during the previous two calendar years.

During periods of high national unemployment, the 1.20 percent ratio is disregarded and an area is classified as a labor surplus area if its unemployment rate during the previous two calendar years was 10 percent or more.

See Emp’t & Training Admin., *supra* note 162.

176. *See* 13 C.F.R. § 126.103 (defining qualified census tract for HUBZone purposes by reference to 26 U.S.C. § 42(d)(5)(C)(ii)(I) (2006) (providing 25% poverty rate as alternative measure when income statistics not available for a census tract)).

177. *See* 26 U.S.C. § 42(d)(5)(C)(ii)(I) (defining qualified census tracts for HUBZone purposes as those in “which 50 percent or more of the households have an income which is less than 60 percent of the area median gross income”); 13 C.F.R. § 126.103 (defining qualified nonmetropolitan counties for HUBZone purposes as those in which “[t]he median household income is less than 80% of the non-metropolitan State median household income”); MINN. STAT. § 16C.16(7)(c)(1) (2004) (providing that economically disadvantaged areas for EDA purposes include “count[ies] in which the median income for married couples is less than 70 percent of the state median income for married couples”).

178. *See* CAL. GOV’T CODE § 4532(d)(2) (West 2008) (unemployment); § 4532(d)(3) (per capita income).

179. *See* CAL. GOV’T CODE § 4532(d)(4) (female-headed households with children present in poverty); § 4532(d)(5) (population over sixty-five in poverty); § 4532(d)(7) (population younger than eighteen in poverty).

180. *See supra* note 173 and accompanying text.

alternative ways of satisfying the sociogeographic requirement. HUBZone treats lands within the external boundaries of Indian reservations and qualified base closure areas as sufficiently disadvantaged to merit inclusion.¹⁸¹ The statute creating the EDA program provides that “[a] business is located in an economically disadvantaged area if . . . the business is a certified rehabilitation facility or extended employment provider.”¹⁸² Although it seems somewhat irrational to conclude that a business is located in a qualifying area based solely on the type of business it conducts, this structure essentially provides the same preferences provided by the EDA program to governmental bodies and nonprofit organizations that help those with severe disabilities find work.¹⁸³ This is not unlike programs at the state and federal level granting similar preferences to people with disabilities related to military service; it is simply couched within a program that purports to be based on geography.¹⁸⁴

c. Methods

Knowing who must own and control the business and in what type of area the business must be located to qualify, the issue becomes what benefits the statutory program bestows upon the business; that is, what methods have been chosen to advantage the qualifying businesses? The one method common to the three programs is price preferences after full and open competition.¹⁸⁵ A price preference adds a specified amount to

181. See 13 C.F.R. § 126.103 (2006). Section 126.103 also provides for certification of “redesignated areas,” which are “census tract[s] and non-metropolitan count[ies] that cease[] to be . . . qualified HUBZone[s]” provided certain other conditions are met. *Id.* Redesignated areas are in substance an extension of certification for other previously certified areas. See BEALE & DEAS, *supra* note 161, at 133.

182. See MINN. STAT. § 16C.16(7)(c)(3).

183. See MINN. STAT. § 268A.01(6) (2004) (defining rehabilitation facility as “an entity which is operated for the primary purpose of providing or facilitating employment for persons with a severe disability”); MINN. STAT. § 268A.15(2) (declaring purpose of extended employment program to provide employment services to those with disabilities).

184. *Cf.* 38 U.S.C. § 8127(a)(1)(B) (2006) (establishing contracting goals for “veterans with service-connected disabilities”); CAL. GOV’T CODE § 7084 (West 2008) (establishing Enterprise Zone Act, which mirrors TACPA but focuses instead on “enterprise zone[s]”); CAL. GOV’T CODE § 7118 (West 2008) (establishing Local Agency Military Base Recovery Act, which mirrors TACPA but focuses instead on “local agency military base recovery area[s]”); CAL. MIL. & VET. CODE § 999.2(a) (West 2008) (establishing contracting goal for participation by disabled veteran businesses); *see also* MINN. STAT. § 16C.16(6a)(a)(2) (establishing contracting preference for “veterans with service-connected disabilities” and tying preference amount under this program to, *inter alia*, the amount of EDA preference).

185. See 15 U.S.C. § 657a(b)(3)(A) (2006) (establishing HUBZone preference); CAL. GOV’T CODE §§ 4533–4534.1 (West 2008) (establishing TACPA preferences); MINN. STAT. § 16C.16(7)

nonpreferred bids for the purpose of determining which bid is lowest.¹⁸⁶ HUBZone provides for the greatest price preference at 10%, which is the absolute maximum under the program.¹⁸⁷ EDA has similarly absolute preferences, although the absolute preference itself varies based on the industry in question: construction contracts receive a 4% preference, while contracts relating to all other industries receive a 6% preference.¹⁸⁸

TACPA takes a noticeably different approach to preferences. First, TACPA requires that 90% of the labor hours under a service contract be performed in the designated area to receive a preference in a service contract, while only 50% of such hours need be conducted in such an area under a goods contract.¹⁸⁹ Next, and more distinctively, TACPA provides for a varying preference based on the percentage of the business's employees who are at high risk of unemployment.¹⁹⁰ In effect, the minimum available preference under TACPA is 5%,¹⁹¹ while the maximum is 9%,¹⁹² meaning that in no event will it provide a greater

(2004) (establishing EDA preferences).

186. See Harry Holzer & David Neumark, *Assessing Affirmative Action*, 38 J. ECON. LITERATURE 483, 490 n.16 (2000).

187. See 15 U.S.C. § 657a(b)(3)(A) (noting that price "shall be deemed as being lower than the price offered by another offeror" if it is "not more than 10 percent higher").

188. See MINN. STAT. § 16C.16(7)(a) (setting general preference); § 16C.16(7)(b) (lowering preference for construction contracts). HUBZone similarly distinguishes between construction and nonconstruction contracts, although not in its preference regime, but rather with regard to sole-source procurements. See 13 C.F.R. § 126.612(b) (2006). See generally *infra* note 205 and accompanying text (describing sole source procurements). Also, HUBZone provides preferential rather than detrimental treatment to preferred construction bidders, raising the maximum contract amount for set-asides from \$3,500,000 to \$5,500,000. See 13 C.F.R. § 126.612(b).

189. Compare CAL. GOV'T CODE § 4533 (granting 5% preference on goods contracts where 50% of the total labor hours are accomplished in a distressed area), with CAL. GOV'T CODE § 4534 (granting 5% preference on goods contracts where 90% of the total labor hours are accomplished in a distressed area).

190. See CAL. GOV'T CODE §§ 4533–4534 (creating 5% preference for businesses in specified worksites); CAL. GOV'T CODE §§ 4533.1, 4534.1 (creating additional preferences varying in degree from 1% to 4% for businesses that already qualify for the preferences depending on how many people "with high risk of unemployment" it certifies it will hire); see also *infra* notes 211–14 and accompanying text (discussing TACPA's employee-specific requirements and "defining high risk of unemployment").

