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Defining Social and Economic Disadvantage: Are Government Preferential Business Certification Programs Narrowly Tailored?

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DEFINING SOCIAL AND ECONOMIC DISADVANTAGE: ARE GOVERNMENT PREFERENTIAL BUSINESS CERTIFICATION PROGRAMS NARROWLY TAILORED?

George R. La Noue*

ABSTRACT

The passage of the Public Works Employment Act ("PWEA") of 1976 which set aside ten percent of all procurement dollars awarded under it for "minority owned businesses" began a precedent of the use of contracting preferences for these firms in various federal programs. Later, many of these procurement programs were expanded to include women-owned businesses as beneficiaries. Soon such programs were initiated by state and local governments across the country.

Race and gender preferential contracting programs have always had an uneasy relationship with equal protection principles. Although the PWEA survived a United States Supreme Court decision in *Fullilove v. Klutznick,* in two later landmark decisions, *City of Richmond v. Croson* and *Adarand v. Pena,* the Court determined that strict scrutiny would be the standard of review for race-based programs. Specifically, such programs would need to have a compelling interest and be narrowly tailored to survive. Since then, lower courts have made several dozen decisions applying these standards. Courts have heavily criticized some of these programs for not having a compelling interest, but more often where preferential programs have been terminated or altered, it has been because they have not been narrowly tailored. The most common programmatic defect has been including groups without evidence of discrimination against them.

There is another narrow tailoring problem courts have not addressed. Almost all preferential contracting programs require as a condition of participation that individual firm owners seek certification as a Disadvantaged Business Enterprise ("DBE") for federal procurement or Minority and Women-Owned Business Enterprise ("MWBE") for state and local procurement. Without such certification, a business

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cannot receive a preferential contract or be counted in meeting a goal. The certification process to determine social and economic disadvantage are remarkably uniform across agencies and levels of government.

Three characteristics of the certification process raise narrow tailoring problems. First, the social disadvantage affidavit requires only that the owner affirm that he or she has been "subjected to racial or ethnic prejudice or cultural bias." These phrases do not properly distinguish between remediable discrimination and societal discrimination, which the Supreme Court has found is not a basis for a narrow tailored remedy.

Second, there is evidence that while the process for challenging the rebuttable presumption of social disadvantage exists, the criteria for establishing that an owner, identified as a member of a designated group, now has sufficient achievement and social standing to be no longer socially disadvantaged does not exist. Thus, social disadvantage is as a practical matter established at birth and cannot be challenged by evidence of a successful life.

Third, the economic disadvantage affidavit requires that an owner attest that "my ability to compete in the free enterprise system has been impaired due to diminished capital or credit opportunities compared to other businesses in the same or similar lines of business who are not socially or economically disadvantaged." This attestation requires the owner to have accurate information about the capital and credit opportunities of the other businesses. The diminished status has no time or place limitations. The certification process requires no actual information about the applicant's credit or borrowing history.

This Article examines the legal framework for the certification process as well as two different sources of empirical evidence. A number of disparity studies around the nation have asked minority and women business owners whether they have suffered from business-related discrimination. Most owners, in fact, do not claim they have suffered from discrimination. The second source of empirical evidence is from a telephone survey where certified Maryland MWBEs were asked what they thought the concept of social disadvantage meant and to describe the incidents of discrimination that had affected them. Overwhelmingly, these results show that owner understandings of disadvantage and discrimination are inconsistent with the requirement to identify relevant discrimination outlined in *Croson*. The Article then concludes by suggesting some modifications in the certification process to make it narrowly tailored.

TABLE OF CONTENTS

I. INTRODUCTION 277

II. THE HISTORICAL CONTEXT OF PREFERENTIAL CONTRACTING PROGRAMS 280

III. JUDICIAL REVIEW OF THE NARROW TAILORING OF PREFERENTIAL CONTRACTING PROGRAMS 282

IV. CERTIFICATION OF PROCESS 291

A. Proving Economic Disadvantage 293

B. Asserting Social Disadvantage 295

C. The Case of Marco Rubio 297

D. Certification for Individuals Without a Designated Group Identification 299

V. EVIDENCE FROM DISPARITY STUDIES 300

VI. EVIDENCE FROM A SURVEY OF MARYLAND MWBE CERTIFIED FIRMS 310

VII. CONCLUSION 314

I. INTRODUCTION

When governments use racial, ethnic, or gender classifications to influence the award of public contracts, which firm owners are entitled to those benefits? Almost everywhere, the answer is firms whose owners meet the criteria for certification as Disadvantaged Business Enterprises ("DBEs") in federal programs administered by the Small Business Administration ("SBA"), the United States Department of Transportation ("USDOT"), the Environmental Protection Agency ("EPA"), and other federal agencies or Minority and Women-Owned Business Enterprises ("MWBEs") in state and local programs. Certification is the key to the benefits. When a racial classification is involved, the Supreme Court has held that the standard of review is strict scrutiny, which requires the existence of a compelling interest and a use of race that is narrowly tailored.[1] Whether the certification process and criteria are narrowly tailored is the subject of this Article.

In Part I, the Author first briefly reviews characteristics of DBE and MWBE programs and the controversies about them. Part II portrays the historical context of preferential contracting programs. Part III examines the narrow tailoring prong of the strict scrutiny test courts have developed to evaluate these programs. In Part IV, the Author describes the certification process and criteria for determining economic and social disadvantage. The social disadvantage presumption in the certification process is then compared to evidence from several disparity studies in Part V, and to a small sample of Maryland-certified MWBEs in Part VI. Finally, Part VII explores some suggestions for modifying the certification process.

Currently there are about 1,425 state and local recipients of federal transportation funds, all of whom must set DBE goals on the federally subsidized contract they administer.[2] About 27,000 firms are certified as DBEs,[3] and there are also about 8,440 8(a) certified firms[4]

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[1] City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493–94 (1989) (plurality opinion).

[2] Email from Leonardo San Román, Spec. Assistant to the Dir., Off. of Small & Disadvantage Bus. Utilization, to John Sullivan, Assoc. Director, Project on Civil Rights & Public Contracts (Sept. 27, 2011) (on file with author).

[3] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-78, DISADVANTAGED BUSINESS ENTERPRISE PROGRAMS: ASSESSING USE OF PROXY DATA WOULD ENHANCE ABILITY TO KNOW IF STATES ARE MEETING THEIR GOALS 8 (2011).

[4] The Small Business Administration allows small businesses that are owned and controlled by a socially and economically disadvantaged individual to apply for

eligible for federal prime contracts set aside for them.[5] There is no accurate count of state and local MWBE programs or the number of MWBE certified firms, but they are common in areas with large minority populations.[6]

Race and gender preferential contracting programs have always had an uneasy relationship with equal protection principles. Although a federal minority business program survived a United States Supreme Court decision in *Fullilove v. Klutznick,*[7] in two later landmark decisions, *City of Richmond v. Croson*[8] and *Adarand Constructors, Inc. v. Pena,*[9] the Court adopted the strict scrutiny standard for race-based contracting programs at any level of government. Specifically, such programs would need to have a compelling interest and be narrowly tailored to survive.[10]

Since then, lower courts have made several dozen decisions applying these standards with mixed results. With the exception of the decision by the United States Court of Appeals for the Federal Circuit in *Rothe v. Department of Defense,*[11] courts have generally decided federal preferential contracting programs have a compelling interest.[12] In *W. States Paving Co., Inc. v. Wash. State Dep't of Transp.*,[13] however, the United States Court of Appeals for the Ninth Circuit found

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an 8(a) certification program. 13 C.F.R. § 124.1 (2012). "The purpose of the 8(a) BD program is to assist eligible small disadvantaged business concerns compete in the American economy through business development." *Id*. These businesses must demonstrate a "potential for success" and must be "unconditionally owned and controlled by one or more socially and economically disadvantaged individuals who are of good character and citizens of and residing in the United States." 13 C.F.R. § 124.101 (2012).

[5] U.S. SMALL BUS. ADMIN., FY 2012 CONGRESSIONAL BUDGET JUSTIFICATION AND FY 2010 ANNUAL PERFORMANCE REPORT 77 (2012).

[6] *See Certification Overview*, MWBE.COM, http://www.mwbe.com/cert/certification.htm (last visited October 14, 2012).

[7] 448 U.S. 448, 492 (1980) (plurality opinion).

[8] 488 U.S. 469 (1989).

[9] 515 U.S. 200 (1995).

[10] *Id.* at 237.

[11] Rothe Dev. Corp. v. Dep't of Defense, 545 F.3d 1023, 1049 (Fed. Cir. 2008).

[12] *See, e.g.*, Adarand Constructors, Inc. v. Slater, 228 F.3d 1147, 1155 (10th Cir. 2000); Sherbrooke Turf, Inc. v. Minn. Dep't of Transp., 345 F.3d 964, 969 (8th Cir. 2003); N. Contracting, Inc. v. Illinois, 473 F.3d 715, 720 (7th Cir. 2007).

[13] 407 F.3d 983 (9th Cir. 2005).

that the state's implementation of a federal program was not narrowly tailored.[14]

State and local funded preferential contracting programs have fared worse under judicial scrutiny.[15] Following *Croson*, it has been generally established that without a disparity study identifying contracting discrimination in a local market, thus creating a compelling interest, procurement programs that give advantages to businesses on the basis of race, ethnicity, or gender violate the Equal Protection Clause.[16] Courts,[17] federal agencies[18] and scholars[19] have heavily criticized many of these studies as flawed grounds for establishing a compelling interest. More often, however, where preferential programs have been terminated or altered by courts, it has been because they have not been narrowly tailored.[20]

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[14] *See id.* at 1003 (holding that the State of Washington failed to meet its burden of proving that its DBE program is "narrowly tailored to further Congress's compelling remedial interest").

[15] Post-*Croson* courts have found serious flaws in the statistical evidence of discrimination presented to them. *See* O'Donnell Constr. Co., v. District of Columbia, 963 F.2d 420, 427 (D.C. Cir. 1992); Contractors Ass'n of E. Pa., Inc. v. City of Phila., 91 F.3d. 586, 610 (3rd Cir. 1996); Phillips & Jordan, Inc. v. Watts, 13 F. Supp. 2d 1308, 1316 (N.D. Fla. 1998); Webster v. Fulton Cnty., Ga., 51 F. Supp. 2d 1354, 1383 (N.D. Ga. 1999), *aff'd*, 218 F.3d 1267 (11th Cir. 2000); Assoc. Util. Contractors of Md., Inc. v. Mayor of Balt., 83 F. Supp. 2d 613, 622 (D. Md. 2000); Concrete Works of Colo., Inc. v. City of Denver, Colo., 36 F.3d 1513, 1530–31 (10th Cir. 1994); Builders Ass'n of Greater Chi. v. Cnty. of Cook, 256 F.3d 642, 647 (7th Cir. 2001); Hershell Gill Consulting Eng'r, Inc. v. Miami-Dade Cnty., 333 F. Supp. 2d 1305, 1344 (S.D. Fla. 2004); L. Tarango Trucking v. Cnty. of Contra Costa, 181 F. Supp. 2d 1017, 1038 (N.D. Cal. 2001). On the other hand, a few courts have been more favorably disposed toward disparity studies. *See* Concrete Works of Colorado, Inc. v. City of Denver, 321 F.3d 950, 994 (10th Cir. 2003); N. Contracting, Inc. v. Ill., 473 F.3d 715, 724 (7th Cir. 2007).

[16] *See* U.S. COMM'N ON CIVIL RIGHTS, DISPARITY STUDIES AS EVIDENCE OF DISCRIMINATION IN FEDERAL CONTRACTING 2 (2006).

[17] *See Phillips & Jordan*, 13 F. Supp. 2d at 1315 (criticizing the use of census data in a disparity study for an overinclusive measure of availability) or Associated Gen. Contractors of Ohio v. Drabik, 50 F. Supp. 2d 741, 747 (S.D. Ohio 1999) (criticizing the overstatement of the percentage of qualified MBEs that can provide public services).

