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Strict Constitutional Scrutiny is Not Fatal in Fact: Federal Courts Uphold Affirmative Action Programs in Public Contracting

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The life of the law has not been logic: it has been experience.

—*Oliver Wendell Holmes, Jr.*

Both sides of the affirmative action debate watched with keen interest the U.S. Supreme Court's review of the University of Michigan cases challenging the school's use of race-conscious admissions criteria. In *Grutter* v. *Bollinger*,[1] the Court affirmed that preferences for the admission of Black and Hispanic students can, under certain circumstances, pass constitutional muster. The state must prove that it has a "compelling interest" in promoting diversity, and that the means chosen to advance that interest are "narrowly tailored." This test, articulated by the Court in *City of Richmond v. J.A. Croson Co.*,[2] and *Adarand v. Peña*,[3] had been applied by the lower federal courts to routinely strike down race-based government contracting programs. Now, the Court has confirmed that strict scrutiny need not be fatal in fact and that affirmative action efforts can comport with Equal Protection analysis.

This significant change in outcomes seems to be the product of experience. The courts now have the results of a decade of so-called "color-

blind" public procurement, and those who support government intervention into the market to level the playing field for minorities and women have learned the hard way that only sound evidence and scientifically defensible studies will pass judicial muster. The combination has produced a new willingness to realistically address the continuing effects of race discrimination on public entrepreneurial opportunities.

I. SUPREME COURT OPINIONS IN UNIVERSITY OF MICHIGAN CHALLENGES

A. Law school's admissions policy passes strict scrutiny

Justice O'Connor's majority opinion in *Grutter* reiterates the strict scrutiny framework in reviewing the University of Michigan Law School's policy.

> The hallmark of that policy is its focus on academic ability coupled with a flexible assessment of applicants' talents, experiences, and potential 'to contribute to the learning of those around them'. The policy requires admissions officials to evaluate each applicant based on all the information available in the file.…The policy makes clear, however, that even the highest possible score does not guarantee admission to the Law School.…The policy does not restrict the types of diversity contributions eligible for 'substantial weight' in the admissions process, but instead recognizes 'many possible bases for diversity admissions.'…The policy does, however, reaffirm the Law School's longstanding commitment to 'one particular type of diversity,' that is, 'racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics and Native Americans, who without this commitment might not be represented in our student body in meaningful numbers.…'[4]

After reviewing Justice Lewis Powell's plurality opinion in *Regents of Univ. of Cal.* v. *Bakke*,[5] the majority held that it was not necessary to decide whether his opinion was binding precedent, because "we endorse Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions."[6] In keeping with the Court's tradition, it chose to defer to the Law School's educational judgment that diversity is essential to its educational mission. The educational benefits of diversity were held to be "substantial" and "real, as major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas and viewpoints."[7] The Court seemed particularly impressed with the position of high-ranking military and civilian officials that a highly qualified and diverse officer corps is essential to national security. "Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized."[8] Thus, it is not the case that only remedying past discrimination is the only permissible governmental use of race.

This comports with the purpose of strictly scrutinizing race-conscious governmental decision-making. Citing *Croson*, the Court affirms that the "searching judicial inquiry" is designed to determine which racial classifications are based on "illegitimate notions of racial inferiority or simple racial politics."[9] In a resounding rejection of the "color blind" notion, Justice O'Connor states that "[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause. … Not every decision influenced by race is equally objectionable and strict scrutiny is designed to provide a framework for carefully examin-

ing the importance and the sincerity of the reasons advanced by the governmental decision maker for the use of race in that particular context."[10]