191. See CAL. GOV'T CODE §§ 4533.1, 4534.1.

192. This would result if a business located within a distressed area as required by sections 4533 or 4534, and receiving the according 5% preference, agreed under penalty of perjury "to hire persons with high risk of unemployment equal to 20 or more percent of its work force during the period of contract performance," which would provide the business with an additional 4% preference. See CAL. GOV'T CODE §§ 4533.1, 4534.1.

preference than HUBZone,¹⁹³ but in certain circumstances it may provide a greater preference than EDA.¹⁹⁴

Two of the programs allow for combination with other preference programs, albeit to varying extents. California law allows all of its other statutory preferences¹⁹⁵ to be combined with the TACPA preference, provided no business may receive a preference greater than 15% on any one contract.¹⁹⁶ Federal law provides for such combination in limited circumstances; namely, where a business is “both a qualified HUBZone [business] and [a Small Disadvantaged Business, it] must receive the benefit of both the HUBZone price evaluation preference . . . and the [Small Disadvantaged Business] price evaluation preference.”¹⁹⁷ Minnesota law does not appear to allow combination of its preferences.¹⁹⁸

TACPA preferences apply to a limited range of contracts; a contract must be worth at least \$100,000 to qualify, but the state cannot give a preference of more than \$50,000 under TACPA alone or \$100,000 when combined with other programs.¹⁹⁹ HUBZone contains no such limits in the preference context.²⁰⁰ While EDA does not limit the maximum dollar

193. *Cf. supra* note 187 and accompanying text (describing HUBZone’s absolute 10% preference).

194. *Cf. supra* note 188 and accompanying text (demonstrating EDA’s absolute preferences for construction at 4% and nonconstruction at 6%).

195. *E.g.*, CAL. GOV’T CODE § 14838(b)(1) (West 2008) (creating 5% preference for small businesses and microbusinesses); CAL. PUB. RES. CODE § 42891 (West 2008) (creating 5% “preference, wherever feasible, to the suppliers of recycled tire products”).

196. *See* CAL. GOV’T CODE § 4535.2 (West 2008) (providing that “[t]he maximum preference and incentive a bidder may be awarded pursuant to [TACPA] and any other provision of law shall be 15 percent”). However, companies that receive the small business preference, *see supra* note 195, “have precedence over non-small business bidders in that the application of any bidder preference for which non-small business bidders may be eligible, including [TACPA], shall not result in the denial of the award to a small business bidder.” CAL. GOV’T CODE § 4535.2.

197. *See* 13 C.F.R. § 126.614 (2006) (allowing combination only with the small disadvantaged business program and verifying that combination with other programs is not allowed in listed Example 2).

198. *See* MINN. STAT. § 16C.16(7) (2004) (providing “*up to a six percent preference* in the amount bid on state procurement to small businesses located in an economically disadvantaged area” (emphasis added)); MINN. R. 1230.1830(D) (2009) (providing that “when the division awards a different percentage preference to a certified targeted group small business and a certified economically disadvantaged small business on the same solicitation, the lowest acceptable response must be determined by deducting *the appropriate preference* percent awarded from the acceptable responses by the certified small businesses” (emphasis added)).

199. *See* CAL. GOV’T CODE § 4535.2.

200. *Compare* 13 C.F.R. § 126.613 (providing no mention of limits in preference context), *with* 13 C.F.R. § 126.612(b) (limiting value of contracts eligible for set-aside procurement). There are, however, two relevant limits to any potential HUBZone award. No HUBZone award can be made if the contract could be let to Federal Prison Industries, Inc. based on specified statutory language, or if the contract could be let to “participating non-profit agencies for the blind and severely disabled” under the Jarits-Wagner-O’Day Act. *See* 13 C.F.R. § 126.605(a). Moreover, no HUBZone award can

amount of any one preference, it does provide limits to ensure that no business that receives a specified amount of its gross revenues or sales from state contracting preferences or set-asides continues to receive the preferences.²⁰¹

HUBZone is unique among the three in that it utilizes methods other than preferences—namely, set-asides and sole-source purchases.²⁰² Set-asides, which restrict competition to qualified HUBZone businesses,²⁰³ are authorized when a contracting officer has “a reasonable expectation after reviewing [the Small Business Administration’s] list of qualified HUBZone [businesses] that at least two responsible qualified HUBZone [businesses] will submit offers” and can “[d]etermine that award can be made at fair market price.”²⁰⁴ A sole-source contract is one in which the contracting officer awards the contract to a specific HUBZone business after determining that the contract does not exceed specified maximum amount limits, that “[t]wo or more qualified HUBZone [businesses] are not likely to submit offers,” and that “the contract award can be made at a fair and reasonable price.”²⁰⁵ The plain language of federal law makes the preferences mandatory and the other two methods discretionary,²⁰⁶

be made if “[a]n 8(a) participant currently is performing the requirement through the 8(a)BD program or SBA has accepted the requirement for award through the 8(a)BD program, unless SBA has consented to release the requirement from the 8(a)BD program.” See 13 C.F.R. § 126.605(b).

201. See MINN. R. 1230.1860. Businesses that received an average of 80% of their gross revenues or sales through preferences or set-asides during their second and third years of receiving such advantages are no longer eligible. MINN. R. 1230.1860(B)(1). The percentage of gross revenues or sales required for disqualification lowers over time: 50% during years four and five, and 40% for years six and beyond. See MINN. R. 1230.1860(B)(2)–(3).

202. See 15 U.S.C. § 657a(b)(2)(A)–(B) (2006). The same general limits apply to these programs as to preferences. See *supra* note 200 (describing the general limits to HUBZone program).

203. 13 C.F.R. § 126.600 (2006).

204. See 13 C.F.R. § 126.607. The relationship between various federal set-aside programs is provided by regulation. See *id.* This regulation has been interpreted to give HUBZone priority. See Mission Critical Solutions, B-401057 (Comp. Gen. May 4, 2009); Int’l Program Grp., Inc., B-400278 (Comp. Gen. Sept. 19, 2008). *But see* Memorandum from Jeannie S. Rhee, Deputy Assistant Attorney Gen., U.S. Dep’t of Justice, to Sara D. Lipscomb, Gen. Counsel, Small Bus. Admin. (Aug. 21, 2009), available at http://www.justice.gov/olc/2009/sba-hubzone-opinion_082109.pdf (noting that the Department of Justice does not interpret HUBZone to “compel SBA to prioritize the HUBZone Program in the manner GAO determined to be required”).

205. See 13 C.F.R. § 126.612.

206. See 13 C.F.R. § 126.604 (declaring that “[t]he contracting officer for the contracting activity makes [the] decision” whether “a contract opportunity for HUBZone set-aside competition exists”); 13 C.F.R. § 126.612 (declaring that “[a] contracting officer *may* award a sole source contract” when conditions are met (emphasis added)); § 126.613(a)(1) (requiring that “[w]here a [contracting officer] will award a contract on the basis of full and open competition, the [contracting officer] *must* deem” the HUBZone business price lower than the non-HUBZone price if preference requirements met (emphasis added)).

although the contracting officer has a great deal of de facto discretion in determining whether HUBZone will apply to any particular contract.²⁰⁷

d. Employee-Specific Requirements

Although they do so in strikingly different ways, HUBZone, TACPA, and EDA recognize the importance of employing people who either reside in the areas covered by their respective programs or who have some other attribute that hinders their employability. EDA provides the least consideration of employee attributes, only considering them under the alternative certification method for employment services for the disabled.²⁰⁸ HUBZone and TACPA, on the other hand, consider how many employees exhibit certain economic risk factors, although the two focus on different measures of risk and give disparate significance to the measures.²⁰⁹ Under HUBZone, a threshold requirement for certification is that 35% of the business's employees reside in a HUBZone.²¹⁰ TACPA imposes no employee-based threshold requirement, but it does provide additional and increasing preferences based on how many employees are at a high risk of unemployment.²¹¹ One can be at "high risk of unemployment" under TACPA regardless of where he lives,²¹² as the term of art includes the following statutorily defined classes of people: economically disadvantaged youth, economically disadvantaged ex-convicts, vocational rehabilitation referrals, youth participating in a qualified cooperative education program, recipients of supplemental social security income, general assistance recipients,²¹³ applicants and recipients of aid to families with dependent children who would have registered for

207. See BEALE & DEAS, *supra* note 161, at 126 (citing anecdotal evidence and data suggesting that "contracting officers are not using the program," including the fact that "only one in eight (13 percent) has used a HUBZone setaside, sole source, or price preference in awarding a contract"); cf. 13 C.F.R. § 126.603 (advising certified businesses to "market their capabilities to appropriate contracting activities in order to increase the prospect that the contracting activity will adopt an acquisition strategy that includes HUBZone contract opportunities").