[18] U.S. COMM'N ON CIVIL RIGHTS, *supra* note 16, at 25 (2006).

[19] *See generally* Stephen E. Celec, Dan Voich, Jr., E. Joe Nosari & Melvin T. Stith, Sr., *Measuring Disparity in Government Procurement: Problems with Using Census Data Estimating Availability*, 60 PUB. ADMIN. REV. 134 (2000); George R. La Noue, *Who Counts?Measuring the Availability of Minority Businesses for Public Contracting after Croson*, 21 HARV. J.L. & PUB. POL'Y 793 (1998).

[20] *See, e.g.*, *W. States Paving Co., Inc. v. Wash. State Dep't of Transp.*, 407 F.3d 983, 1003 (9th Cir. 2005).

Consequently, examining whether the certification process on which all federal, state, and local race and gender preferential contracting programs are based is narrowly tailored is a significant issue.

II. THE HISTORICAL CONTEXT OF PREFERENTIAL CONTRACTING PROGRAMS

The passage of the Public Works Employment Act of 1977 ("PWEA"),[21] which set aside ten percent of all procurement dollars awarded under the Act for "minority owned businesses," began a legislative precedent of using contracting preferences for these firms in various federal programs. The next year Congress passed Amendments to the Small Business Investment Act of 1958, which gave legislative approval to an earlier administrative practice of setting aside 8(a) contracts for "socially or economically disadvantaged individuals."[22] The SBA had determined that Blacks, Hispanics, and Native Americans were presumptively socially disadvantaged.[23] Later, many of these preferential procurement programs were expanded to include other minority and women-owned businesses as beneficiaries.[24] Soon, state and local governments across the country initiated such programs.

As is true of most public programs, there were many motivations for what initially were called minority business enterprise ("MBE") programs:

> (1) To remedy instances of current discrimination against specific minority businesses.[25]
>
> (2) To overcome the present effects of past discrimination against minority businesses.[26]

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[21] Pub. L. No. 95-28 (91 Stat. 116).

[22] Pub. L. No. 95-507 (92 Stat. 1757) (1978).

[23] 49 C.F.R. § 26.67(a)(1) (2012).

[24] Elizabeth Newell, *Administration Takes First Crack at Controversial Women's Procurement Program*, GOV'T. EXEC., (Mar. 2, 2010), http://www.govexec.com/oversight/2010/03/administration-takes-first-crack-at-controversial-womens-procurement-program/30964/.

[25] MD. GOVERNOR'S OFFICE OF MINORITY AFFAIRS, STATE OF MARYLAND MINORITY BUSINESS ENTERPRISE (MBE) PROGRAM SUBGOAL DIRECTIVE AND GUIDELINES FOR SETTING CONTRACT SUBGOALS 1 (2011), *available at* http://www.mdminoritybusiness.org/documents/SubgoalGuidanceImplementationGuidelinesFinal-website_000.pdf.

[26] *Id.*

(3) To compensate for societal discrimination against some groups.[27]

(4) To create new economic strength in the minority communities.[28]

(5) To create more business competition.[29]

(6) To respond to the political demands of particular individuals or groups to reallocate public contracts.[30]

(7) To create new political coalitions to overturn the existing commercial and political establishment. [31]

The PWEA identified the preferred minority groups as Black, Spanish-speaking, Oriental, Indian, Eskimos, or Aleuts.[32] Over time, however, the SBA, which administered the 8(a) program setting aside

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[27] *Id.*

[28] Timothy Bates & Darrell Williams, *Racial Politics: Does it Pay?*, 74 SOC. SCI. Q. 507, 507 (1993) (discussing how MBE programs expanded the number and revenues of black businesses in cities with black mayors).

[29] *Minority Business Development Agency*, U.S. Dep't of Commerce, OFF. OF GEN. COUNS., *Minority Business Development Agency*, http://www.commerce.gov/os/ogc/minority-business-development-agency (last visited Oct. 7, 2012).

[30] In a 1995 study, Bates and Williams also found that black businesses experienced an increase in sales and growth in cities run by black mayors who supported an MBE program. Timothy Bates & Darrell Williams, *Preferential Procurement Programs and Minority-Owned Businesses*, 17 J. URB. AFF. 227, 227–42 (1995). On the other hand, in a 1996 study, they found that MBE programs that heavily relied on government contracts, were more likely to go out of business than comparable firms. Timothy Bates & Darrell Williams, *Do Preferential Procurement Programs Benefit Minority Business?*, 86 AM. ECON. REV. 294, 294 (1996). In a 1998 study, Kenneth Chay and Robert Fairlie found that in the pre-*Croson* period, MBE set aside programs increased black self-employment. Kenneth Y. Chay & Robert W. Fairlie, *Minority Business Set-Asides and Black Self-Employment* (December 1998) (unpublished manuscript), *available at* http://www.google.com/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=2&cad=rja&ved=0CCcQFjAB&url=http%3A%2F%2Fciteseerx.ist.psu.edu%2Fviewdoc%2Fdownload%3Fdoi%3D10.1.1.196.9952%26rep%3Drep1%26type%3Dpdf&ei=yTp7UM6DJouy0QHk3oH4Ag&usg=AFQjCNHCuWsHWTHORQf_beIYkg9JHNIDQ.

[31] GEORGE R. LA NOUE, LOCAL OFFICIALS GUIDE TO MINORITY BUSINESS PROGRAMS AND DISPARITY STUDIES 6–7 (1994).

[32] Public Works Employment Act, 42 U.S.C. § 6705(f) (2006).

federal contracts, formalized a modified definition of recognized minorities.[33] Spanish-speaking became Hispanic, since many Hispanics do not actually use Spanish to communicate.[34] Oriental, which was considered a pejorative term, was expanded to include non-white Asian nationalities beyond the Far Eastern geographical area.[35] Currently, all DBE and most MWBE programs use the same definition of designated minority groups. The preferred racial and ethnic groups are: Black Americans; Hispanic Americans; Native Americans (Alaska Natives, Native Hawaiians, or enrolled members of a Federally or State recognized Indian Tribe); Asian Pacific Americans (persons with origins from Burma, Thailand, Malaysia, Indonesia, Singapore, Brunei, Japan, China (including Hong Kong), Taiwan, Laos, Cambodia (Kampuchea), Vietnam, Korea, The Philippines, U.S. Trust Territory of the Pacific Islands (Republic of Palau), Republic of the Marshall Islands, Federated States of Micronesia, the Commonwealth of the Northern Mariana Islands, Guam, Samoa, Macao, Fiji, Tonga, Kiribati, Tuvalu, or Nauru); Subcontinent Asian Americans (persons with origins from India, Pakistan, Bangladesh, Sri Lanka, Bhutan, the Maldives Islands or Nepal).[36]

III. JUDICIAL REVIEW OF THE NARROW TAILORING OF PREFERENTIAL CONTRACTING PROGRAMS

The ten percent set-aside in the PWEA was almost immediately challenged, resulting in the Supreme Court decision in *Fullilove v. Klutznick*.[37] There were five separate opinions in the case, though the majority mustered six votes to approve the program.[38] There were different theories about why the minority set-aside should be upheld. Chief Justice Burger, joined by Justices White and Powell, thought the

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[33] For a description of the SBA administrative process and its decisions about which groups were considered socially disadvantaged, *see generally* George La Noue and John C. Sullivan, *Presumptions for Preferences: The Small Business Administration's Decisions on Groups Entitled to Affirmative Action*, 6 J. POL'Y HIST. 439 (1994). For a more detailed history of the SBA and the 8(a) program, *see generally* JONATHAN J. BEAN, BIG GOVERNMENT AND AFFIRMATIVE ACTION: THE SCANDALOUS HISTORY OF THE SMALL BUSINESS ADMINISTRATION (2001).

[34] *Compare* 42 U.S.C. § 6705(f) (2006) *with* 13 C.F.R. § 124.103(b) (2012).

[35] *Compare* 42 U.S.C. § 6705(f) (2006) *with* 13 C.F.R. § 124.103(b) (2012).

[36] 13 C.F.R. § 124.103(b) (2012).

[37] *See* 448 U.S. 448 (1980).

[38] *Id*. at 492.

purpose of the act was within the Congressional spending power[39] and that limited use of race and ethnic criteria on its face did not violate equal protection under the Due Process Clause of the Fifth Amendment.[40] In a separate concurring opinion, Justice Powell thought the government needed to make some findings of previous illegal discrimination and that Congress had reasonably done so.[41] Justice Marshall asked only if the set-asides were "substantially related" to a remedial purpose.[42] In dissent, Justice Stewart, joined by Justice Rehnquist, argued that the set-aside provisions were illegally intended to create racial balance in the award of public works contracts and were also aimed at compensating for social, educational, and economic disadvantage, which were not a monopoly of any race.[43] Justice Stevens added in dissent that as Congress had not made the proper findings and that as a remedy, the set-asides were overbroad.[44]

In *City of Richmond v. Croson*, the Supreme Court confronted for the first time one of the local limitations of federal preferential contracting programs.[45] Richmond had created a program requiring that at least 30% of local construction dollars go to minority businesses.[46] After suggesting important differences between federal and local authority, the Court rejected Richmond's arguments and evidence to justify its program.[47]

While accepting narrowly tailored race conscious remedial programs in the "extreme case,"[48] the *Croson* court also announced a number of restrictions on them.[49] Perhaps the most important requirement was that the discrimination had to be carefully identified[50] and

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[39] *Id.* at 475 (plurality opinion). *See also* U.S. CONST. art. IV, § 8, cl. 1 ("The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States.").

[40] *Fullilove*, 448 U.S. at 482–83 (plurality opinion).

[41] *Id.* at 502 (Powell, J., concurring).

[42] *Id*. at 519 (Marshall, J., concurring).

[43] *Id*. at 529–30 (Stewart J., dissenting).

[44] *Id.* at 552–54 (Stevens, J., dissenting).

[45] 488 U.S. 469 (1989).

[46] *Id.* at 477.

[47] *Id*. at 508.

[48] *Id*. at 509.

[49] *See id*. at 498–99 (plurality opinion).

[50] *Id*. at 497 (citing Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 276 (1986) (plurality opinion)) (noting the difference between societal and identified discrimination). *See also id.* at 499 (assertions about discrimination in an entire industry are inadequate); *id.* ("It is sheer speculation how many minority firms there would be in

would require "searching judicial inquiry into the justification for such race-based measures."[51] As Justice O'Connor wrote in a plurality opinion: "Proper findings in this regard are necessary to define both the scope of the injury and the extent of the remedy necessary to cure its effects."[52] These findings had to go beyond assertions of societal discrimination, because it "without more, is too amorphous a basis for imposing a racially classified remedy."[53] Among the proper findings for a narrowly tailored MBE[54] program, the evidence had to focus in the local market place and could not rely on national data.[55] *Croson* also insisted that the finding of discrimination be specific to a particular industry, because "a generalized assertion that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy."[56]

Croson also stands for the proposition that preferential programs must have justification for each major group receiving them.[57] Most state and local MWBE programs followed the federal definition of "minority groups" without any modification for local conditions. But Justice O'Connor noted the city had no evidence of "past discrimination against Spanish-speaking, Oriental, Indian, Eskimo, or Aleut persons in any aspect of the Richmond construction industry," including whether Richmond ever had any Eskimo or Aleut citizens.[58] Final-

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Richmond absent societal discrimination."); *id*. at 507 ("[I]t is almost impossible to assess whether the Richmond Plan is narrowly tailored to remedy prior discrimination since it is not linked to identified discrimination in any way.").

[51] *Croson*, 488 U.S. at 493 (plurality opinion).

[52] *Id*. at 510.

[53] *Id*. at 497 (quoting *Wygant,* 476 U.S. at 276) (plurality opinion).

[54] Richmond's program should be properly called an MBE rather than MWBE program because women were not included in the beneficiary groups. *See id.* at 477–78.