Turning to whether the Law School's policy was narrowly tailored, the Court reiterated *Croson's* holding that the purpose of the requirement is to ensure that the chosen means fit so closely that there is "little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype."[11] Quotas are not permitted; race must be used in a flexible, nonmechanical way. The Law School's policy is not a quota but rather a "highly individualistic, holistic review of each applicant. … Unlike the program at issue in *Gratz* v. *Bollinger*, the Law School awards no mechanical, predetermined diversity 'bonuses' based on race or ethnicity."[12] While narrow tailoring requires serious consideration of race-neutral measures, it does not require the exhaustion of "every conceivable race-neutral alternative…. Narrow tailoring does, however, require serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks."[13] The Constitution does not require Michigan to choose between a dramatic sacrifice of diversity or academic quality or both. Nor is the policy unduly burdensome to non-minorities because it uses race only as a "plus." However, such policies must have a "logical end point," through sunset provisions and periodic reviews. "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."[14]

B. Undergraduate admissions policy violates equal protection

Applying strict scrutiny to the challenge to the University's undergraduate admissions policy, the majority, in an opinion authored by Justice Rehnquist, held that it violates Equal Protection.[15] The policy provides 20 points to each minority applicant, without individualized review, making race the "decisive" factor.[16] Therefore, although diversity is a compelling state interest, the undergraduate system is insufficiently narrowly tailored to survive strict scrutiny. Justice O'Connor's concurring opinion further explains that the automatic, predetermined and large points allocated to racial and ethnic minorities ensures that the diversity contributions of applicants cannot be individually assessed, in "sharp contrast" to the Law School's plan.[17]

II. APPLICATION OF STRICT SCRUTINY TO AFFIRMATIVE ACTION IN PUBLIC CONTRACTING

The *Bollinger* cases' analyses of *Croson's* strict scrutiny framework are directly applicable to preference programs for Minority-owned Business Enterprises (MBEs) and Disadvantaged Business Enterprises (DBEs).[18] *Croson* held that if a local government has

> evidence before it that non-minority contractors were systematically excluding minority businesses from subcontracting opportunities it could take action to end the discriminatory exclusion. 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 contractors, an inference of discriminatory exclusion could arise…. Moreover, evidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government's determination that broader remedial relief is justified.[19]

This explanation of the type of evidence that would support a MBE program gave rise to the "disparity study," designed to provide such proof. Dozens of cities, states and other local entities engaged consultants to conduct disparity or predicate studies to provide statisti-

cal and anecdotal evidence of discrimination against MBEs and Women-owned Business Enterprises (WBEs). These studies used various approaches to estimating the availability of "willing and able" MBEs and WBEs; the entity's utilization of such firms as prime contractors and subcontractors on its projects; whether there was a statistically large and significant disparity between availability and utilization; and to gathering anecdotal information about the experiences of MBEs and WBEs on public and private contracts.

Despite millions of dollars spent on such analyses, the results were often econometrically unsound,[20] politically motivated and legally inadequate.[21] In the 14 years since *Croson*, the federal courts had struck down almost every local MBE program as based upon insufficient evidence of discrimination and often insufficiently narrowly tailored remedies.[22] The Seventh Circuit, in an opinion by Judge Richard Posner, went so far as to question whether any actions other than intentional discrimination by the government entity can support race-conscious initiatives.[23]

Loss of race-conscious remedies led to almost immediate and drastic reductions in the participation of MBEs and WBEs as public subcontractors. Whatever the weaknesses in the disparity studies, it became clear that, absent government intervention, ready, willing and able minority and women firms will be excluded from subcontracting opportunities on government projects. Even the use of race-neutral measures such as technical assistance, increased outreach and "unbundling" large projects failed to ensure equal access to contracting opportunities.