208. See MINN. STAT. § 16C.16(7)(c)(3) (2004); see also *supra* note 183 and accompanying text (describing these alternate methods).

209. See CAL. GOV'T CODE §§ 4533.1, 4534.1 (West 2008); 13 C.F.R. § 126.200(a)(3)(i), (b)(4).

210. See 13 C.F.R. § 126.200(a)(3)(i), (b)(4); see also *supra* note 148 (discussing HUBZone's statutory definition of employee).

211. See CAL. GOV'T CODE §§ 4533.1, 4534.1.

212. See CAL. GOV'T CODE § 4532(f).

213. These classes qualify based on their inclusion in Section 321 of Public Law 95-600 as incorporated by section 4532(f)(1) of the California Government Code.

the Work Incentive Program, and aid to families with dependent children recipients who have been receiving welfare for at least ninety days.²¹⁴

The sliding scale under TACPA provides a 1% preference if the employer agrees to hire persons at high risk of unemployment equal to 5%–9% of its workforce during the period of contract performance, a 2% preference for 10%–14% of the workforce, 3% for 15%–19% of the workforce, and 4% for 20% or more of the workforce.²¹⁵ This preference is in addition to the 5% base preference.²¹⁶ This sliding-scale approach results in TACPA being more inclusive and less arbitrary than HUBZone with respect to employee-specific percentage requirements.²¹⁷ However, TACPA's focus emphasizes the personal attributes of the employee much more than HUBZone, which only considers his place of residence.²¹⁸ This more exacting focus on employee attributes may explain why TACPA is less demanding than HUBZone on its percentage requirements.²¹⁹

Both TACPA and HUBZone, the two programs that rely on representations about how many employees satisfy certain criteria, contain provisions designed to ensure that the contractor will carry through with such representations. HUBZone requires that the businesses “attempt to maintain” the percentage during performance of the contract,²²⁰ which

214. The classes subsequent to note 213 qualify based on their inclusion in Section 322 of Public Law 95-600 as incorporated by section 4532(f)(2) of the California Government Code.

215. See CAL. GOV'T CODE §§ 4533.1, 4534.1 (West 2008).

216. See *supra* note 190 and accompanying text.

217. The 35% requirement is absolute under HUBZone. See 13 C.F.R. §§ 126.200(a)(3)(i), 126.200(b)(4) (2006). However, there is no absolute employee requirement under TACPA. See CAL. GOV'T CODE §§ 4533, 4534. The result is that a business that employs 34% of its labor from a HUBZone is absolutely ineligible for HUBZone preference. Under TACPA, however, such arbitrary distinctions in numbers never lead to outright disqualification. At worst, they lead to a lower marginal preference.

218. Compare 13 C.F.R. § 126.200(b)(4) (requiring that 35% of employees live in HUBZones), with CAL. GOV'T CODE § 4532(f)(1) (defining high risk of unemployment based on specific requirements discussed in text accompanying notes 213 and 214).

219. In 2008, only thirty-four businesses were certified under TACPA. See E-mail from Rachel Voong, Dep't of Gov't Servs., to author (Sept. 21, 2009, 15:49 CST) (on file with author). In that same year, there were 886 registered HUBZone businesses in California. See BEALE & DEAS, *supra* note 161, at 5. Although this is somewhat like comparing apples and oranges because HUBZone provides for ongoing certification while TACPA provides for contract-by-contract certification, see *infra* Part II.D.2.f., this apparent disparity does at least suggest that TACPA is perceived by contractors to be more demanding than HUBZone despite its more relaxed percentage preferences. One plausible explanation for this perception is the difficulty of determining whether 20% of one's employees would qualify for the various programs listed in notes 213 and 214, as opposed to merely ascertaining whether or not they live in a HUBZone. Cf. Roney, *supra* note 70, at 944–45 (noting that HUBZone's less intrusive “residence requirement could place an employer in the unenviable position of soliciting personal information from its employees or potential employees—information such as the employee's intent to live on his or her street indefinitely”).

220. 13 C.F.R. §§ 126.200(a)(3)(iii), 126.200(b)(5).

means that employers must “mak[e] substantive and documented efforts such as written offers of employment, published advertisements seeking employees, and attendance at job fairs.”²²¹ TACPA similarly requires that participating employers

[a]ct in good faith for the purpose of maintaining such persons as employees for the duration of contract performance; and . . . make a reasonable effort to replace such persons, who for any reason permanently cease to be on the payroll, with other persons with high risk of unemployment.²²²

Violations of these requirements subject bidders to suspension, debarment, and penalties of both the civil and criminal variety.²²³

e. Size limitations

Only small businesses are eligible for HUBZone²²⁴ and EDA.²²⁵ TACPA is not explicitly limited to small businesses,²²⁶ but California law does provide for an additional preference to small businesses²²⁷ that can be added to the TACPA preference.²²⁸ EDA is unique among the three

221. See 13 C.F.R. § 126.103.

222. See CAL. CODE REGS. tit. 2, § 1896.40(c)(1)–(2) (2009). TACPA also imposes an affirmative obligation to report “any such persons who have been terminated or absent from work.” See CAL. CODE REGS. tit. 2, § 1896.40(c)(3).

223. See CAL. GOV’T CODE § 4535.1 (West 2008) (providing for restitution to state, punitive fees, and inability to conduct business with state for violation of TACPA provisions); 13 C.F.R. § 126.900 (2006) (describing potential suspension, disbarment, civil penalties, and criminal liability emanating from violation of HUBZone requirements).

224. See 13 C.F.R. § 126.203 (2006) (requiring that businesses be small according to NAICS code to be eligible for HUBZone). The company must be small both at the time it is certified as a HUBZone business and at the time of the initial contract offer. *Id.* While “[a] large business may not participate as a prime contractor on a HUBZone award[, it] may participate as a subcontractor to an otherwise qualified HUBZone SBC.” 13 C.F.R. § 126.615 (2006).

225. See MINN. STAT. § 16C.16(7) (2004) (creating preferences “for small businesses”); see also MINN. R. 1230.1600(3)(B) (2009) (defining “small business category” as the lower quartile of businesses based on “representative annual market consisting of the total gross revenues or sales generated by the reporting sample class” as determined by SIC or NAICS codes).

226. Compare CAL. GOV’T CODE § 4531 (West 2008) (declaring that the purpose of TACPA program is to provide preferences to “California based companies” (emphasis added)), with 13 C.F.R. § 126.100 (2006) (declaring that the purpose of HUBZone program “is to provide federal contracting assistance for qualified [small business concerns] located in historically underutilized business zones in an effort to increase employment opportunities, investment, and economic development in such areas” (emphasis added)).