[55] *Id.* at 504 (citing Fullilove v. Klutznick, 448 U.S. 448, 487 (1980)) ("Congress explicitly recognized that the scope of the problem would vary from market area to market area."). *See id*. at 500 (finding that statements about discrimination in the Pittsburgh construction industry have "little probative value in establishing identified discrimination in the Richmond construction industry").

[56] *Croson*, 488 U.S. at 498.

[57] *See id*. at 506.

[58] *Id*. ("The random inclusion of racial groups that, as a practical matter, may never have suffered from discrimination in the construction industry in Richmond, suggests that perhaps the city's purpose was not in fact to remedy past discrimination."). This principle has had a major impact on lower courts reviewing MWBE programs. For example, the recent decision by the United States Court of Appeals for the Fourth Circuit in *Rowe v. N.C. Dep't of Transp.*, stripped women, Hispanics, and Asians from the state's MWBE program because of the lack of evidence in the state's disparity study to support their inclusion. 615 F.3d 233, 259 (4th Cir. 2010).

ly, Justice O'Connor noted that many of the barriers impacting minority owned firms appeared to be race neutral, but that "there does not appear to have been any consideration of the use of race neutral means to increase minority business participation in city contracting."[59]

While the plurality did not require any particular limitation to Congressional authority to use racial preferences in federal contracting in *Fullilove*,[60] fifteen years later the Court confronted the issue of whether the strict scrutiny standards developed in *Croson* for state and local MWBE programs should also apply to federal preferential contracting programs in *Adarand v. Pena*.[61] The Court found that there should be a single standard of strict scrutiny applied to all governmental programs based on racial classifications, which means that DBE and other federal contracting programs must have a compelling interest and be narrowly tailored.[62] While courts have given extensive guidance on a number of narrow tailoring issues (as discussed above), they have only indirectly addressed the narrow tailoring implication of the blanket presumption in the certification process that all minority and women business owners are socially disadvantaged. For example, in *Fullilove v. Klutznick*, dissenting Justices were concerned not only with the Congressional decision about which groups were eligible for the ten percent set-aside contracts,[63] but also which particular firms were to be eligible for those contracts. Justice Stewart argued, "In today's society, it constitutes far too gross of an oversimplification to assume that every single Negro, Spanish-speaking citizen, Oriental, Indian, Eskimo and Aleut potentially interested in construction contracting currently suffers from the effects of past or present racial discrimination."[64]

Justice Stevens made a similar point:

See also W. States Paving Co. v. Wash. State Dep't of Transp., 407 F.3d 983, 1002-03; Monterey Mech. Co. v. Wilson, 125 F.3d 702, 713 (9th Cir. 1997); Builders Ass'n of Greater Chi. v. Cnty. of Cook, 256 F.3d 642, 645 (7th Cir. 2001), Associated Gen. Contractors of Ohio v. Drabik, 214 F.3d 730, 736 (6th Cir. 2000); O'Donnell Constr. Co. v. District of Columbia, 963 F.2d 420, 427 (D.C. Cir. 1992).

[59] *Croson*, 488 U.S. at 507.

[60] 448 U.S. 448, 490 (1980).

[61] 515 U.S. 200, 227 (1995).

[62] *Id.*

[63] Justice Stevens complained in his *Fullilove* dissent that there was not a single word in the Act or its legislative history about why the particular groups in PWEA were selected as beneficiaries. *Fullilove*, 448 U.S. at 535–36.

[64] *Id*. at 530 n.12 (Stewart, J., dissenting).

> Assuming, however, that some firms have been denied public business for racial reasons, the instant statutory remedy [PWEA] is nevertheless demonstrably much broader than is necessary to right any such past wrong. For the statute grants the special preference to a class that includes (1) those minority-owned firms that have successfully obtained business in the past on a free competitive basis and undoubtedly are capable of doing so in the future as well, (2) firms that have never attempted to obtain any public business in the past, (3) firms that were initially formed after the Act was passed, including those that may have been organized simply to take advantage of its provisions, (4) firms that have tried to obtain public business but were unsuccessful for reasons that are unrelated to the racial characteristics of their stockholders, and (5) those firms that have been victimized by racial discrimination.[65]

The Court was presented with no empirical evidence about the distribution of minority firms in these categories, but Justice Stevens concluded: "In any event, since it is highly unlikely that the composition of the fifth category is at all representative of the entire class of firms to which the statute grants a valuable preference, it is ill-fitting to characterize this as a narrowly tailored remedial measure."[66]

Croson clarified the standard of review for racial classification as strict scrutiny, moving the concern for narrowly tailoring the beneficiaries of a remedial race-based contracting program from a dissent position to that of a plurality opinion.[67] Though unconvinced that the evidence Richmond proffered created a compelling interest for its quota program, Justice O'Connor was clear that some remedies were appropriate where contracting discrimination was identified.[68] If systematic exclusion of minority subcontractors by non-minority prime contractors could be proven, then in the "extreme case," a narrowly tailored preference to break down patterns of "deliberate exclusion"

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[65] *Id*. at 540–41 (Stevens, J. dissenting).
[66] *Id*. at 541 (Stevens, J. dissenting) (internal quotation marks omitted).
[67] 488 U.S. 469, 510–11 (1989).
[68] *Id*. at 492 (plurality opinion).

could be employed.[69] If there were individual instances of a racially motivated refusal to employ minority subcontractors, "a city would be justified in penalizing the discriminator and providing appropriate relief to the victim of such discrimination."[70]

Once contracting discrimination had been identified, how should the beneficiaries of the appropriate remedy be determined? Justice O'Connor faulted Richmond for not inquiring into "whether or not the particular MBE seeking a racial preference has suffered from the effects of past discrimination by the city or prime contractors."[71] She suggested that failure was caused by "simple administrative convenience."[72] However, the Court held, "[T]he interest in avoiding the bureaucratic effort necessary to tailor remedial relief to those who truly have suffered the effects of prior discrimination cannot justify a rigid line drawn on the basis of a suspect classification."[73]

The *Croson* Court did not specifically raise issues about the MBE certification process,[74] but its language suggests that a presumption that all members of a group were victims of societal or contracting discrimination in a certification process would not be justifiable.

In the majority opinion in *Adarand Constructors v. Pena,* Justice O'Connor returned to the question about whether the Constitution requires individualized proof of social or economic disadvantage and what kind of proof is sufficient.[75] Her opinion raised questions about certification in a number of programs:

> [U]nresolved questions remain concerning the details of the complex regulatory regimes implicated by the use of subcontractor compensation clauses. For example, the SBA's 8(a) program requires an individualized inquiry into the economic disadvantage of every participant, see 13 CFR § 124.106(a) (1994), whereas the DOT's regulations implementing STURAA § 106(c) do *not* require certifying authorities to make such individualized inquiries, see 49 CFR

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[69] *Id*. at 509.

[70] *Id.*

[71] *Id*. at 508.

[72] *Id*.

[73] *Id*. (criticizing administrative convenience as a defense where constitutional rights are involved).

[74] *See generally id.*

[75] 515 U.S. 200, 208 (1995).

> § 23.62 (1994); 49 CFR pt. 23, subpt. D, App. C (1994). And the regulations seem unclear as to whether 8(d) subcontractors must make individualized showings, or instead whether the race-based presumption applies both to social *and* economic disadvantage, compare 13 CFR § 124.106(b) (1994) (apparently requiring 8(d) participants to make an individualized showing), with 48 CFR § 19.703(a)(2) (1994) (apparently allowing 8(d) subcontractors to invoke the race-based presumption for social and economic disadvantage). See generally Part I, *supra*. We also note an apparent discrepancy between the definitions of which socially disadvantaged individuals qualify as economically disadvantaged for the 8(a) and 8(d) programs; the former requires a showing that such individuals' ability to compete has been impaired "as compared to others in the same or similar line of business *who are not socially disadvantaged*," 13 CFR § 124.106(a)(1)(i) (1994) (emphasis added), while the latter requires that showing only "as compared to others in the same or similar line of business," § 124.106(b)(1). The question whether any of the ways in which the Government uses subcontractor compensation clauses can survive strict scrutiny, and any relevance distinctions such as these may have to that question, should be addressed in the first instance by the lower courts.[76]

Justice O'Connor did not purport to settle these questions about certification, since the record before the Court did not permit it, but she was clearly insisting that the question of individualized finding for beneficiaries of a race-based program was a legitimate subject for judicial review.

What followed was quite unpredictable. On remand, the district court found that the Subcontractor Compensation Clause ("SCC"), the provision that awarded a bonus to prime contractors for using minority

[76] *Id*. at 238–39 (emphasis in original).

subcontractors, and the presumption of social and economic disadvantage used in the certification process were not narrowly tailored.[77] The court reviewed the various preferential contracting that used the presumption and held:

> The statutes and regulations governing the SCC program are overinclusive in that they presume that all those in the named minority group members are economically and, in some acts and regulations, socially disadvantaged. This presumption is flawed, as is its corollary, namely that the majority (caucasians) as well as members of other (unlisted) minority groups are not socially and or/ economically disadvantaged. By excluding certain minority groups whose members are economically and socially disadvantaged due to past and present discrimination, the SCC program is underinclusive.[78]

Adarand then filed suit against Colorado state officials, arguing that its administration of the federal highway DBE program was also unconstitutional.[79] In the face of this challenge, Colorado changed its DBE certification guidelines by eliminating the presumption of social and economic disadvantage for minorities and opening up certification to anyone who affirmed he was socially disadvantaged.[80] The district court hearing the case against the state program reasoned that the SCC program and its racial presumptions made Adarand's owner, Randy Pech, socially disadvantaged as a white male, and therefore he had a remedy of becoming a DBE himself.[81] On appeal, however, the United States Court of Appeals for the Tenth Circuit vacated on the grounds that Pech, now a DBE, no longer had standing.[82] Pech then sought review by the Supreme Court, and there found a more sympathetic audi-

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[77] Adarand Constructors, Inc. v. Pena, 965 F. Supp. 1556, 1570 (D. Colo. 1997), *vacated sub nom*. Adarand Constructors, Inc. v. Slater, 169 F.3d 1292 (10th Cir. 1999) *cert. granted* 528 U.S. 216 (2000), *and rev'd*. Adarand Constructors, Inc. v. Slater, 228 F.3d 1147 (10th Cir. 2000).

[78] Adarand Constructors, Inc., 965 F. Supp. at 1580.

[79] Adarand Constructors, Inc. v. Romer, 174 F.R.D. 100, 101–02 (D. Colo. 1997).

[80] Adarand Constructors, Inc. 169 F.3d at 1296.

[81] *Id*.

[82] *Id*. at 1296–97.

ence.[83] Once again *Adarand* was before the Supreme Court, and the Tenth Circuit's opinion was again reversed.[84]

The certification issue was not raised in subsequent litigation, however, until it came into judicial purview in a challenge to the state administration of a DBE program. In *W. States Paving Co.*, the Washington State Department of Transportation, lacking a completed disparity study, tried to argue that its collection of sworn DBE certification affidavits constituted appropriate evidence of discrimination. [85] The Ninth Circuit was not impressed and responded:

> [E]ven if we were to consider these affidavits, they do not provide any evidence of discrimination within Washington's transportation contracting industry. Notwithstanding the State's express representation to the contrary during oral argument, these affidavits do *not* require prospective DBEs to certify that they have been victims of discrimination in the contracting industry. Rather, as mandated by the federal regulations, the owner of a firm applying for DBE status need only attest to having been subjected to racial or ethnic prejudice or cultural bias, or having suffered the effects of discrimination, because of his identity as a member of one or more minority groups, without regard to his individual qualities. Such claims of general societal discrimination--and even generalized assertions about discrimination in an entire industry--cannot be used to justify race-conscious remedial measures.[86]

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[83] Adarand Constructors, Inc., 528 U.S. at, 223–24 (per curiam).

[84] *Id.* at 224 (per curiam).