For example, Richmond's MBE participation dropped from 30% to 4% within the first year after *Croson*. Similar freefalls in MBE and WBE utilization occurred in Atlanta (35% to 14%); Fulton County, Georgia (17% to 2%); Elyria, Ohio (25% to .6%); and Cook County, Illinois (40% to less than 12%).[24] Decreases in utilization ranged from a low of 50% in Tampa for Hispanics (the drop was 99% for Blacks), to 80% in San Jose, to 97% in Philadelphia.[25]

Similar comparisons emerged across the nation between DBE utilization mandated on federally funded transportation projects and utilization on state funded contracts without affirmative action goals. 1996 examples include Oregon (16.2% federal DBE participation vs. 3.8% state DBE participation); Arkansas (11.9% federal DBE participation vs. 2.9% state DBE participation); Louisiana (12.4% federal DBE participation vs. .4% state DBE participation); Michigan (15.5% federal DBE participation vs. 1.4% state DBE participation); and Delaware (12.7% federal DBE participation vs. .9% state DBE participation).[26]

It was becoming clear that a different approach was necessary if these dismal results of discrimination were to be ameliorated. 1999 saw a sea change in the way the issue of affirmative action was approached by its proponents. First, the U. S. Department of Transportation (USDOT) revised its DBE Program to meet strict scrutiny as required by *Adarand* when the transportation authorizing legislation was adopted in 1998. The U.S. Department of Justice had compiled extensive evidence of the present effects of past discrimination in the market for federally financed transportation contracts.[27] Based upon that evidence and additional testimony, Congress made major changes to the DBE Program to meet *Adarand III*.[28] The implementing regulations[29] made extensive revisions to the Program, including giving grantees the discretion to set overall, annual goals based upon their marketplaces; requiring that DBE participation be achieved by race-neutral measures to the greatest possible extent; and imposing additional requirements of economic disadvantage on eligible firms.

At around the same time, a municipality finally employed a new methodology to support the constitutionality of its MBE/WBE program. The City and County of Denver's Program had been challenged several years earlier,[30] and the trial was finally held in February 1999. Denver recognized that the proper inquiry is not only whether disparities remain despite the operation of its Program but also whether disparities remain when remedial intervention is not im-

posed upon the marketplace, as reflected by MBE and WBE participation on contracts without affirmative action goals. It further was willing to spend the resources to engage internationally prominent econometricians instead of the usual "disparity study consultants" to provide the quality of expert testimony upon which federal courts will rely.[31]

As discussed below, the results of these new approaches have been dramatic. Every challenge to the DBE program has been roundly rejected, and Denver's Program was upheld by the Tenth Circuit.

III. FEDERAL AFFIRMATIVE ACTION IN PUBLIC CONTRACTING PROGRAM MEETS STRICT SCRUTINY

A. *Adarand* revisited

Adarand Constructors continued its fight against affirmative action after *Adarand III*, challenging the use of race-conscious measures for federal highway construction subcontracting and the DBE Program eligibility standards as revised in 49 C.F.R. Part 26. Upon remand from the Supreme Court,[32] the Tenth Circuit held that Congress had "strong evidence" of discrimination in the award of federally funded transportation contracts in enacting TEA-21, and that the statutory remedies and the DOT regulations promulgated thereto were narrowly tailored to meet that compelling interest.[33]

In holding that the compelling evidence prong was satisfied, the court provided a framework for consideration of this issue in the context of a review of federal action. It emphasized that while the government has the burden of initial production of proof of discrimination, the challenger has the ultimate burden of persuasion that the legislation fails constitutional muster under any application in a facial attack.[34]

Compelling interest. Direct and circumstantial evidence, including post enactment evidence, was considered. Statistical and anecdotal evidence of public and private discrimination in the general construction industry is relevant and probative (although anecdotal evidence alone is insufficient).[35] Taken as a whole, the government's evidence establishes two types of barriers to fair DBE participation due to private discrimination: formation of businesses at the onset, and fair competition for government contracts for existing firms. Discrimination in business formation includes exclusion from "old boy" and family based networks; trade union roadblocks; and "particularly striking" denial of access to capital (relying in part on the *Concrete Works* evidence). Barriers to fair competition include exclusion from private subcontracting opportunities; resistance by prime contractors to working with minorities and resulting bid shopping; discrimination in obtaining surety bonds; and discrimination by suppliers who give special prices to non-minority firms.[36]