227. CAL. GOV’T CODE § 14838(b)(1) (West 2008) (creating 5% preference for small businesses and microbusinesses).

228. See *supra* note 196 and accompanying text (discussing preference combination rules and small business preference taking precedence over TACPA).

programs in that it effectively provides for an additional size limit by “graduat[ing]” a business from the program once it “has captured a proportionate share in its market for assets employed” relative to the amount of time it has been receiving preferences.²²⁹

f. Certification

Once a business is certified under HUBZone²³⁰ or EDA,²³¹ it remains certified, provided it maintains the original certification requirements.²³² Also, a business can be graduated from EDA if it either captures a proportionate share in its market²³³ or if it receives more than a certain percentage of its contracts from the program based on how long it has participated.²³⁴ HUBZone provides some relief to businesses who would otherwise lose certification based on changes to the relevant socioeconomic attributes of the area in which their business is located.²³⁵

229. See MINN. R. 1230.1860(C)(3) (2009). A business is graduated when its proportionate market share in terms of assets employed averages 200% in the first year, 175% in the first two years, 150% in the first three years, 125% thereafter. See *id.*

230. See 13 C.F.R. § 126.300 (2006) (providing that an interested business must “apply to SBA for certification” and that “[i]f SBA determines that the concern is a qualified HUBZone SBC, it will issue a certification to that effect and add the concern to the List”). This is the only way to be certified under HUBZone. 13 C.F.R. § 126.301. To be eligible for contracts, the business must in fact be on the list of certified businesses, regardless of whether its exclusion from the list was proper or not. See 13 C.F.R. § 126.308; see also *HUBZone Contractor Gateway Search*, U.S. SMALL BUS. ADMIN., http://dsbs.sba.gov/dsbs/search/dsp_searchhubzone.cfm (last modified May. 4, 2007) (list of certified HUBZone businesses). A denied or decertified business must wait one year to reapply. See 13 C.F.R. § 126.309. Certification in and of itself does not guarantee that the business will receive contracts. See 13 C.F.R. § 126.603; see also BEALE & DEAS, *supra* note 161, at ii (noting that only 23% of certified businesses have received contracts under the program).

231. See MINN. R. 1230.1700 (2009) (outlining the certification process, including an extensive list of documents that must be submitted); see also MINN. R. 1230.1805 (requiring creation of directory of eligible businesses). The directory can be accessed online. See *TG/ED List (Directory)*, MINN. MATERIALS MGMT. DIV., <http://www.mmd.admin.state.mn.us/process/search/> (last visited May 1, 2011).

232. See 13 C.F.R. § 126.601(c) (requiring that any participating business “be a qualified HUBZone SBC both at the time of its initial offer and at the time of award in order to be eligible for a HUBZone contract”); MINN. R. 1230.1860(C)(2) (graduating business from EDA if “demographic statistics justify loss of status as a labor surplus area, a 70 percent median income county, or a disadvantaged area”). HUBZone accomplishes this by requiring a certification that the business still qualifies at the time an offer for a contract is made. See 13 C.F.R. § 126.601(d). EDA, on the other hand, imposes an affirmative obligation on businesses to notify the state if any of the conditions making it eligible change at any time, which “is not limited to changes occurring while an application is pending approval.” See MINN. R. 1230.1905.

233. See *supra* note 229 and accompanying text.

234. See *supra* note 201 and accompanying text.

235. See *supra* note 181. This is a temporary designation, however, because an area is not redesignated until results from the 2010 census are announced or three years after the area ceased to be eligible, whichever is later. See 13 C.F.R. § 126.103. This “grandfather” period is intended to “provide

TACPA, on the other hand, requires certification each time a bidder submits a bid.²³⁶ All three programs require that the business maintain the requirements for certification during the life of the certification.²³⁷

III. RECOMMENDATIONS

Previous Parts have explained the goals of class-based affirmative action, the likelihood that many state and local governments will soon be (or have already begun) turning to alternatives to their traditional affirmative action programs, the structure of three existing “place-not-race” programs, and that the American population is generally more likely to approve of class-based programs than race-based programs.²³⁸ Having placed three programs under the figurative state-as-laboratories microscope to flesh out their respective form and function, the question becomes: what should such a program look like if a state or local government wishes to continue using contracting as a means to effectuate socioeconomic policy?²³⁹

Three basic premises will guide this discussion. First, recall that the stated purpose of “place-not-race” programs is to encourage job creation in distressed areas.²⁴⁰ Further, recall that class-based affirmative action seeks to remedy relative inequality of opportunity.²⁴¹ Finally, recall that class-

sufficient time for firms to recoup a return on their investment in locating their businesses in qualified HUBZone areas.” See HUBZone, Government Contracting, 8(a) Business Development and Small Business Size Standard Programs, 70 Fed. Reg. 51,243, 51,245 (Aug. 30, 2005) (to be codified at 13 C.F.R. pts. 121, 124–26). The alternative method regarding 2010 census data was added to provide additional time to firms that had already moved as opposed to those that were considering the impacts of moving. See *id.*

236. See CAL. CODE REGS. tit. 2, § 1896.40 (2009) (defining certification requirements in terms of “the duration of contract performance”).

237. See 13 C.F.R. §§ 126.200(a)(3)(iii), 126.200(b)(5) (requiring that HUBZone businesses “attempt to maintain” the requisite number of employees); CAL. CODE REGS. tit. 2, § 1896.40 (requiring business receiving contract to comply with terms of TACPA, “[a]ct in good faith” to maintain the requisite number of employees, and to make “reasonable efforts to replace such persons” as necessary); MINN. R. 1230.1905 (2009) (requiring EDA businesses to notify state of changes in eligibility which will then be used under section 1230.1860 to graduate the business from the program).

238. See *supra* note 56.

239. Cf. Sarah M. Morehouse & Malcom E. Jewell, *States as Laboratories: A Reprise*, 7 ANN. REV. POL. SCI., 177, 198 (2004) (noting that “[a]s laboratories of democracy, the states must provide for their poor”). The laboratory analogy is attributed to Justice Louis Brandeis, who called states ‘laboratories of democracy’ “because he viewed them as sources of experimentation, with new solutions to social and economic questions.” *Id.* at 177. Of course, states can also learn from the federal government, which is in effect a fifty-first point of comparison. Cf. *id.* (noting that “[t]he 50 states offer much greater opportunity for comparative research than is found in Congress”).

240. See *supra* notes 127, 129 and accompanying text.

241. See *supra* notes 86–88 and accompanying text; see also Kahlenberg, *Class-Based Affirmative*

based affirmative action programs must recognize and account for the administrative and political obstacles to their adoption and implementation.²⁴²

To accomplish these goals, any such program should focus on the smallest geographic area possible. The size of the area matters for two reasons. First, providing preferences to too large of an area would increase the costs of the program by increasing the number of businesses eligible for the preference, while also dissipating the program's impact.²⁴³ Second, the more people who live in the area, the more likely that the individual attributes of the people who live in it will be muddled, meaning that the use of the geographic area as a proxy for class becomes less valid.²⁴⁴ An underlying premise of "place-not-race" programs is that where one lives may serve as an effective proxy for the economic disadvantage he has suffered and that this, in turn, serves as an obstacle to his employment.²⁴⁵ The proxy is used to make the program more administrable as it is relatively easy for an employer to know where his employees live.²⁴⁶ Indeed, all HUBZone requires an employer to know about his employees

Action, supra note 84, at 1085 (noting that "a class-based program should correct for relative inequality of opportunity").

242. See supra notes 117–22 and accompanying text.

243. See BEALE & DEAS, supra note 161, at 227.

244. See Arline T. Geronimus, John Bound & Lisa J. Neidert, *On the Validity of Using Census Geocode Characteristics to Proxy Individual Socioeconomic Characteristics*, 91 J. AM. STAT. ASS'N 529, 536 (1996) (suggesting that "aggregate variables based on more narrowly defined geographic areas . . . would be better proxies" while conceding that there is no "empirical evidence to rule out the possibility that block group data for a less select sample might better represent individual characteristics than census tracts or zip codes"); see also supra notes 164–70 and accompanying text (discussing approaches under existing programs and analyzing why size matters); cf. BEALE & DEAS, supra note 161, at 228 (providing example of similar phenomenon under HUBZone due to metropolitan and nonmetropolitan areas being classified differently).