[85] W. States Paving Co. v. Washington State Dep't of Transp., 407 F.3d 983, 1001–02 (9th Cir. 2005).

[86] *Id.* at 1002 (emphasis in original) (internal quotation marks and citations omitted). *See also* Shaw v. Hunt, 517 U.S. 899, 909–10 (1996) ("[A]n effort to alleviate the effects of societal discrimination is not a compelling interest."); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 276 (1986) (plurality opinion) ("Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy.").

While the thrust of the court's dicta was that the certification affidavits were not appropriate to establish the necessary predicate for Washington state's administration of a DBE program, its language can also be read to imply that such affidavits are too broad to sustain a finding that any individual owner is entitled to benefit from a race conscious remedial measure.[87] As the court noted, attesting to being a victim of societal discrimination is not a narrowly tailored predicate for such an individual remedy.[88]

Although all of these opinions suggest the certification process and its criteria are legitimate subjects for judicial review, none of them constitute an in-depth analysis of that process or contain a definitive judicial pronouncement about whether it is narrowly tailored.

IV. CERTIFICATION OF PROCESS

While courts have frequently addressed the narrow tailoring issue of whether the groups preferred in DBE and MWBE programs were overinclusive,[89] the narrowly tailoring problems in the certification process and criteria have not been fully examined. Almost all preferential contracting programs require as a condition of participation that individual firm owners seek certification as a DBE or 8(a) firm for federal procurement or as a MWBE for state and local procurement.[90] Without such certification a business cannot receive a set-aside contract or be counted in meeting a subcontracting goal set by the jurisdiction.

The need for contemporary certification processes is a legacy of the federal government's response to the *Adarand* decision, but the criteria and language used in them go back to earlier decisions made by the SBA.[91] Recognizing after *Adarand* that both the compelling interest and narrow tailoring prongs of strict scrutiny would now be applied to federal contracting programs using racial classifications, the Clinton administration, following the President's "Mend Don't End" philosophy, moved to shore up the compelling interest for such programs and to narrowly tailor their administration.[92]

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[87] *See W. States Paving Co.*, 407 F.3d at 1002.

[88] *Id.*

[89] *See generally supra* note 58.

[90] *See* 49 C.F.R. § 26.83 (2012).

[91] *See* BEAN, *supra* note 33, at 102.

[92] Participation by Disadvantaged Business Enterprises in Department of Transportation Programs, 64 Fed. Reg. 5096 (Feb. 2, 1999). *See* U. S. COMM'N ON CIVIL RIGHTS, *supra* note 16, at 34–46 (2006).

The focus of this effort was the various transportation subsidy programs, which like the PWEA, had required that ten percent of the dollars spent had to go to MBEs. The Department of Commerce commissioned a disparity study, but it showed very mixed patterns of under and over utilization depending on the type of construction industry and the regions of the country.[93] The Department of Justice contracted with the Urban Institute to do a meta-study of existing state and local disparity studies, but meta-studies depend on the validity of the original studies.[94] Many of those studies used methodologies that were later invalidated in litigation.[95] The Department of Justice also produced Appendix A to "Proposed Reforms to Affirmative Action Federal Procurement," which was a compendium of existing disparity studies and other research to buttress its position that a compelling interest existed.[96]

In narrowly tailoring the administration of the federal transportation program, it was decided that a national ten percent quota was no longer defensible. Consequently, it was left to state and local recipients of federal transportation dollars to determine the size of their DBE goals according to their determination of the level of DBE participation that would be expected absent discrimination in their marketplaces.[97] Sometimes that resulted in DBE goals lower than ten percent, sometimes much higher.[98]

One narrow tailoring change that was not made was to reexamine the particular racial and ethnic groups eligible for the presumption of social and economic disadvantage.[99] These groups have essentially remained the same since the enactment of the PWEA.

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[93] Small Disadvantaged Business Procurement: Reform of Affirmative Action in Federal Procurement, 63 Fed. Reg. 71724, 71724 (Dec. 29, 1998).

[94] *See* U. S. COMM'N ON CIVIL RIGHTS, *supra* note 16, at 35.

[95] *See id.* at 39–40 n. 52.

[96] Proposed Reforms to Affirmative Action in Federal Procurement, 61 Fed. Reg. 26042, 26051–63 (May 23, 1996).

[97] 49 C.F.R. § 26.45(b) (2012).

[98] For a report on the process and outcomes of post-*Adarand* DBE goal setting in all fifty states, *see* George R. La Noue, *Setting Goals in the Federal Disadvantaged Business Enterprise Program*, 17 GEO. MASON U. C.R. L.J. 423, 443–51 (2006). For a discussion of the process and outcomes of post-*Adarand* DBE goals setting in airports, *see generally* George R. La Noue, *Follow the Money: Who Benefits From the Federal Aviation Administration's DBE Program?,* 38 AM. REV. PUB. ADMIN. 480 (2008).

[99] *See generally* George R. La Noue & John Sullivan, *Gross Presumptions: Determining Group Eligibility for Federal Procurement Preferences*, 41 SANTA CLARA L. REV. 103 (2000).

There were, however, some narrow tailoring changes in the DBE certification process in the articulation of the concepts of social and economic disadvantage. Since many state and local governments participate in or follow the standards of the Uniform Certification Program,[100] the effect of the federal DBE changes was also to restructure simultaneously state and local MWBE certification procedures. Since one set of state and local administrators manage both the DBE and MWBE certification process, it is obviously more administratively efficient for them and firms seeking certification to use common criteria and forms.

Certification plans are based on social and economic considerations, which purport to demonstrate disadvantage. Any person who owns fifty-one percent of a business and identifies with one of the designated minority groups or who is a woman is "presumed" to be socially and economically disadvantaged.[101] These concepts were borrowed from earlier decisions by the SBA in administering its 8(a) program.[102] In the certification process, however, the two prongs are treated differently.

A. Proving Economic Disadvantage

During the post-*Adarand* Congressional debate on the DBE program, opponents hammered away at the idea that very wealthy people could own a DBE.[103] Consequently, proponents argued that the proposed new DBE regulations would restrict DBE owners to persons who were "economically disadvantaged" because of the low size of their net worth and because their businesses were considered small businesses according to the standards set by the SBA.[104] In determining the limits of a DBE's applicant's net worth, the USDOT also bor-

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[100] *See* 49 C.F.R, § 26.81 (1997) (describing the Unified Certification Program). The Uniform process is required to be used by all recipients of federal funds. *Id.* § 26.81(a). It may operate jointly in two or more states, and firms certified in one state may be automatically certified in another state. *Id.* § 26.81(e).

[101] 49 C.F.R § 26.67 (2012).

[102] BEAN, *supra* note 33, at 102.

[103] *Id.* at 103.

[104] SBA was driven to set an objective limit to defining economic disadvantage because, as SBA administrator Vernon Weaver recalled in an earlier period, "'It boils down to a judgment call . . . . I must have spent a couple of hundred hours with my general counsel . . . discussing: What the hell is 'economic disadvantage?" *Id.* 102–03.

rowed SBA criteria from the 8(a) minority set-aside program.[105] A DBE owner's net worth had to be below $750,000, excluding the value of the owner's principal residence and the value of the owner's business.[106] Not only do DBE applicants have to swear in affidavits that they meet those criteria, they must also submit to personal interviews and provide detailed documents to verify those facts.[107] Certification authorities then carefully monitor the documentation about economic disadvantage in the certification application.

Narrow tailoring questions still can be raised about the definition of economic disadvantage, particularly since the definition of net worth limit was raised in January 2011 to $1.32 million.[108] To put that federally determined cutoff into context, according to the 2010 census, the national average household net worth, excluding the equity in a home and a business, was $46,740.[109]

There is another narrow tailoring issue. The economic disadvantaged section of the affidavit, apparently realizing that creating an abstract dollar definition of economic disadvantage would include many whites males, requires DBE applicants to attribute their "low" net worth because their "ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are not socially disadvantaged."[110] Statements in the affidavit are made and executed under oath and the penalty of perjury. Just how a person

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[105] *See* Participation by Disadvantaged Business Enterprises in Department of Transportation Programs, 64 Fed. Reg. 5096, 5098 (Feb. 2, 1999).

[106] *Id*. In 1995, Phillip Lader, SBA Administrator, testified that, even by using family net worth, rather than individual net worth, more than 91% of all business owners would have been considered economically disadvantaged because they were below the $750,000 limit. *The Small Business Administration's 8(a) Minority Business Development Program: Hearing Before the S. Comm. on Small Bus.*, 104th Cong. 14–29 (1995) (statement of Philip Lader, Adm'r of the U.S. Small Bus. Admin.).

[107] *See e.g.*, 49 C.F.R § 26.67(b)(3) (2012).

[108] Disadvantaged Business Enterprise: Program Improvements, 76 Fed. Reg. 5098, 5099 (Jan. 28, 2011). In some state and local MWBE programs, the owner net worth limits are higher. In the New York state program, for example, the economically disadvantage limit is $3,500,000. DIV. OF MINORITY & WOMEN BUS. DEV., EMPIRE STATE DEV., ATTACHMENT A: NYS MWBE CERTIFICATION INDIVIDUAL PERSONAL NET WORTH AFFIDAVIT. The recently enacted Milwaukee MWBE program had no owner net worth limitations at all. *See* MILWAUKEE, WIS., CODE ORDINANCES ch. 370 (2012).

[109] *See Wealth and Asset Ownership*, U.S. CENSUS BUREAU, http://www.census.gov/people/wealth/ (last visited Jan. 10, 2013).

[110] 49 C.F.R § 26 App. E (2012).

is able to swear under oath that they have the breadth of information about the capital and credit of their competitors is uncertain. Does the term "others" mean most or some competitors? If a person had not experienced difficulty in raising money for a business, could he honestly sign the economic disadvantage affidavit? Though it would be possible for certification authorities to require evidence that a firm had tried and failed to receive credit or a loan, applicants who are presumed economically disadvantaged are not asked to supply that information.[111]

B. Asserting Social Disadvantage

This Article is more focused on whether the definition of social disadvantage is narrowly tailored, because if a person is not classified as socially disadvantaged, their economic status is irrelevant. Social disadvantage in DBE programs and most often in MWBE programs is established in a two-step process. First, a minority or female owner checks a box indicating group identification in one of the designated groups: Female, Black American, Asian-Pacific American, Hispanic American, Native American, Sub-Continent Asian-American, or Other.[112] Second, such a person then signs a one-sentence affidavit claiming:

> I certify that I am socially disadvantaged because I have been subjected to racial or ethnic prejudice or cultural bias, or have suffered the effects of discrimination, because of my identity as a member of one or more of the groups identified above, without regard to my individual qualities.[113]

Since members of such groups are presumed to be socially disadvantaged, certification authorities ask for no proof of an applicant's

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[111] *See generally* DIV. OF MINORITY & WOMEN BUS. DEV., *supra* note 108.

[112] *See, e.g.*, CAL. UNIFIED CERTIFICATION PROGRAM, DISADVANTAGED BUSINESS ENTERPRISE (DBE) CERTIFICATION APPLICATION 4 (2011), *available at* http://www.caltrans.ca.gov/hq/bep/downloads/pdf/DBE_Application.pdf.; DIV. OF MINORITY & WOMEN BUS. DEV., EMPIRE STATE DEV., NEW YORK STATE MWBE CERTIFICATION SUPPLEMENTAL APPLICATION AND AFFIDAVIT 4 (2012), *available at* http://www.esd.ny.gov/MWBE/Data/Application/MWBE_Fast_Track_ForEII.pdf.

[113] *See, e.g.*, CAL. UNIFIED CERTIFICATION PROGRAM, *supra* note 112, at 17.

claim about being subject to ethnic prejudice or ethnic bias or suffering the effects of discrimination.[114]

The social disadvantage certification presumption raises two narrow tailoring issues: (1) whether the affidavit language on its face meets the standards courts have set for remediable action in contracting and (2) whether these affidavits distinguish between those particular business-owners who have actually suffered from the kind of discrimination properly remedied by a preferential contracting program and those making inappropriate claims.