Congress further considered evidence from local disparity studies that established, at a minimum, that qualified minority subcontractors were still underutilized despite the operation of local subcontracting goals programs.[37] Disparities between MBE availability and utilization raise the inference that they result from discrimination, and such inferences become more pointed given the barriers to the formation of MBEs. While it would be "pure speculation" to even attempt to estimate the number of MBEs that would exist in the absence of identified discriminatory barriers, that "the existence of evidence indicating that the number of minority DBEs would be significantly (but unquantifiably) higher but for such barriers is nevertheless relevant to the assessment of whether a disparity is sufficiently significant to give rise to an inference of discriminatory exclusion."[38] The court further rejects the plaintiff's "decidedly vague urgings" that disparity studies are *per se* invalid.[39]

Although not dispositive, that MBE participation plummets or disappears when programs are abandoned or discontinued is highly probative of the claim that significant discriminatory barriers continue to exist to full and fair economic opportunities for minority firms. This "strongly supports the government's claim that

there are significant barriers to minority competition in the public subcontracting market, raising the specter of racial discrimination."[40]

Finally, blanket assertions that race-conscious remedies are illegal regardless of the compelling interest are not sufficient to carry the requisite evidentiary and persuasive burdens. "The Constitution does not obligate Congress to stand idly by and continue to pour money into an industry so shaped by the effects of discrimination that the profits to be derived from congressional appropriations accrue exclusively to the beneficiaries, however personally innocent, of the effects of racial prejudice."[41]

Narrow tailoring. The remedies meet the narrow tailoring prong of strict scrutiny. First, in reauthorizing the revised Program, Congress properly found that race-neutral alternatives had proven inadequate for decades to eradicate racial discrimination in government contracts.[42]

The Program also has an appropriate limit on duration. Firms' eligibility to participate is reviewed annually, and the expiration of TEA-21 in 2003 appropriately sunsets the remedies.[43]

Next, the Program is flexible. Waivers are expressly available and no prime contractor is forced to use any subcontractor.[44]

Moreover, goals are not "rigid numerical quotas,"[45] nor must they be strictly tied to current MBE availability, which reflects the continuing effects of discrimination. Strict scrutiny does not prohibit setting an "aspirational goal" above the current level of MBE availability. The "*existing* percentage of minority-owned businesses is not necessarily an absolute cap on the percentage that a remedial program might legitimately seek to achieve.… *Croson* does not prohibit setting an aspirational goal above the current percentage of minority-owned businesses that is substantially below the percentage of minority persons in the population as a whole.… It is reasonable to conclude that allocating more than … 90% of federal transportation contracts to non-minority males, is in and of itself a form of passive participation in discrimination that Congress is entitled to seek to avoid."[46] In addition, the standards whereby recipients set overall annual goals are now much more rigorous and reality based than those in the prior scheme in 49 C.F.R. Part 23. Even this process does not penalize recipients who fail to meet their aspirational goals, and USDOT must thoroughly examine the bases upon which such goals were set.[47]

The next factor—the burden on third parties—does not invalidate the Program. While there is no serious burden on prime contractors, non-DBE subcontractors such as Adarand will be deprived of some business opportunities. However, "innocent" third parties can be called upon to bear some of the burden of eradicating discrimination. To hold otherwise would be to render strict scrutiny fatal in fact.[48] Moreover, disadvantaged non-minority males are eligible to participate.[49]

Lastly, the limitation on the DBE owner's personal net worth of $750,000 (exclusive of equity in the DBE and personal residence) cures the prior Program's over-inclusiveness. "The current regulations more precisely identify the proper minority recipients of DBE certification by periodically rescreening for economic disadvantage all candidates for such certification."[50] The court seems to suggest that an individualized inquiry into an applicant's social disadvantage should also be conducted.[51]

Strict scrutiny does not, however, mandate an inquiry into discrimination against each ethnic or racial subgroup. Broad classifications such as Asian-American are permissible because "the fact remains that discrimination occurs based on such classifications, and engaging the classifications is a necessary evil which constitutes a compelling governmental interest."[52]