245. See Kahlenberg, *Class-Based Affirmative Action*, supra note 84, at 1080 (discussing a sophisticated definition of class and noting that "much evidence supports William Julius Wilson's thesis that neighborhood matters, and the debate should turn on how much weight to give this factor, not on whether it should count at all" (footnote omitted)). This is even truer for blacks than for whites, as "richer white families live in more affluent areas, while poorer minorities often live in meager surroundings." EMMA COLEMAN JORDAN & ANGELA P. HARRIS, *ECONOMIC JUSTICE: RACE, GENDER, IDENTITY, AND ECONOMICS* 76 (2005).

246. Cf. Kahlenberg, *Class-Based Affirmative Action*, supra note 84, at 1092–93 (noting that a requirement to hire based on class preferences would be easier to administer if "graduating high school students who wish to benefit from a class preference must fill out a standard form providing readily accessible data, such as the identity of a student's high school, her place of residence, family structure, and parental income"); Roney, supra note 70, at 944 (describing the "unenviable position [for an employer] of soliciting personal information from its employees"). Employers collect an employee's address when they are hired. See *Hiring Employees*, INTERNAL REVENUE SERV. (Dec. 17, 2008), <http://www.irs.gov/businesses/small/article/0,,id=98164,00.html> (noting that employers are required to collect an I-9 form from employees at hiring).

is where they live,²⁴⁷ while TACPA requires employers who wish to receive additional preferences to look into far more intrusive areas such as their employees' criminal histories, ages, receipt of welfare, and number of dependents.²⁴⁸ While the creation of a standardized form²⁴⁹ to provide employers with this detailed information about employees as a way to avoid the use of proxy information might seem appealing, this form would likely suffer the same flaws as FAFSA, the government form to determine federal financial aid for college, which "[m]ost everyone agrees . . . something is very wrong with" because "it scares off the very families most in need."²⁵⁰

In this context, the smallest practical classification is the census block group.²⁵¹ There are two principal concerns to using such a small unit: arbitrary exclusion and failure to treat disadvantaged areas that span multiple block groups as such. Arbitrary exclusion is epitomized by two businesses situated across the street from one another that, for all intents and purposes, are in the same economic and geographic position, but which are treated differently because one side of the street is considered disadvantaged while the other is not.²⁵² TACPA suggests a solution to this concern through the creation of a buffer of one census block around qualified census blocks.²⁵³ To ensure that the buffer, which itself did not qualify for the preference, is appropriately treated differently, it should be given a lower base percentage preference than businesses located in block groups that qualified on their own merits.²⁵⁴ Of course, this merely extends the problem of arbitrariness to the boundary between the buffer and the surrounding area, but this is less troublesome as it is less likely to exclude legitimately deserving businesses.²⁵⁵ As to the failure to treat large

247. See *supra* text accompanying note 210.

248. See *supra* notes 213, 214 and accompanying text.

249. See Kahlenberg, *Class-Based Affirmative Action*, *supra* note 84, at 1092–93.

250. See Tamar Lewin, *The Big Test Before College? Filling out the Financial Aid Form*, N.Y. TIMES, Feb. 22, 2009, at A1.

251. See *supra* note 164; see also *supra* notes 156–63 (discussing alternative geographic units).

252. See BEALE & DEAS, *supra* note 161, at 227–28 (relating anecdotal evidence of this wrong-side-of-the-street problem under HUBZone).

253. See *supra* notes 151, 152 and accompanying text.

254. See *infra* note 279 and accompanying text (recommending a variable preference to account for material differences between applicants).

255. Cf. TERRY D. CLARK, JENNIFER M. LARSON, JOHN N. MORDESON, JOSHUA D. POTTER & MARK J. WIERMAN, APPLYING FUZZY SET MATHEMATICS TO FORMAL MODELS IN COMPARATIVE POLITICS 29–30 (2008) (explaining the mathematical concept of partial membership in a fuzzy set and the corresponding difficulty of “determin[ing] which objects are in the set and which objects are not in the set”). In fact, certain fuzzy set theorists have used the problem of drawing an “exact dividing line between *rich* and *poor*,” and the related problem of where “the middle class fit[s] into such a categorization,” as examples of where fuzzy set theory can be helpful. See *id.* at 31. Because “[t]he

disadvantaged areas as a whole, the approach taken by TACPA again presents an appealing solution: contiguous qualifying block groups should be treated as one disadvantaged area known as a cluster.²⁵⁶ This maintains the proper focus on isolating disadvantaged areas while also allowing for the broadest geographical definition thereof. It also ensures that non-disadvantaged block groups do not muddle the analysis.

Having recommended the appropriate geographical confines of a qualifying area, the next issue is what socioeconomic conditions an area must exhibit to receive benefits under the program. The existing programs focus principally on unemployment, poverty, and income.²⁵⁷ A focus on income makes sense, as the “simple definition of class”—with class being the obvious core of class-based affirmative action—focuses on family income.²⁵⁸ A focus on levels of unemployment also makes sense, as a stated goal of these programs is to encourage employment in disadvantaged areas.²⁵⁹ In the end, a determination of which of these factors to focus on and to what degree is a political question that will vary to a great degree across governments; to be sure, decisions about how many areas to include in the program are necessarily decisions about how much a government is willing to spend on such programs. Accordingly, decisions about precisely which types of areas will be given preference in any particular area should be made after considering the potential impact and cost of any particular approach in the relevant area.

Whichever of these factors a government decides to focus on, a new tool will aid them in determining which areas satisfy their criteria based on more current data than the decennial census provides.²⁶⁰ The American Community Survey (ACS), an undertaking of the U.S. Census Bureau, “provides single-year labor force estimates” and “has been optimized . . . to produce accurate estimates for geographic areas as small as census

fundamental idea of fuzzy set theory is that real world phenomenon,” such as the dividing line for eligibility for statutory preferences like those considered herein, “cannot be divided cleanly into *black* or *white* divisions,” *id.*, the buffer approach recommended in this Note, *see supra* text accompanying note 253, is, in a way, a crude operationalization of fuzzy set theory.

256. *See supra* note 157 and accompanying text.

257. *See supra* notes 171–80 and accompanying text (analyzing approaches taken by HUBZone, TACPA, and EDA).

258. *See Kahlenberg, Class-Based Affirmative Action, supra* note 84, at 1074.

259. *See supra* notes 127, 129 and accompanying text.

260. Of course, the more current the data that is used, the more longitudinal variation there will be as to which areas qualify. To address the situations in which these timing issues would be problematic, something like HUBZone’s Redesignated Area concept, *see supra* note 181, might be required to address these concerns. *See BEALE & DEAS, supra* note 161, at 229 (“The Redesignated Area seems to be a reasonable practical compromise on the issue of loss of HUBZone status . . .”).

tracts and block groups.”²⁶¹ Because the program being recommended herein focuses on clusters of block groups, and because ACS plans to make available more recent poverty and unemployment data at this level,²⁶² ACS data may be helpful in the administration of these programs.²⁶³

The next layer of analysis is determining what type of connection to a qualifying cluster of block groups a business must maintain to receive a preference. The goal of job creation in disadvantaged areas is furthered whenever an employer hires people from these areas, regardless of whether it is in the business’s principal office, as required by HUBZone,²⁶⁴ or merely a branch.²⁶⁵ TACPA acknowledges this through the connection method of certification, which allows certification of businesses that, over a period of three years, have had a major office or manufacturing facility in the state and which have employed Californians.²⁶⁶ These businesses need only have a worksite in the distressed area and ensure that the required amount of work is conducted in the disadvantaged area to satisfy the connection requirement.²⁶⁷ Such an approach is superior to the principal office approach because the focus remains on job creation for prospective employees, which is the core of this type of employment-focused class-based affirmative action.