For persons identified with the designated racial, ethnic, and gender groups, the presumption of being socially disadvantaged exists in all preferential contracting programs. However, what does "identified" mean in a country that has an increasing number of mixed race and ethnic persons who have multiple or weak identifications with any group? SBA regulations define the concept of identification as follows: "An individual must demonstrate that he or she has held himself or herself out, and is currently identified by others, as a member of a designated group if SBA requires it."[115] Except for some groups such as Native American tribes, however, no concept of "official" racial or ethnic member of a designated group exists. In reality, group identification for the SBA and USDOT recipients is established by checking one of these boxes on the application form.[116]

Group identification is only the first step for an owner seeking certification for a business. Since it might be thought that granting public contracting preferences to any person identified with designated racial, ethnic, and gender groups is not a narrowly tailored remedy, the regulations also require the owner applying for certification to be "socially and economically disadvantaged."[117] Persons so identified with the designated groups, however, are "presumed" to be socially and economically disadvantaged. This presumption, in theory, can be challenged. The SBA regulations state: "The presumption of social disadvantage may be overcome with credible evidence to the contrary. Individuals possessing or knowing of such evidence should submit the information in writing to the Associate Administrator for Business Development ("AA/BD") for consideration."[118]

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[114] *See generally id.* (omitting any indication that the applicant must provide proof of being subject to ethnic prejudice or ethnic bias or suffering the effects of discrimination).

[115] 13 C.F.R. § 124.103(b)(2) (2012).

[116] George R. La Noue & John C. Sullivan, *supra* 99, at 149–50.

[117] 13 C.F.R. § 124.101 (2012).

[118] *Id.* § 124.103(b)(3) (2012).

USDOT recipients are also required to follow a procedure for challenges.[119] The regulations state nine procedural steps for such a challenge (e.g., the complaint must be in writing, recipients must provide written notice to firms deemed ineligible, must provide opportunity for a hearing, etc.)[120]

On the surface then, the rebuttable process looks like a well-articulated administrative procedure that might contribute to narrow tailoring. Nevertheless, some judges have been skeptical about whether the presumption can in fact be challenged. Federal Court of Appeals Judge Richard Posner noted, "The presumption can be rebutted, but given the difficulty of establishing whether a particular individual is socially and economically disadvantaged the availability of the disadvantage is likely to be decisive."[121] Was Posner right about the possibility of rebuttal? In defining the substantive standards for a challenge, the regulations essentially repeat the criteria used in the social disadvantage affidavit described in Part III of this Article.[122] The only substantive difference is that in addition to the language "socially disadvantaged individuals" the phrase "disability" has been added.[123]

There is one huge omission, however. The regulations do not address the circumstance when an individual's life experiences might mean that they have outgrown the socially disadvantaged designation.[124] All owners seeking certification need to do is swear that at one time in their life they were subjected to group-based prejudice or bias.

C. The Case of Marco Rubio

To illustrate this issue, consider the career of Marco Rubio (R. Fla.). Mr. Rubio was born in Miami to parents of Cuban exiles[125] and,

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[119] *See* 49 C.F.R. § 26.87 (2012).

[120] *Id.*

[121] Milwaukee Cnty. Pavers Ass'n v. Fielder, 922 F.2d 419, 422 (7th Cir. 1991).

[122] *See* 49 C.F.R. § 26 App. E (2012).

[123] *See id.* The regulations state that the Department is aware that "people with disabilities have disproportionately low incomes and high rates of unemployment . . . The Americans with Disabilities Act (ADA) was passed in recognition of the discrimination faced by people with disabilities." *Id.* § 26 App. E(II) (2012).

[124] *See* 49 C.F.R. § 26 App. E (2012) (omitting any reference to procedures regarding when an individual might outgrow the socially disadvantaged designation).

[125] *About Marco*, MARCO RUBIO: U.S. SENATOR FOR FLA., http://www.rubio.senate.gov/public/index.cfm/biography (last visited Sept. 27, 2012),

thus, is clearly identified as Hispanic.[126] In Miami, however, there is some question as to whether the Cuban-American community is disadvantaged as a whole.[127] But what about Mr. Rubio as an individual? Is he currently socially disadvantaged?

He graduated from the University of Florida and then received his J.D. from the University of Miami in 1996.[128] Did his educational achievement make him no longer "socially disadvantaged"? Mr. Rubio served as a City Commissioner for West Miami and was then elected to the Florida House of Representatives in 1999.[129] In 2006, Mr. Rubio was elected Speaker of the Florida House,[130] indicating his acceptability on a statewide basis far beyond Cuban-American neighborhoods. Three years later, he began his campaign for the United States Senate, first toppling incumbent Governor Charlie Crist in the Republican primary and then beating his Democratic opponent in the general election.[131] Currently, he serves on the Senate Foreign Relations Committee and is the ranking member on one of its subcommittees.[132] Would any of his political accomplishments render Mr. Rubio no longer "socially disadvantaged" and, if so, which ones?

Suppose Mr. Rubio had purchased a business and had sought certification for that business in the DBE or 8(a) programs as a "socially disadvantaged" owner. Even though Mr. Rubio's success is well-known, could anyone successfully rebut his claim to be socially disadvantaged and at what stage of his meteoric career could such a challenge be effective? The answer is probably no one, because, although the process for such a challenge exists in the regulations, the criteria do not. The regulations do not identify particular achievements

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[126] Roughly fifteen percent of Hispanics in the United States now marry caucasians, Zhenchao Qian & Daniel T. Lichter, *Changing Patterns of Interracial Marriage in a Multiracial Society*, 73 J. MARRIAGE & FAMILY 1065, 1073 (2011), but the regulations only require that the certification applicant identify with a presumptively disadvantaged group.

[127] For an explanation of what is often called the Cuban-American economic miracle in Miami, s*ee generally* MIGUEL GONZALEZ-PANDO, THE CUBAN-AMERICANS 117–40 (1998).

[128] *Marco Rubio – Biography*, REPUBLICAN BUS. COUNCIL, http://www.republicanbusinesscouncil.com/bios/rubio_bio.pdf (last visited Oct. 21, 2012).

[129] *Marco Rubio*, BIO. TRUE STORY, www.biography.com/people/marco-rubio-20840041 (last visited Oct. 21, 2012).

[130] *Id.*

[131] *Id.*

[132] *Committee on Foreign Relations*, U.S. SENATE http://www.senate.gov/general/committee_membership/committee_memberships_SSFR.htm (last visited Oct. 21, 2012).

through which a person identified with the designated groups could emerge from a "socially disadvantaged" status. Therefore, if birth determines whether a person is forever "socially disadvantaged," and there is no practical way for that status to change or be challenged, then the presumption will not yield narrowly tailored results.

Since the criteria do not exist by which a challenger might assert that a particular owner was not actually socially disadvantaged, there would be no clear basis for such a challenge. What Judge Posner suspected can be demonstrated empirically. Freedom of Information Act ("FOIA") requests to SBA and the Maryland Department of Transportation disclose that no challenges were made concerning the "social disadvantage" status of any of the roughly 9,000 8(a) firms or 6,000 DBE firms in Maryland between January 2003 and October 2011.[133] Of course, the fact that Maryland DOT has had no complaints in eight years[134] does not eliminate the possibility that there has been such activity in other states. Without articulated criteria for determining when someone is no longer socially disadvantaged, however, such complaints are unlikely.

If it is the case that as a practical matter the status of being "socially disadvantaged" is a permanent status when a person is identified with one of the designated racial, ethnic, or gender groups and that no person can challenge that disadvantaged status designation by showing an owner's individual achievement, then the presumption challenge process does little to narrowly tailor the certification process.

D. Certification for Individuals without a Designated Group Identification

During the post-*Adarand* debate on the future of the DBE program, proponents emphasized that persons who were not identified with designated groups could become certified DBEs as evidence that the program really was narrowly tailored.[135] Like the claim that the social disadvantage presumption can be rebutted, the claims about non-designated group owner participation as DBEs do not describe the way the program really works. The regulations state that an applicant seek-

[133] Emails from Joan Elliston, Program Analyst, U.S. Small Bus. Admin., to author and Zenita Wickham Hurley, Director, Office of Md. MBE (Sept. 23, 2011) (on file with author).

[134] *Id.*

[135] Participation by Disadvantaged Business Enterprises in Department of Transportation Programs, 64 Fed. Reg. 5096, 5099 (Feb. 2, 1999).

ing DBE status as an individual rather than as a member of a designated group must have:

> A. At least one objective distinguishing feature that has contributed to social disadvantage, such as race, ethnic origin, gender, disability, long term residence in an environment isolated from the mainstream of American society, or other similar causes not common to individuals who are not socially disadvantaged.
> B. Personal experiences of substantial and chronic social disadvantage in American society.[136]

The key language, however, is that certifying recipients will consider evidence about various forms of discrimination in education, employment, and business history "to see if the *totality of circumstances* shows disadvantage in entering into or advancing in the business world."[137] In contrast, neither any sort of evidence of substantial and chronic disadvantage nor an evaluation of totality of circumstances are required to award certification to persons identified with the designated groups.[138] As a consequence, except for a few disabled persons, there are very few owners who are certified DBEs who are not members of designated groups. In a 2004 study of Federal Aviation Administration awards across the country, DBEs not affiliated with a designated group received only 3% of DBE contracts and less than 1% of these dollars.[139]

V. EVIDENCE FROM DISPARITY STUDIES

After rejecting the various forms of evidence Richmond relied upon to support its MBE program, Justice O'Connor offered a formula in her *Croson* opinion for beginning the process of establishing proof of discrimination. She argued, "Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contrac-

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[136] 49 C.F.R. § 26, App. E(I) (2012).
[137] *Id.* § 26, App. E(I)(C) (emphasis added).
[138] *See id.* § 26 App. E(I).
[139] George R. La Noue, *Follow the Money: Who Benefits From the Federal Aviation Administration's DBE Program?*, *supra* note 98, at 494.

tors, an inference of discriminatory exclusion could arise."[140]

A lesson many jurisdictions took from this *Croson* language was that to maintain or establish an MWBE program, they needed to commission a disparity study. About 350 of these studies have been completed at a cost of at least $140 million.[141] These studies examine whether there are significant statistical disparities in the availability and utilization of MWBEs compared to non-MWBEs in the award of government contracts.[142] The crucial issue is whether availability is measured according to *Croson's* standards of comparing the number of qualified minority contractors willing and able to perform special services with the number actually retained. Often, that standard has not been met.[143]

Even if a valid statistical disparity were found, *Croson* states it would only create an inference of discrimination,[144] so most studies also engage in anecdotal research as an attempt to understand whether a discriminatory context exists that would explain the found disparities.[145] Typically, the disparity consultant will form focus groups or conduct phone or mail surveys to ask questions about respondent expe-

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[140] City of Richmond v. J.A. Croson Co., 488 U.S. 469, 509 (1989) (plurality opinion).

[141] The Project on Civil Rights and Public Contracts collection of disparity studies in the Albin O. Kuhn library at the University of Maryland Baltimore County houses 280 such studies.

[142] *See, e.g.*, NAT'L ECON. RESEARCH ASSOCIATES, THE STATE OF MINORITY- AND WOMAN- OWNED BUSINESS ENTERPRISE: EVIDENCE FROM NEW YORK 381 (2010).

[143] *Croson*, 488 U.S. at 501–02 ("[W]here special qualifications are necessary, the relevant statistical pool for the purposes of demonstrating discriminatory exclusion must be the number of minorities *qualified to undertake the particular task*.)". The *Croson* Court then criticized Richmond because it had no data regarding "how many MBE's in the relevant market are qualified to undertake prime or subcontracting work in public construction projects." *Id.* at 502. Various circuit courts have emphasized the necessity of measuring qualifications and firm capacity. *See* O'Donnell Construction Co. v. District of Columbia, 963 F.2d 420, 426 (D.C. Cir. 1992); Eng'g Contractors Ass'n of S. Fla. v. Metro. Dade Cnty. 122 F.3d 895, 920–21 (11th. Cir. 1997); Associated Gen. Contractors of Ohio, Inc. v. Drabik, 214 F.3d 730, 736 (6th Cir. 2000); Rothe Dev. Corp. v. Dep't of Def., 545 F.3d 1023, 1045 (Fed. Cir. 2008).