B. USDOT DBE program is constitutional

***Sherbrooke Turf, Inc. v. Minnesota Department of Transportation, et al,* (Sherbrooke III) and *Gross Seed Company v. Nebraska Department of Roads, et al*.** In these consolidated opinions, the Eighth Circuit upheld the constitutionality of the USDOT's DBE Program.[53] Agreeing with the analysis in *Adarand VII,* the court held that Congress had a compelling interest in enacting the legislation and the regulations implementing the statute were con-

stitutional on their face and as applied in Minnesota and Nebraska.

The plaintiffs provide landscaping services to prime contractors on federally assisted highway projects. They have standing to sue because they have bid on such projects in the past, will continue to do so in the future, and will suffer competitive harm when contracts are awarded to DBEs under the program.[54] On the merits, the court affirmed both district courts' holdings that the DBE Program as implemented in Minnesota[55] and Nebraska[56] satisfies *Adarand III*.

The court first reviewed the legislative background of the DBE program. Since 1982, federal law has required that at least ten percent of federal highway construction dollars be paid to "small businesses" owned and controlled by "socially and economically disadvantaged" persons, as defined in § 8(d) of the Small Business Act (15 U.S.C. § 637).[57] In the wake of *Adarand III*, Minnesota's DBE Program under Part 23 was enjoined.[58]

The Minnesota Department of Transportation (MnDOT) implemented a revised DBE Program pursuant to Part 26 in 1999. Sherbrooke again sued, arguing that the new regulations were unconstitutional.

First, the court agreed that the DBE Program is subject to strict scrutiny. Although the term "socially and economically disadvantaged individuals" is facially race-neutral, that the statute employs a race-based rebuttable presumption of social disadvantage and authorizes the use of race-conscious remedial measures subjects the Program to the *Adarand III* test.[59]

Within that framework, plaintiffs' argument that Congress lacked strong evidence of widespread race discrimination in the construction industry was rejected. The court took a "hard look" at the evidence Congress considered, and concluded that it had "spent decades compiling evidence of race discrimination in government highway contracting, of barriers to the formation of minority-owned construction businesses, and of barriers to entry. In rebuttal, Sherbrooke and Gross Seed presented evidence that the data was susceptible to multiple interpretations, but they failed to present affirmative evidence that no remedial action was necessary because minority-owned small businesses enjoy non-discriminatory access to and participation in highway contracts. Thus, they failed to meet their ultimate burden to prove that the DBE program is unconstitutional on this ground."[60]

The court likewise rejected the claim that grant recipients must independently satisfy the compelling interest prong of strict scrutiny. There is no merit to "appellants' contention that their facial challenges to the DBE program must be upheld unless the record before congress included strong evidence of race discrimination in construction *in Minnesota and Nebraska*. On the other hand, a valid race-based program must be narrowly tailored, and to be narrowly tailored, a *national* program must be limited to those parts of the country where its race-based measures are demonstrably needed. To the extent the federal government delegates this tailoring function, a State's implementation becomes critically relevant to a reviewing court's strict scrutiny."[61]

Thus, the narrow tailoring analysis looks at the functions of the grantees. Unlike the prior program, Part 26 provides that:

- The overall goal must be based upon demonstrable evidence of the number of DBEs ready, willing and able to participate on the recipient's federally assisted contracts.
- The goal is to be adjusted upwards to reflect the availability of DBEs but for the effects of the DBE Program and of discrimination.
- The recipient must meet the maximum feasible portion of the goal through race-neutral measures as well as estimate that portion of the goal it predicts will be met through such means.
- The use of quotas and setasides is severely limited.
- The goals are to be adjusted during the year to remain narrowly tailored.
- Absent bad faith administration of the Program, a state cannot be penalized for not meeting its goal.
- Exemptions and waivers from any or all Program requirements are available.[62]