The use of such a discerning method to isolate the preferred geographic areas brings with it an accompanying effect that serves as further justification of “place-not-race” programs for those who support race-based affirmative action and who would prefer to maintain those programs. Although class-based affirmative action would in theory result

261. *Guidance on Differences in Employment and Unemployment Estimates from Different Sources*, U.S. CENSUS BUREAU, <http://www.census.gov/hhes/www/laborfor/laborguidance092209.html> (last visited May 1, 2010); see also *American Community Survey (ACS)*, U.S. CENSUS BUREAU, <http://www.census.gov/acs/www/index.html> (last updated Apr. 20, 2011) (ACS homepage).

262. See U.S. DEP’T OF COMMERCE, U.S. CENSUS BUREAU, *A COMPASS FOR UNDERSTANDING AND USING AMERICAN COMMUNITY SURVEY DATA: WHAT RESEARCHERS NEED TO KNOW 2*, 11 (2009), available at <http://www.census.gov/acs/www/Downloads/ACSResearch.pdf>.

263. Cf. U.S. DEP’T OF COMMERCE, U.S. CENSUS BUREAU, *A COMPASS FOR UNDERSTANDING AND USING AMERICAN COMMUNITY SURVEY DATA: WHAT STATE AND LOCAL GOVERNMENTS NEED TO KNOW* (2009), available at <http://www.census.gov/acs/www/Downloads/ACSStateLocal.pdf> (providing assistance to state and local governments that wish to use ACS data).

264. See *supra* note 146 and accompanying text.

265. Cf. BEALE & DEAS, *supra* note 161, at 230–32 (discussing complications under HUBZone’s principal office requirement when a business has multiple branches, as well as “a strong, if largely implicit, presumption that actual performance of a HUBZone contract would take place at a business location in a HUBZone”).

266. See *supra* note 139 and accompanying text.

267. See *supra* notes 151, 189 and accompanying text.

in fewer minorities than whites being preferred,²⁶⁸ using place as a proxy for socioeconomic status rather than some other measure of disadvantage should increase the percentage of minorities benefited due to the high degree of residential segregation in the United States.²⁶⁹ Blacks have historically been the victims of a great deal of residential segregation that is decreasing to some extent, but which remains relatively high.²⁷⁰ Indeed, one in three blacks lives in a “hypersegregated” area.²⁷¹ Empirical studies reveal the “growing importance of the interaction between residential segregation and income inequality in determining the concentration of poverty, an interaction that obviously disadvantages blacks compared to other groups in the United States.”²⁷² As a result, programs that target disadvantaged areas are more likely to benefit blacks than are programs that focus on individual attributes alone.²⁷³ This is because blacks have not only faced the obvious economic barriers that justify class-based affirmative action, but have also faced structural barriers that have resulted in anachronistic residential patterns that in and of themselves harm blacks.²⁷⁴ It would be a mistake, however, for this to become the primary motivation of class-based affirmative action; although class-based affirmative action appears to be constitutional in the run of cases,²⁷⁵ a race-based rationale for adopting the programs could increase the risk of challenges under the Equal Protection Clause.²⁷⁶

268. See *supra* notes 102–05 and accompanying text.

269. See John A. Powell, *The Race and Class Nexus: An Intersectional Perspective*, 25 *LAW & INEQ.* 355, 390 (2007) (stating that a variety of historical factors, including residential segregation, have “locked Blacks out of the middle class”). Although Powell concludes “that race neutral tactics are not up to the task . . . of addressing many of the structural problems that prevent the development of social solidarity across racial boundaries,” he does note that “class and race interact and are not separable.” *Id.* at 426.

270. See JOHN ICELAND, DANIEL H. WEINBERG & ERIKA STEINMETZ, U.S. CENSUS BUREAU, *Residential Segregation of Blacks or African Americans*, in *RACIAL AND ETHNIC SEGREGATION IN THE UNITED STATES: 1980–2000*, at 59 (2002), available at http://www.census.gov/hhes/www/housing/housing_patterns/pdf/ch5.pdf.

271. Douglas S. Massey & Mary J. Fischer, *How Segregation Concentrates Poverty*, 23 *ETHNIC & RACIAL STUD.* 670, 671 (2000).

272. *Id.* at 685.

273. Cf. JOHN EDWARDS, *WHEN RACE COUNTS: THE MORALITY OF RACIAL PREFERENCES IN BRITAIN AND AMERICA* 183 (1995) (noting that preferences for all minority groups, without disaggregating them into their respective races, to a certain extent, “will not matter, given relatively high degrees of residential segregation” because “[i]f the labour draw area is predominantly black, the programmes, if successful, will pull in blacks even if the goal relates to ‘all minorities’”).

274. See *supra* notes 270–72 and accompanying text.

275. See *supra* note 111 and accompanying text.

276. See Chapin Cimino, Comment, *Class-Based Preferences in Affirmative Action Programs After Miller v Johnson: A Race-Neutral Option, or Subterfuge?*, 64 *U. CHI. L. REV.* 1289, 1289–91 (1997) (noting that the Supreme Court’s enthusiasm for “race-neutral” alternatives to affirmative action may be in conflict with its hesitancy towards “subterfuge,” or covertly doing by permissible

For those who support class-based affirmative action without regard to race, understanding the interactive nature of economic opportunity and place of residence serves to mitigate, at least to some degree, the “top of the bottom” and “close swap” concerns.²⁷⁷ Although the system will still select in the manner contemplated by the critique, the consequences will be less troubling because the described method can isolate areas where many factors have worked together to hinder people in the job market. Therefore, although the people who are selected will still be the “top of the bottom,” characterizing this as a “close swap” becomes less valid because those being benefited are more disadvantaged than they would otherwise be. That is, the distance of the swap is far greater than it would be in the metaphorical Cosby-kids swap in the race context.²⁷⁸

Moreover, the program should be based on percentage preferences after competitive bidding, not set-asides or sole-source procurements, for several reasons. First, preferences can be adjusted to reflect the relative disadvantage of the applicants,²⁷⁹ while set-asides and sole-source procurements are less flexible.²⁸⁰ A carefully crafted variable preference will encourage businesses to strive for the next level of preference, while also continually furthering the program’s goals.²⁸¹ Second, preferences can

means what one cannot do by impermissible means, in other equal protection contexts); *cf.* *Washington v. Davis*, 426 U.S. 229, 240–41 (1976) (establishing that there can be no Equal Protection violation without proof of a purpose to discriminate); *Pyke v. Cuomo*, 567 F.3d 74, 78 (2d Cir. 2009) (indicating that geographical classifications that are not “insidious proxies for suspect racial classifications” are not suspect classifications). Despite the potential for these novel subterfuge challenges, some legislators apparently continue to advocate for class-based programs as a way to do indirectly what cannot be done directly. *See supra* note 6 (describing city councilman who makes similar argument). Certain Justices of the Supreme Court have implicitly encouraged this sort of analysis. *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 789 (2007) (Kennedy, J., concurring in part and concurring in the judgment) (encouraging school boards to consider, *inter alia*, “drawing attendance zones with general recognition of the demographics of neighborhoods” because such “mechanisms are race conscious but do not lead to different treatment based on a [racial] classification.”).