[144] *Croson,* 488 U.S. at 509.

[145] On the other hand, anecdotes alone are generally not considered to be a sufficient predicate for a preferential contracting program. "While anecdotal evidence may suffice to prove individual claims of discrimination, rarely, if ever, can such evidence show a systemic pattern of discrimination necessary for the adoption of an affirmative action plan…[T]he MBE program cannot stand without a proper statistical foundation." Coral Constr. Co. v. King Cnty., 941 F.2d 910, 919 (9th Cir. 1991).

riences with discrimination.[146] Generally, these results will be reported in snippets of quotes or paraphrases without attribution to any person or firm.[147] Often these anecdotes will reflect complaints of societal discrimination,[148] which *Croson* and other court decisions have found are not enough to support race-based decisions. Some of these anecdotes, if true, will reflect incidents of discrimination, which would require individual remedies. A few reflect more generalized problems that might fit *Croson's* standard of an extreme case of "patterns of deliberate exclusion."[149]

The anecdotal sections of disparity studies also have been subjected to various criticisms.[150] The major problem with disparity study anecdotal sections is that rarely is there a quantitative report on the frequency of alleged discriminatory incidents.[151] For example, if a study reports one respondent has had a problem with a biased building inspector, the reader has no way to tell whether that is an isolated or endemic problem. Such anecdotes contribute little to understanding whether *Croson's* "patterns of deliberate exclusion" exist and cannot contribute to evaluating whether the blanket presumption of social disadvantage in the certification process for members of some groups is narrowly tailored.

Some disparity studies, however, do quantify their results from mail surveys.[152] Though the evidence is not perfect (return rates are frequently low, and there is no verification about the truth of any allegation), these studies provide some evidence about the perceptions minority and women owned business owners have about the extent of discrimination they face.[153]

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[146] *See, e.g.*, NAT'L ECON. RESEARCH ASSOCIATES, RACE, SEX, AND BUSINESS ENTERPRISE: EVIDENCE FROM THE STATE OF MARYLAND (FINAL REPORT) 13 (2006).

[147] *See, e.g.*, *id.* at 226–32.

[148] *See, e.g.*, *id.*

[149] *Croson*, 488 U.S at 509.

[150] *See* Jeffrey M. Hanson, Note, *Hanging by Yarns?: Deficiencies in Anecdotal Evidence Threaten the Survival of Race-Based Preference Programs for Public Contracting*, 88 CORNELL L. REV. 1433, 1437 (2003) (arguing that state policymakers have not sufficiently scrutinized the anecdotal sections of disparity studies and subsequently have allowed narratives of actual discrimination to be undervalued); *See* U.S. COMM'N ON CIVIL RIGHTS, *supra* note 16, at 78.

[151] *See, e.g.*, Associated Gen. Contractors of Am. v. Columbus, 936 F. Supp 1363, 1413–15 (S.D. Ohio 1996), *vacated on other grounds* 172 F.3d 411 (1999).

[152] *See, e.g.*, NAT'L ECON. RESEARCH ASSOCIATES, *supra* note 146, at 218–26.

[153] *See, e.g.*, Associated Gen. Contractors of Am., 936 F. Supp 1363 at 1415–19, *vacated on other grounds* 172 F.3d 411 (1999).

Such evidence of minority and women's perceptions of discrimination has existed for at least two decades. In 1990, the Minnesota Center for Survey Research published the results of a survey of about 700 minority and women business owners within that state.[154] In answer to the question of whether you believe "your business has been hampered by discrimination against you as a minority or female," about two-thirds of the respondents said no.[155] Since roughly two-thirds of the owners had participated in a "purchasing preference or a set-aside program" for MWBEs and approximately two-thirds had been awarded contracts or purchases under these programs, it is likely most of the respondents were owners of certified businesses.[156] Of those claiming to have experienced an instance of discrimination, less than 10% filed any sort of complaint.[157] In a more recent disparity study for the City of Milwaukee, 7.1% and 3.9% of firm owners who did business with the city claimed they had suffered discrimination because of race/ethnicity or gender by that government, respectively.[158]

The National Economic Research Associates ("NERA") is one of the largest producers of disparity studies.[159] Most of their studies survey MWBEs about their experience with various forms of discrimination or barriers to business formation.[160] Some NERA studies thus permit an examination of whether DBEs/MWBEs believe they have been discriminated against in their application for credit. They would need to affirm in the certification process that "my ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business."[161] Figure A displays the answer to the question about commercial loan credit from a wide variety of jurisdictions.

[154] MINN. DEP'T. OF ADMIN., A STUDY OF DISCRIMINATION AGAINST WOMEN- AND MINORITY-OWNED BUSINESSES AND OF OTHER SMALL-BUSINESS TOPICS 47 (1990).

[155] *See id.* at 51.

[156] *See id.* at 52.

[157] *Id.* at 49.

[158] D. WILSON CONSULTING GROUP, DISPARITY STUDY FOR THE CITY OF MILWAUKEE 9-45 (2010).

[159] *MBW/WBE/DBE Availability and Disparity Studies*, NERA.COM, http://wwwnera.com/59-2147.htm (last visited Sept. 29, 2012).

[160] *See, e.g.*, NAT'L ECON. RESEARCH ASSOCIATES, *supra* note 146, at 236 (highlighting the different areas where various firms have indicated that they have been treated less favorably due to race).

[161] *See*, *e.g.*, 13 C.F.R. § 127.203 (2012).

Figure A[162]
Percentage of Firms Indicating They Had Been Treated Less Favorably Due to Race and/or Gender in Applying for Commercial Loans

Study	*African American*	*Hispanic*	*Asian American*	*Native American*	*Women*	*MWBE/DBE Average*
State of MD (2011)	43.1	21.7	32.2	38.9	9.5	25.1
State of MD (2006)	49.2	39.5	19.6	22.2	18.5	31.5
Augusta, GA (2009)	47.1	0.0	30.0	5.9	9.4	26.2
Memphis, TN (2008)	41.7	33.3	37.5	37.5	18.4	32.9
State of UT (2009)	25.0	13.6	20.0	30.0	9.4	12.5
Northeast Ohio, OH (2010)	45.0	11.1	0.0	20.0	13.5	19.0
Austin, TX (2008)	47.8	23.8	0.0	14.3	8.3	16.5
State of NY (2010)	37.5	19.6	15.8	0.0	13.0	19.2
Broward Co., FL (2010)	47.4	16.9	22.2	0.0	11.6	20.2
Minneapolis, MN (2010)	40.0	20.0	29.4	11.1	12.4	17.0

[162] NAT'L ECON. RESEARCH ASSOCIATES, *supra* note 146, at 236; NAT'L ECON. RESEARCH ASSOCIATES, RACE, SEX, AND BUSINESS ENTERPRISE: EVIDENCE FROM THE CITY OF AUSTIN 249 (2008); NAT'L ECON. RESEARCH ASSOCIATES, RACE, SEX, AND BUSINESS ENTERPRISE: EVIDENCE FROM AUGUSTA, GEORGIA 272 (2009); NAT'L ECON. RESEARCH ASSOCIATES, THE STATE OF MINORITY- AND WOMAN- OWNED BUSINESS ENTERPRISE: EVIDENCE FROM NEW YORK 381 (2010); NAT'L ECON. RESEARCH ASSOCIATES, THE STATE OF MINORITY- AND WOMAN- OWNED BUSINESS ENTERPRISE: EVIDENCE FROM BROWARD COUNTY 343 (2010); NAT'L ECON. RESEARCH ASSOCIATES, THE STATE OF MINORITY- AND WOMAN- OWNED BUSINESS ENTERPRISE: EVIDENCE FROM MINNEAPOLIS 246 (2010); NAT'L ECON. RESEARCH ASSOCIATES, THE STATE OF MINORITY- AND WOMAN- OWNED BUSINESS ENTERPRISE: EVIDENCE FROM MARYLAND 491 (2011); NAT'L ECON. RESEARCH ASSOCIATES, THE STATE OF MINORITY- AND WOMAN- OWNED BUSINESS ENTERPRISE: EVIDENCE FROM NORTHEAST OHIO 310 (2010); NAT'L ECON. RESEARCH ASSOCIATES, THE STATE OF MINORITY- AND WOMAN- OWNED BUSINESS ENTERPRISE: EVIDENCE FROM MEMPHIS, TENNESSEE 276 (2008); NAT'L ECON. RESEARCH ASSOCIATES, THE STATE OF MINORITY- AND WOMAN- OWNED BUSINESS ENTERPRISE: EVIDENCE FROM STATE OF UTAH 309 (2009).

As Figure A shows, while responses vary in different jurisdictions and among different groups, there is a discernible pattern. African-Americans owners are most likely to believe they have been treated less favorably in seeking credit, while white women are least likely to share that sentiment. In no group does even a majority claim unfavorable treatment in seeking credit.

The social disadvantage certification process, however, asks for affirmation of a much broader claim than does the economic certification requirement. It asks whether respondents have "been subjected to racial or ethnic prejudice or cultural bias within American Society because of their identities as members of [minority] groups, and without regard to their individual qualities."[163] No disparity study in its anecdotal section has asked a question that broadly, but NERA studies do ask respondents whether they believe they had been "treated less favorably due to race and/or sex while participating in business dealings," in fourteen different business categories.[164] Respondents were asked to check "yes" or "no" in a box for each category.[165] It would have been instructive if the NERA studies had followed up on their surveys to find out more about what incidents persons were referring to when they believed they were subjected to discrimination. While some of the percentages are disturbingly high, no further information about the character of the incident is available. The aggregated results from recent NERA studies can be seen below.[166]

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[163] P.R. DEP'T TRANP., CERTIFICATION OF SOCIAL & ECONOMIC DISADVANTAGE: PERSONAL NET WORTH 1 (2012), *available at* http://www.dtop.gov.pr/pdf/det_social_disadvantage.pdf.

[164] *See, e.g.*, NAT'L ECON. RESEARCH ASSOCIATES, *supra* note 146, at 236.

[165] *See id.*

[166] Research on the NERA studies in Figure A and B was conducted by John C. Sullivan, Associate Director of the Project on Civil Rights and Public Contracts, July 2011.