These elements led the court to conclude that the program is narrowly tailored on its face. First, the regulations place strong emphasis on the use of race-neutral means to achieve minority and women participation. Relying upon *Grutter*, the court held that while "[n]arrow tailoring does not require the exhaustion of every conceivable race-neutral alternative … it does require serious, good faith consideration of workable race-neutral alternatives."[63]

Next, the program is flexible. A state cannot be penalized for failure to meet its overall goal and eligibility is limited to small firms owned by persons whose net worth is less than $750,000. There are built-in time limits, and the state may terminate the program if it meets its annual overall goal through race-neutral means for two consecutive years. Moreover, TEA-21 is subject to Congressional reauthorization that will ensure periodic public debate.

Third, the goals are tied to the relevant labor market. "Though the underlying estimates may be inexact, the exercise requires the States to focus on establishing realistic goals for DBE participation in the relevant contracting markets. This stands in stark contrast to the program struck down in *Croson*…."[64]

Finally, Congress has taken significant steps to minimize the race-conscious nature of the Program. "[W]ealthy minority owners and wealthy minority-owned firms are excluded, and certification is available to persons who are not presumptively [socially] disadvantaged but can demonstrate actual social and economic disadvantage. Thus, race is made relevant in the program, but it is not a determinative factor."[65]

Turning to the defendant's application of the regulations to their individual Programs, the court also held that the results of the regulations as applied were sufficiently narrowly tailored.

MnDOT relied upon a study conducted by National Economic Research Associates, Inc. (NERA).[66] NERA first determined that DBEs comprise 11.4% of highway construction prime contractors, of which .06% were minority-owned and 10.8% were women-owned. Based upon its analysis of business formation statistics, NERA next estimated that the number of participating minority-owned firms would be 34% higher in a race-neutral market. Therefore, NERA adjusted its DBE availability figure from 11.4% to 11.6%, which MnDOT adopted as its overall goal for fiscal year 2001. MnDOT predicted that it would meet 9% of its goal through race-conscious measures, based upon the drop from 10.25% DBE participation in 1998 to 2.25% participation in 1999, when its previous program was enjoined in *Sherbrooke I*. USDOT approved this goal. While "Sherbrooke presented evidence attacking the reliability of NERA's data, it failed to establish that better data was available or that MnDOT was otherwise unreasonable in undertaking this thorough analysis and in relying on its results. The precipitous drop in DBE participation in 1999, when no race-conscious methods were employed, supports MnDOT's conclusion that a substantial portion of its 2001 overall goal could not be met with race-neutral measures, and there is no evidence that MnDOT failed to adjust its use of race-conscious and race-neutral methods as the year progresses…."[67]

Nebraska Department of Roads (NDOR) adopted an overall goal, approved by USDOT, of 9.95%, with 4.82% to be met through race-conscious methods. Without discussion, the court held that Gross Seed failed to prove that the DBE Program is not narrowly tailored in Nebraska.

Western States Paving Co., Inc. v. Washington Department of Transportation, et al. In this case, the trial court granted summary judgment in favor of the government, upholding the constitutionality of the US Department of Transportation's Disadvantaged Business Enterprise Program, promulgated in 49 CFR Part 26.[68] The court agreed with the earlier holdings that Congress had strong evidence of discrimination in the marketplace for federally-funded transportation contracts in enacting the Program, and that the regulations are narrowly tailored to that evidence.[69]

The DBE Program was:

> Congress' response to its compelling interest in not perpetuating the effects of racial discrimination in its own distribution of federal funds and in remediating the effects of past discrimination in the government contracting markets created by its disbursements. Congress reviewed studies and statistics from all regions of the republic. These studies demonstrated that the effects of private discrimination spanning many years had impeded the ability of DBEs to compete in the highway construction marketplace. The effects of this discrimination were manifested in virtually every aspect of business formation and operation, including, but not limited to: financing, bonding, purchasing, insuring, training and even union membership. By way of confirmation of these affirmative findings, the Court was particularly influenced by statistics showing that when affirmative action programs were removed, DBE participation fell well below the percentage of DBEs ready, willing and able to fully participate in the marketplace.[70]