277. *See supra* note 107 and accompanying text (outlining the critiques).

278. *See supra* text accompanying note 101 (discussing one critique of race-based affirmative action focusing on situations in which children who would otherwise not be seen as disadvantaged, such as Bill Cosby’s children, receive preferences).

279. *See Kahlenberg, Class-Based Affirmative Action, supra* note 84, at 1085 (describing two-tier system admission at Berkeley based on how far below median their family income was); Roney, *supra* note 70, at 958 (recommending a differential preference based on size of business).

280. *See* David Benjamin Oppenheimer, *Distinguishing Five Models of Affirmative Action*, 4 BERKELEY WOMEN’S L.J. 42, 42 (1988–90). Oppenheimer notes that the “quota model” of affirmative action leads to opportunities being “set aside to be occupied only by” members of the protected class. *Id.* at 43. “The preference model,” on the other hand, takes account of one’s status in a protected class but is “flexible.” *Id.* at 46.

281. *Cf.* Roland G. Fryer, Jr. & Glenn C. Loury, *Affirmative Action and Its Mythology*, 19 J. ECON. PERSP. 147, 154 (2005) (describing “affirmative action as a form of market regulation that

operate within existing merit-based bidding programs rather than requiring a separate system for class-based applicants.²⁸² Because class-based affirmative action is intended to “adjust for the latent potential of those who have faced obstacles and done fairly well nonetheless,” this variable preference effectively adjusts the required merit of the bid to a slightly lower level when a business faces burdens at a slightly higher level.²⁸³ This also makes the program more administrable by removing discretion from contracting officers to decide which regime to apply.²⁸⁴ Finally, preferences tend to be more politically palatable than more exclusive programs precisely because they do not remove consideration of merit.²⁸⁵

The preference should increase accordingly as the employer hires more people from the targeted area, much like TACPA does.²⁸⁶ However, unlike TACPA, the focus should be on where the employee lives and not a more

induces a shift in demand for the services of persons at various skill levels in affected groups” and how such “policies may lead firms to hire or promote minority applicants at a given skill level, even though similar nonminority applicants would be rejected”). Under HUBZone, the only incentives are to locate one’s principal place of business in a HUBZone, *see supra* note 146 and accompanying text, and to employ 35% of one’s staff from HUBZones, *see supra* note 210 and accompanying text. Therefore, there is no benefit from going from 35% to 36%. Under TACPA, however, an employer who only employs 8% of employees who are at risk of unemployment will receive an additional 1% price preference if he increases the percentage of his workforce at high risk of unemployment to 9%. *See supra* note 215 and accompanying text. And then, once he hits 14%, he will receive another 1%. *Id.*

282. *See* Oppenheimer, *supra* note 280, at 46 (noting that all applicants are considered together while some receive the advantage of having a certain quality in a preference approach).

283. *See* Kahlenberg, *Class-Based Affirmative Action*, *supra* note 84, at 1061; *see also supra* note 87 and accompanying text (discussing the balancing nature of the theory).

284. *Cf.* BEALE & DEAS, *supra* note 161, at 229–30 (noting that HUBZone preferences are mandated by law but that contracting officers do not appear to understand this, which frustrates HUBZone advocates). In theory, a city or state will have fewer contracting officers to train and will be better able to enforce such a preference than the federal government. *Cf.* Roney, *supra* note 70, at 956 (noting that the federal government has engaged in various attempts to train contracting officers, including travelling, disseminating literature, and posting information to the internet, but that “many [contracting officers] remain uncomfortable” with the program).

285. *See* Faye J. Crosby, Aarti Iyer & Sirinda Sincharoen, *Understanding Affirmative Action*, 57 ANN. REV. PSYCHOL. 585, 595–96 (2006) (suggesting that people support softer forms of affirmative action at higher rates than harder forms, especially when assured that merit is taken into account). This hostility toward the more absolute programs is not only held by the electorate, but also the judiciary. *See* Johnson v. Transp. Agency, Santa Clara Cnty., Cal., 480 U.S. 616, 637–38 (1987) (holding, under Title VII, that goals do not “unnecessarily trammel[]” the rights of the nonpreferred class like quotas do because no one is automatically excluded); Univ. of Cal. Regents v. Bakke, 438 U.S. 265, 319–20 (1978) (Powell, J., announcing the judgment of the Court) (“No matter how strong their qualifications, quantitative and extracurricular, including their own potential for contribution to educational diversity, [members of nonpreferred groups] are never afforded the chance to compete with applicants from the preferred groups for the special admissions seats [that are set aside by a quota]. . . . The fatal flaw in petitioner’s preferential program is its disregard of individual rights as guaranteed by the Fourteenth Amendment. . . . For this reason, that portion of the California court’s judgment holding petitioner’s special admissions program invalid under the Fourteenth Amendment must be affirmed.”).

286. *See supra* note 190 and accompanying text.

detailed inquiry into the employee's background to ensure that the program is administrable.²⁸⁷ While this approach favors administrative convenience over a more accurate measure of relative inequality of opportunity,²⁸⁸ administrability is at the heart of an effective government preference program because it prevents the program from being overrun with fraud and abuse.²⁸⁹ The federal government has recently started cracking down on fraud in the HUBZone system, especially those businesses that falsely claim to have met the 35% requirement.²⁹⁰ Four of the firms that failed to meet this requirement had 33, 53, 74, and 116 employees, respectively.²⁹¹ To audit these four businesses under a TACPA-like approach that considers a variety of individual factors rather than mere residency, the government would have to apply various standards to 276 employees to determine if the correct preferences were applied.²⁹² Because state and local governments tend to have less money to spend on enforcing these procurement laws than the federal government does, ease of auditing is a crucial factor in the success of any program.²⁹³

Various other factors could also result in different levels of preference. To be as true as possible to the theory of class-based affirmative action, which seeks to benefit people at “‘meritocratic crisis points’ relatively

287. See *supra* notes 247–50 and accompanying text; see also BEALE & DEAS, *supra* note 161, at 235 (noting that under a residency-only approach, “[a]ll you have to do is sit down with payroll information and enter addresses into the HUBZone mapping system”).

288. But see *supra* note 107 (noting that care must be taken to avoid oversimplifying these programs to such an extent that they undermine their own purposes).

289. See MODEL PROCUREMENT CODE PROJECT STAFF, *Overview of the Procurement Process, Related Frauds, and the Model Procurement Code*, in IDENTIFYING AND PROSECUTING FRAUD AND ABUSE IN STATE AND LOCAL CONTRACTING 3 (1984) (noting that an ideal procurement program would provide for competition and dissuade illegal conduct); see also Kahlenberg, *supra* note 84, at 1066 (noting that verifiable information and serious penalties for fraud are necessary); *supra* notes 117–20 and accompanying text (noting that fraud prevention is a crucial component of making any social program, including class-based affirmative action programs, administrable).

290. See U.S. GOV'T ACCOUNTABILITY OFFICE, HUBZONE PROGRAM: FRAUD AND ABUSE IDENTIFIED IN FOUR METROPOLITAN AREAS 8–10 (2009), available at http://www.sba.gov/idc/groups/public/documents/sba_program_office/hubzone_reports_d09440t.pdf [hereinafter FRAUD REPORT] (discussing several firms who received contracts despite various violations, including a failure to meet the 35% employee requirement and the principal office requirement).

291. *Id.*

292. Because the recommended program is not limited to small businesses, see *supra* text accompanying note 278, this problem would be even worse for governments adopting the program because larger businesses have more employees to audit.