Figure B[167]
NERA Disparity Studies Asking About Various Forms of Business Discrimination

Jurisdiction	*Percentage of Minority Respondents NOT Claiming Discrimination in Business Dealings*	*Percentage of White Women NOT Claiming Discrimination in Business Dealings*
State of MD (2006)	42.5%	61.2%
Austin, TX (2008)	50.5%	64.5%
Memphis, TN (2008)	35.2%	50.8%
State of UT (2009)	52.6%	64.4%
Augusta, GA (2009)	49.6%	70.1%
State of NY (2010)	51.0%	62.5%
Northeast Ohio, OH (2010)	46.3%	67.9%
Broward County, FL (2010)	56.8%	72.7%
Minneapolis, MN (2010)	40.6%	61.9%
State of MD (2011)	46.7%	69.1%

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[167] NAT'L ECON. RESEARCH ASSOCIATES, INC., *supra* note 146, at 236 (2006); NAT'L ECON. RESEARCH ASSOCIATES, INC., RACE, SEX, AND BUSINESS ENTERPRISE: EVIDENCE FROM THE CITY OF AUSTIN 249 (2008); NAT'L ECON. RESEARCH ASSOCIATES, INC., RACE, SEX, AND BUSINESS ENTERPRISE: EVIDENCE FROM AUGUSTA, GEORGIA 272 (2009); NAT'L ECON. RESEARCH ASSOCIATES, INC., THE STATE OF MINORITY- AND WOMAN-OWNED BUSINESS ENTERPRISE: EVIDENCE FROM NEW YORK 381 (2010); NAT'L ECON. RESEARCH ASSOCIATES, INC., THE STATE OF MINORITY- AND WOMAN-OWNED BUSINESS ENTERPRISE: EVIDENCE FROM BROWARD COUNTY 343 (2010); NAT'L ECON. RESEARCH ASSOCIATES, INC., THE STATE OF MINORITY- AND WOMAN-OWNED BUSINESS ENTERPRISE: EVIDENCE FROM MINNEAPOLIS 246 (2010); NAT'L ECON. RESEARCH ASSOCIATES, INC., THE STATE OF MINORITY- AND WOMAN-OWNED BUSINESS ENTERPRISE: EVIDENCE FROM MARYLAND 491 (2011); NAT'L ECON. RESEARCH ASSOCIATES, THE STATE OF MINORITY- AND WOMAN- OWNED BUSINESS ENTERPRISE: EVIDENCE FROM NORTHEAST OHIO 310 (2010); NAT'L ECON. RESEARCH ASSOCIATES, THE STATE OF MINORITY- AND WOMAN- OWNED BUSINESS ENTERPRISE: EVIDENCE FROM MEMPHIS, TENNESSEE 276 (2008); NAT'L ECON. RESEARCH ASSOCIATES, THE STATE OF MINORITY- AND WOMAN- OWNED BUSINESS ENTERPRISE: EVIDENCE FROM STATE OF UTAH 307 (2009).

As Figure B shows, across many different NERA studies in different parts of the country, there was a roughly similar pattern in respondent answers. About three-fifths of women business owners and two-fifths of minority business owners did *not* claim they had suffered from discrimination in *any* form of business dealings. It cannot be determined how many of these business owners NERA surveyed had signed the certification affidavit claiming they had suffered from racial prejudice, cultural bias, or discrimination. The NERA sample, however, was confined to owners who indicated their firms had worked or attempted to work in the public sector in the last five years, so it would have made sense for many of these firms to seek certification. Plausibly, certified firms would be overrepresented in disparity study anecdotal sections, since they would have the most interest in continuing MWBE programs,[168] but one cannot be sure about the proportions of certified and non-certified firms in any of the NERA samples.

Who most often reports discrimination tends to vary not only by the group identification but also by the type of business involved. Figure C illustrates responses of 4,500 Texas MWBEs or Historically Underutilized Businesses ("HUBs"), as they are called in that state, to a very broad question asking if they had experienced at least one instance of any sort of discrimination in the last five years.

[168] In *Engineering Contractors Ass'n of S. Florida v. Metro. Dade Cnty.*, for example, the trial court expressed doubt about whether self interest might taint anecdotal reports. 943 F.Supp. 1546, 1579 (S.D.Fla. 1996). ". . . [I]ndividuals who have a vested interest in preserving a benefit or entitlement may be motivated to view events in a manner that justifies the entitlement." *Id.* "Consequently, it is important that both sides are heard and that there are other measures of the accuracy of the claims. Attempts to investigate and verify the anecdotal evidence should be made." *Id.*

Figure C[169]
Percentage of Texas Hubs in Specific Industries Who Report at Least One Instance of Discrimination in the Last Five Years

Race/ Sex Group	*Construction*	*Commodities*	*Professional and Other Services*	*Total Average*
African American	48.4	44.8	41.7	43.5
Hispanic	35.2	19.6	24.1	24.1
Asian	38.9	16.9	26.1	22.7
Native American	27.6	24.4	19.1	22.7
Total Minorities	38.5	26.4	29.7	29.6
White Women	19.1	9.7	16.3	13.6
Total Average HUBS	31.9	18.2	24.4	22.8

As reported in Figure C, no majority of owners in any group claims to have suffered from discrimination, though there are some clear patterns. Again, African-Americans are most likely to claim discrimination and white women are the least likely to do so. Discrimination is more often claimed by firm owners in the construction industry than by businesses in commodities and professional or other services.

In a few studies, NERA found some groups of MWBE business owners claimed to have experienced less business discrimination than non-MWBEs, but that was not the common pattern.[170]

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[169] NAT'L ECON. RESEARCH ASSOCIATES, INC., STATE OF TEXAS DISPARITY STUDY, xxiv (1994), *available at* http://hub.tamus.edu/Documents/Disparity%20 Study.pdf.

[170] *See* NAT'L ECON. RESEARCH ASSOCIATES, INC., RACE, SEX, AND BUSINESS ENTERPRISE: EVIDENCE FROM THE CITY OF AUSTIN 249 (2008); NAT'L ECON. RESEARCH ASSOCIATES, INC., RACE, SEX, AND BUSINESS ENTERPRISE: EVIDENCE FROM AUGUSTA, GEORGIA 272 (2009); THE STATE OF MINORITY- AND WOMEN-OWNED BUSINESS ENTERPRISE: EVIDENCE FROM NORTHEAST OHIO 310 (2010).

Figure D[171]
Disparity Studies Where Some Minorities Claimed Less Discrimination in Any Business Dealings than White Males

STUDY	*GROUP*	*PERCENTAGE OF MINORITY GROUP RESPONDENTS CLAIMING DISCRIMINATION*	*PERCENTAGE OF WHITE MALES CLAIMING DISCRIMINATION*
Austin, TX (2008)	NATIVE AMERICAN	31.0%	32.7%
Memphis, TN (2008)	HISPANIC	20.0%	26.2%
Augusta, GA (2009)	NATIVE AMERICAN	20.0%	26.1%
Northeast, OH (2010)	ASIAN	21.4%	26.6%

In both the NERA and the other disparity studies discussed here, certified and non-certified firms were included in their samples. However, a disparity study for Fulton County, Georgia in metropolitan Atlanta, conducted by Thomas Boston, an economics professor at The Georgia Institute of Technology, surveyed only certified MWBEs to obtain anecdotes.[172] Of 73 respondents, only 16% believed they had encountered discrimination by Fulton County in the past and only 12% believed such discrimination was still continuing.[173] On the other hand, 52% felt that they had encountered discrimination in seeking financing and credits; 20% agreed they had encountered bonding discrimination; and 53% agreed that they had been discriminated against by majority-owned firms in the past.[174]

[171] NAT'L ECON. RESEARCH ASSOCIATES, INC., RACE, SEX, AND BUSINESS ENTERPRISE: EVIDENCE FROM THE CITY OF AUSTIN 249 (2008); NAT'L ECON. RESEARCH ASSOCIATES, INC., RACE, SEX, AND BUSINESS ENTERPRISE: EVIDENCE FROM AUGUSTA, GEORGIA 272 (2009); NAT'L ECON. RESEARCH ASSOCIATES, INC., THE STATE OF MINORITY- AND WOMEN-OWNED BUSINESS ENTERPRISE: EVIDENCE FROM NORTHEAST OHIO 310 (2010); NAT'L ECON. RESEARCH ASSOCIATES, THE STATE OF MINORITY- AND WOMAN- OWNED BUSINESS ENTERPRISE: EVIDENCE FROM MEMPHIS, TENNESSEE 276 (2008).

[172] Webster v. Fulton Cnty., Ga., 51 F. Supp. 2d 1354, 1357 (N.D.Ga. 1999).

[173] *Id*. at 1379.

[174] *Id*. When a federal district court reviewed the statistical and anecdotal evidence in the studies Fulton County relied on, , it found the county's MFBE program did not have a compelling interest. *Id*. at 1382.

In short, in a variety of disparity studies completed by different consultants in different parts of the country at different times, when MWBEs were asked whether they believe they had experienced discrimination or unfavorable treatment because of their race, ethnicity, or gender, respondents were quite mixed in their responses. Taken together, the evidence from disparity studies support a conclusion that many MWBEs believe business discrimination exists. On the other hand, the studies show most MWBEs do not perceive such discrimination. A widespread perception of contracting discrimination is cause for concern, even if not all perceptions are accurate. The disparity study reports, however, also do not support the blanket presumption that all minority and women-owned businesses should be considered socially disadvantaged in the certification process because they experienced discrimination.

VI. EVIDENCE FROM A SURVEY OF MARYLAND MWBE CERTIFIED FIRMS

When a firm owner signs the affidavit claiming "social disadvantage" in order to gain DBE or MWBE certification, what is that person's understanding of that concept? When the owner claims to have suffered from discrimination, what kind of incidents does the owner have in mind? Those questions have not been previously studied. Are those concepts and incidents consistent with the standard of narrow tailoring on which a race and gender-conscious contracting program could be constitutionally based? Maryland uses the Uniform Certification process,[175] so the process to become a certified DBE for federal contracts and for state MWBE contract is the same. Does the certification process affidavit clearly weed out owners entitled to some remedy from those who are not? A survey of certified Maryland MWBEs provides very preliminary answers to these questions.

In a February 2011 NERA statewide disparity study conducted for the Maryland Department of Transportation ("MDOT"), 46.7% of minority respondents and 69.1% of white women respondents did not claim they had encountered discrimination in their business dealings.[176] The survey included certified and uncertified firms, and the results are generally consistent with the pattern NERA found in its studies nationwide.

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[175] MD. CODE REGS. 11.01.10.01 (2012).

[176] NAT'L ECON. RESEARCH ASSOCIATES, INC., THE STATE OF MINORITY- AND WOMEN-OWNED BUSINESS ENTERPRISE: EVIDENCE FROM MARYLAND 491 (2011).

So what would be found if only certified Maryland MWBE firms were asked about their concept of social disadvantage and their experiences of discrimination? In June 2011, Maryland had certified 5,303 DBEs and MWBEs.[177] From that list, twenty firms were chosen for a telephone survey by using a systematic sample. Some owners could not be reached at all, and sometimes the person filling out the certification affidavit was not available. In those instances, the next tenth firm on the certification list was used as a replacement to maintain the quality of the survey. In the end, of the twenty firms surveyed, twelve were African American, three were Hispanic American, one was an Asian American, and four were "non-minority" females.

Respondents gave a variety of answers about why they were socially disadvantaged:

- I don't have equal share of the contracts that are being awarded by the government.
- Not being able to achieve or get what you want because of your sex.
- Not getting what you deserve or want due to certain reasons having to do with your race.
- Being denied things because of your social conditions, race or sex.
- Not having access to the same opportunity.
- Not getting an equal share or opportunity to bid for contracts.
- Being a minority, and having low income.
- Not having equal share of government contracts.
- Being confronted with the perception that people of your race cannot perform in the business world.

[177] Theodore Ogune & George La Noue, A Survey of Maryland MWBE Certified Firms (December 16, 2012) (unpublished study) (on filed with the author). This particular section of research was conducted by Theodore Ogune, a lawyer and doctoral student in Public Policy at UMBC.

• Not being treated fairly by the government because you are African-American.

• Being deprived of rights and opportunities.

• The stereotype someone has to live within the business world because of race.

• Being discriminated against in the business world, where your business is put aside or ignored because of your race.

• Being denied things that should be free and equal for all.

• Being a woman and being Black in this world.

• Not receiving equal treatment and benefits from the government.

• The advantages from which you are naturally ruled out because of your race.

When asked in follow-up questions about particular experiences of past discrimination, sixteen, or 80%, reported having individual experiences of past discrimination in the business world at some point in their life. When asked to describe specific incidents of this discrimination, however, many examples appeared to be generalized assertions of "societal discrimination."

For example, respondents reported:

• "I don't have specifics, but we can always see that a lot of contracts from the county and state go to the large companies that are usually run by the white corporate world. So being black and a female always put me in the back seat."

•"I have a white friend who basically would not be searched when we went out together, but I would usually be searched to the fullest."

- "I have no specific examples but I have filed a complaint about discrimination in the past."

- "I have faced racism on several occasions in business but I could not prove it."

- "I applied for a job in the past and did not receive it because of my race. I believed it was because of race because the person that I found out later got the job was white and was not more qualified than me."

- "I won't even speak of the horrifying experiences, but what I would say is that I have experienced racism in the country, and racism is still in full force depending on where you find yourself."

- "I interviewed for a job that I believe I did not get because of my race."

- "At a restaurant in Texas when I went for a trip, the white waiter was rude and very obnoxious towards me, when I asked him the reason for his behavior he called me a derogatory name."

Only two of the illustrations of discrimination were related to specific contracting occurrences.

- "I once applied for a contract and, for reasons that I could not understand, did not get the contract, even though I had the same qualifications as the one who received the contract."

- "Back in 2004, I applied for a contract with the government along with my Caucasian friend, but, for some reason, she received the contract before I was even considered, and I was generally better than her credential-wise. That left me to believe I was discriminated against at least in that situation."

Not surprisingly, the certified MWBEs in this Maryland survey had a variety of interpretations of the meaning of social disadvantage and of the concept of discrimination itself.

According to contemporary judicial standards, a few of their reports of discriminatory incidents might call for contracting remedies, but most others focused on employment or other forms of discrimination for which an MWBE goals program is not a narrowly-tailored remedy. Still other examples appear to be in the category of societal discrimination which courts have ruled out as a compelling interest for a remedial program.

A sample of twenty Maryland MWBEs cannot prove anything about flaws in the certification process, but it is enough to establish a hypothesis that the social disadvantage prong of that process is not narrowly tailored.

VII. CONCLUSION

The Court's *Croson* decision converted the process of justifying preferential contracting programs from a matter of ideological conviction or stereotypes to a matter of empirical proof. As Justice O'Connor said, "proper findings" have to be made to "assure all citizens that the deviation from the norm of equal treatment of all racial and economic groups is a temporary matter, a measure taken in the service of the goal of equality itself."[178]

The DBE and MWBE certification processes begin by presuming that all minority and women business owners are socially and economically disadvantaged. Access to the business records used in the economic disadvantage section of the certification process, particularly those used to establish the applicant's assertion about his or her comparative disadvantage with competitor firms, could permit a third party to rebut that assertion. There is no meaningful way, however, to rebut this presumption regarding particular applicants. Surely there is still some discrimination in public procurement and some male majority-owned prime-contractors may choose to contract with sub-contractors who look like them or belong to the same social clubs, even if other sub-contractors offer lower prices or are more qualified. But that is a long way from assuming such discriminatory behavior affects all minority and women-owned businesses, is perpetrated by all majority

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[178] City of Richmond v. J.A. Croson Co., 488 U.S. 469, 510 (1989) (plurality opinion).

primes or that all MWBEs and DBEs are permanently damaged because of some past discriminatory incident.

The major reason for the current certification process is probably administrative convenience. The social disadvantage affidavit's use of terms such as racial prejudice and cultural bias to justify contracting preferences are not narrowly tailored according to *Croson*.[179] For the bureaucrats that administer the certification process, however, the affidavit process is enormously efficient. The affidavit is a single sentence, and does not need to be verified.[180] The economic disadvantage form, however, is ten pages, must be accompanied by supporting documents, and is sometimes carefully examined by certification administrators.[181]

As *Croson* concluded, administrative convenience is not a sufficient reason to avoid narrowly-tailoring a preferential contracting program.[182] The Court rejected Richmond's "interest in avoiding the bureaucratic effort necessary to tailor remedial relief to those who truly have suffered the effects of prior discrimination."[183]

Nevertheless, administrative convenience has dominated both the conceptual characteristics and the application procedures of the DBE and MWBE certification process. The list of minority groups under the presumption of disadvantage, and the definitions of social and economic disadvantage, were borrowed by other government agencies from the SBA and codified in the 1978 Small Business Investment Act ("SBIA").[184] Despite the fact that the SBIA was passed many years before *Croson*, *Adarand*, and other court decisions set new standards for race conscious remedies, these 1970s SBA concepts have never been bureaucratically reviewed to examine their contemporary legality.

Key phrases such as "racial prejudice" and "cultural bias," as the Ninth Circuit recognized, may reflect only a claim of "societal discrimination,"[185] which is not a proper predicate for allocating govern-

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[179] *See* 49 C.F.R. § 26 App. F (2012); *Croson*, 488 U.S. at 500.

[180] *See* 49 C.F.R. § 26 App. F (2012).

[181] *See id.* The process of confirming the status of firms claiming economic disadvantage includes an office visit and interviews with the principal officers of the firms to review their career histories. If the firm is a corporation, an analysis of who owns the stock is completed. Analysis of the bonding and financial capacity, equipment owned, licenses held, key personnel, and work history of the firm is required. *Id.* § 26.83 (2012).

[182] *Croson*, 488 U.S. at 508.

[183] *Id*.

[184] BEAN, *supra* note 33, at 102.

[185] W. States Paving Co. v. Wash. State Dep't of Transp., 407 F.3d 983, 1002 (9th Cir. 2005).

ment contracts on the basis of race, ethnicity, and gender.[186] These phrases are subject to a wide variety of personal interpretation. Furthermore, it is also flawed to certify a business because the owner has expressed that "my ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are not socially and economically disadvantaged."[187] Such an opinion may also reflect societal discrimination. It is not tied to any time or place, and no proof is necessary. Creating race conscious remedies based on a person's generalized beliefs about the discriminatory workings of the free enterprise system, capital, and credit markets without documentation of its effects on an individual is a judicially unprecedented predicate for a race conscious remedy.

The social disadvantage presumption eliminates individualized consideration of the characteristics or experiences of particular applicants. In summarizing the debate about the use of the social disadvantage presumption, USDOT concluded, "This presumption (i.e., a determination that it is not necessary for group members to prove individually that they have been the subject of discrimination or disadvantage) is based on the understanding of Members of Congress about the discrimination that members of these groups have faced."[188] Even if "understandings of Members of Congress" were a sufficient basis to grant the presumption to whole groups,[189] the certification process requires individual applicants to sign affidavits, under oath, that they have suffered racial prejudice, cultural bias, or discrimination--societal discrimination which is not a basis for a remedial contracting program, and thus may not be narrowly tailored. Furthermore, Congressional understandings would not be sufficient to support the use of this certification language by states, transit districts, sanitation districts, and school systems.

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[186] Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 276 (1986) (plurality opinion); *Croson*, 488 U.S. at 499.

[187] 49 C.F.R. § 26 App. E (2012).

[188] Participation by Disadvantaged Business Enterprises in Department of Transportation Programs, 64 Fed. Reg. 5096, 5099 (Feb. 2, 1999). On the other hand, Congress also determined that under the revised DBE program, each recipient would have the obligation to determine locally set goals which would create a level playing field and to maximize race neutral means to reach that goal, which is not consistent with a view that Congress wanted to extend preferential contracting benefits to all members of the bureaucratically designated racial, ethnic, and gender groups.

[189] *See* Rothe Dev. Corp. v. Dep't of Def., 413 F.3d 1327, 1338 (Fed. Cir. 2005) (holding that a race preferential contracting must be based on specific preenactment evidence before Congress).

USDOT cited no judicial decisions to support a group-based presumption as a basis for racial preferences because of generalized legislative beliefs. Such a concept was inconsistent with *Croson* then and also with more recent Court decisions about racial classifications.[190] Even when the Court has accepted the limited use of race in allocating public benefits such as in college admissions, it has insisted there be individualized decisions about the beneficiaries.[191]

How could the certification process become narrowly tailored? The first step would be to eliminate the "racial prejudice" and "cultural bias" language from the social disadvantage section of the application. These are concepts that are both under inclusive and over inclusive. Cultural bias in America is not exclusive to the designated minorities or women. Such bias might affect white male persons who are homosexual, disabled, obese, smokers, or members of minority religions or minority ethnic groups such as Arabs or Iranians. On the other hand, a woman or member of the designated minority groups might have experienced cultural bias at some point in their lives, but have long since overcome its effects. The fact that the certification applicant has held a high political or governmental position, is on prominent business or community boards, or is a graduate of an elite university is irrelevant in the current certification process. Apparently, once born into the designated groups, no subsequent achievement can erase the presumption of social disadvantage. There is no comparable assumption in other areas of anti-discrimination enforcement. Where employment or housing is involved, for example, it is not enough to claim generalized preju-

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[190] *See generally* Gratz v. Bollinger, 539 U.S. 244 (2003); Grutter v. Bollinger, 539 U.S. 306 (2003).

[191] In *Gratz v. Bollinger* and *Grutter v. Bollinger*, the Court made the distinction between the University of Michigan's undergraduate admissions process, which the Court found used race unconstitutionally, 539 U.S. at 275, and its law school admission process, because in the latter "each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application." 539 U.S. at 337. In major universities, such individualized admission decisions may involve reviewing tens of thousands of applications annually. *But see Gratz*, 539 U.S. at 275 ("But the fact that the implementation of a program capable of providing individualized consideration might present administrative challenges does not render constitutional an otherwise problematic system."). Recipients of federal funds already have procedures for making individualized, social disadvantage evaluations of applicants by considering education, employment, and business history, but they apply only to persons without the presumption. For persons with the presumption, the social disadvantage decision is based simply on their racial, ethnic, and gender identification. *See, e.g.*, 49 C.F.R. § 26 App. F (2012).

dice or cultural bias--there must be some specific discriminatory incident involved.

Similarly, the language about "diminished ability to compete in the free enterprise system" should be replaced with a request for evidence that the applicant has actually experienced economic discrimination that has continued to affect the competitiveness of their business.

For both the social and economic prongs, the certification process should require information which would allow narrowly-tailored judgments to be reached about disadvantage. For instance, information should be requested about when and where the alleged incidents occurred. Such information is not now required for those whose group membership makes them presumptively disadvantaged, though it is required for those lacking that membership. However, experiences of childhood discrimination [192] or bias may no longer be relevant to an owner's current business situation. While one state may not legally use contracting preferences to remedy discrimination allocating state dollars in its MWBE program to remedy discrimination in another state,[193] MWBE certification processes generally do not require that any of the allegations of prejudice, bias or discrimination be confined to that state. MWBE certification forms are usually based on Uniform Certification forms which reflect the national DBE program.[194] Information should also be gathered about what benefits the applicant has already received. Many firms have been certified for decades and have received preferential contracts during the whole period. Perpetual multi-jurisdictional contracting preferences should not be allowable as narrowly tailored remedies.

If the affidavit were limited to individually experienced discrimination, courts should refine the definitions or boundaries for certification. *Croson* ruled that societal discrimination is not a basis for a remedial program because it has no "stopping point."[195] Since it is extremely unlikely that discrimination and cultural bias in some form will end in the United States, there is no logical end to DBE and MWBE programs either.

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[192] *See Croson*, 488 U.S. at 499 (rejecting the idea that discrimination in primary and secondary schools justifies medical school admission quotas). The current certification applications do not ask when an applicant feels he or she suffered from racial prejudice, cultural bias or discrimination. *See, e.g.*, 49 C.F.R. § 26 App. F (2012).

[193] *See Croson*, 488 U.S. at 490.

[194] *See, e.g.* MD. CODE REGS. 11.01.10.01 (2012).

[195] *Croson*, 488 U.S. at 498 (quoting Wygant v. Jackson Bd. of Ed., 476 U.S. 267, 275 (1986) (plurality opinion)).

From *Croson* to all its many successor judicial decisions, courts have not found DBE or MWBE programs to be abstractly unconstitutional. They have, however, required them to have a compelling interest and to be narrowly tailored in operation. They have examined carefully many aspects of these programs, including the disparity studies and other evidence, the duration of the programs, the groups and industries covered, and the use of race neutral alternatives. However, the one program facet they have not subjected to strict scrutiny is the certification process. Upon examination of the certification process, it is likely that courts will require modification of the economic and social disadvantage affidavit so that it not only focuses on persons entitled to a race or gender conscious remedy, but is also consistent with other racial and gender classification laws.