293. See Sudeep Reddy & Conor Dougherty, *Governments Shed More Workers*, WALL ST. J., Sept. 5, 2009, at A2 (noting that the federal government can borrow money but states must generally balance budgets, which leaves little additional revenue, especially in time of economic uncertainty); cf. Daniel J. Castleman, Op-Ed, *How to Guard Against Stimulus Fraud*, WALL ST. J., Jan. 13, 2010, at A17 (predicting large-scale fraud under the federal stimulus program and that “[p]robably no one” will prevent this fraud, “particularly at the state and local level”).

early in life,”²⁹⁴ additional preferences could be given to employers who hire younger people, such as recent high school graduates, from these areas.²⁹⁵ Also, as suggested above, the preference could be adjusted downward for businesses located in qualifying buffer areas rather than the technical boundaries of the disadvantaged area.²⁹⁶

Further, the program should not be limited to small businesses. Doing so ignores the primary goal of job creation in distressed areas.²⁹⁷ By disqualifying employers who are capable of employing a larger number of people from distressed areas, as HUBZone and EDA do,²⁹⁸ the program is essentially defeating its own purpose.²⁹⁹ Of course, governments have compelling reasons to encourage small business development as well.³⁰⁰ Therefore, if a state or local government determines that those policies are as important as the policies behind a “place-not-race” program, or if it determines that awarding contracting preferences to large businesses would be politically impractical, it could grant an additional preference to businesses that qualify under a preexisting small business preference program.³⁰¹

To prevent fraud, the system must have an effective certification program. The federal government has recently identified a variety of cases of outright fraud in the HUBZone program, which essentially provides for continuing certification contingent on self-certification.³⁰² It is unclear whether the continuing-certification approach adopted by HUBZone and EDA or the TACPA approach requiring recertification at the time of each

294. See *supra* note 115 and accompanying text.

295. Cf. Kahlenberg, *Class-Based Affirmative Action*, *supra* note 84, at 1067 (arguing that “class preferences make sense in the university admissions process, both because applicants are still generally young, and because universities already have access to a wealth of information about an applicant’s background”).

296. See *supra* note 254 and accompanying text (recommending variable preference in this context).

297. See *supra* notes 127, 129 and accompanying text.

298. See *supra* notes 224, 225 and accompanying text.

299. See Roney, *supra* note 70, at 958 (noting that opening HUBZone to larger businesses would offer greater employment opportunity and that this and other limitations “could virtually ensure that the program will never be successful”); cf. BEALE & DEAS, *supra* note 161, at 235 (noting that “[i]f a business is small, location and residency of employees are the only real barriers”).

300. See *About SBA*, U.S. SMALL BUS. ADMIN., <http://www.sba.gov/about-sba> (last visited May 1, 2011) (“Small business is America’s most powerful engine of opportunity and economic growth.”).

301. See *supra* notes 195–96 and accompanying text (describing combination of preferences, including small business preference, under TACPA); see also Roney, *supra* note 70, at 958 (observing that “goals of the [HUBZone program] . . . might have been better achieved by adopting . . . a 10 percent price preference for [small businesses] and a 5 percent one for larger companies in HUBZones”).

302. See FRAUD REPORT, *supra* note 290 (describing recent fraud issues); see also *supra* notes 230, 237 and accompanying text (describing HUBZone certification process).

application best achieves this goal while also being administratively convenient.³⁰³ Therefore, governments adopting these programs should choose the approach that is least costly to implement, which is likely the one most consistent with its existing preference programs. Although far from determinative, one factor weighing in favor of some sort of ongoing certification is the ability to maintain a list of registered businesses to whom other bidding and subcontracting opportunities can be marketed.³⁰⁴

Finally, the program should adopt any other aspects that are necessary as a matter of political practicality to their implementation. The most obvious examples of these limits are ownership and control requirements.³⁰⁵ These requirements do not fit neatly into the framework of providing preferences to encourage job creation in the areas that need the economic boost, and they impose serious administrative costs in auditing.³⁰⁶ However, such theoretically unnecessary limitations may in fact be necessary in response to such political pressures as the “buy American” movement and to budgetary pressures in a time of economic crisis.³⁰⁷ Other such limits that may be necessary for similar reasons are those graduating a business from the program after excessive use (as does EDA)³⁰⁸ and caps on the absolute dollar amount of the preference (as does TACPA).³⁰⁹

IV. CONCLUSION

Although state-sponsored, race-conscious affirmative action continues to disappear by force of ballot initiative and Supreme Court mandate, three existing “place-not-race” programs, as well as the underlying theory of class-based affirmative action, serve as models to states and local governments who seek a novel way to continue using government contracting as a means of effectuating socioeconomic policy. Although

303. Cf. *supra* Part II.D.2.f (discussing and analyzing these approaches).

304. See *supra* notes 230, 231 and accompanying text (discussing similar lists under HUBZone and EDA).

305. See Roney, *supra* note 70, at 958 (noting that “[a]llowing businesses that might have non-U.S. citizens among ownership or key personnel [to receive HUBZone preferences] still would have brought jobs to these areas of high unemployment”).

306. Cf. BEALE & DEAS, *supra* note 161, at 178 (describing the difficulty of obtaining ownership data in assessing effectiveness of program); Roney, *supra* note 70, at 944 (noting the “onerous requirement to inquire into every stockowner’s citizenship”).

307. Cf. Miller, *supra* note 132, at 378–79 (hypothesizing that this “somewhat peculiar” requirement in the HUBZone program is a recognition that “our government has limited resources, and it had chosen to distribute those limited resources only to its citizens”).

308. See *supra* note 229 and accompanying text.

309. See *supra* note 199 and accompanying text.

such programs will not, by themselves, end all of society's economic problems,³¹⁰ they are worth pursuing to make sure that relative equality of opportunity remains a consideration in the area of government contracting, as it has since President Kennedy began the federal affirmative action program nearly fifty years ago. These programs may in fact signal a shift from the "[r]acial [b]attleground to the [e]conomic [c]ommon [g]round."³¹¹ To be sure, although he hesitates to extend his logic to the employment context, even Ward Connerly favors giving "those who are disadvantaged some break" in the education context, "assuming they are generally qualified."³¹²

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310. See Fallon, *supra* note 87, at 1944 (concluding that political and economic barriers could lead to class-based affirmative action being less effective than programs aimed at "the broader problem of poverty" because only a limited amount of people would benefit from class-based affirmative action).

311. See Miller, *supra* note 132, at 367.

312. See Lori Leibovich, *The Anti-Affirmative Action Campaign Goes National*, SALON, <http://www.salon.com/news/news970116.html> (last visited May 1, 2011). Connerly has stated that he "surely do[es]n't support giving assistance to anyone seeking a job on the basis of their class or income or whatever; if you're unemployed, you're unemployed." *Id.* However, his view that education is an appropriate place for preferences because it is "the key to success in life," *id.*, seems to be in line with the larger theme that class-based affirmative action should target people at "meritocratic crisis points' relatively early in life." See *supra* note 125 and accompanying text. Even though Connerly hesitates to go so far as to support the types of programs described herein, other key players in Connerly's movement have made it clear that they "favor[] some alternative to affirmative action based solely on need and ignoring sex and race—at least for entry-level jobs and college admissions." See Kahlenberg, *Class-Based Affirmative Action*, *supra* note 84, at 1059 & n.126 (quoting Paul M. Barrett & G. Pascal Zachary, *Budding Backlash? Race, Sex Preferences Could Become Target In Voter Shift to Right*, WALL ST. J., Jan. 11, 1995, at A1).

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