The Program was also narrowly tailored. There were many race-neutral alternatives available; the availability of good faith efforts to meet DBE goals rendered their application sufficiently flexible; Congressional oversight satisfied the limited duration requirement; the goal setting process created targets in line with the utilization that would be expected absent the effects of discrimination; and the Program was not overly burdensome to non-DBEs because beneficiaries must be socially and economically disadvantaged and recipients must consider whether DBEs are overconcentrated in particular scopes of work.

IV. LOCAL AFFIRMATIVE ACTION IN PUBLIC CONTRACTING PROGRAM MEETS STRICT SCRUTINY

In *Concrete Works of Colorado, Inc. v. City and County of Denver*, the Tenth Circuit upheld Denver's Minority and Women Business Enterprise Program after more than a decade of litigation.[71] The court reversed the trial court's holding that Denver had failed to meet strict constitutional scrutiny and directed the entry of judgment for the government.

A. Procedural background.

Denver adopted an ordinance in 1990 that provided for annual goals of 16% for MBEs and 12% for WBEs in construction contracts, and 10% for both MBEs and WBEs in professional design and construction services contracts. Bidders were to meet contract specific goals or make good faith efforts to do so. The City revised the program in 1996 and 1998, reducing the annual goals for both MBEs and WBEs in construction contracts to 10% and prohibiting M/WBEs from counting self- performed work towards the goals.

Plaintiff Concrete Works of Colorado, Inc. (CWC), a construction firm owned by a white male, sued the City in 1992, alleging that it had been denied three contracts for failure to meet the goals or to make good faith efforts and seeking injunctive relief and money damages. The district court granted the City's motion for summary judgment.[72] The Tenth Circuit reversed, holding that genuine issues of material fact precluded summary judgment.[73] The district court, after a bench trial, held the ordinance to be unconstitutional.[74] Denver appealed.

The Tenth Circuit held that CWC's claims for prospective injunctive relief against the operation of the 1990 and 1996 ordinances became moot as each was amended and replaced by the 1998 ordinance. Plaintiff 's retrospective claim for money damages for the enforcement of the 1990 ordinance was not moot.

B. Denver's evidence.

Denver introduced evidence of its contracting activities dating back to the early 1970s. This

consisted of reports of federal investigations into the utilization and experiences of local MBEs and of the City's early affirmative action efforts. M/WBE participation dramatically increased when the City adopted its first MBE ordinance in 1984. After conducting surveys and hearings, Denver extended the Program and increased the goals in 1988.

To comply with *Croson*, the City commissioned a study to assess the propriety of the Program. The 1990 Study found large disparities between the availability and utilization of M/WBEs on City projects without goals. It likewise found large disparities on private sector projects without goals. Interviews and testimony revealed continuing efforts by white male contractors to circumvent the goals. After reviewing the statistical and anecdotal evidence, the City adopted the 1990 Ordinance. A 1991 study of goods, services and remodeling industries also found large disparities for City contracts not subject to goals.

When the Tenth Circuit reversed and remanded for trial in *Concrete Works II*, the City commissioned another study. The 1995 Study used U.S. Census Bureau data to determine MBE and WBE availability and utilization in the construction and design industries in the Denver Metropolitan Statistical Area (MSA). It calculated separate disparity indices for firms with and without paid employees. Census data were also used to examine average revenues per employee and rates of self-employment. Disparities in self-employment rates persisted even after holding education and length of work experience constant. A telephone survey to determine the availability and utilization of M/WBEs in the Denver MSA showed large disparities in the construction and professional design industries. The 1995 Study included discussion of a 1993 Study for the Denver Housing Authority which found disparities for M/WBEs in some areas in some years, including those when it implemented an affirmative action program, and a 1992 Study for the Regional Transportation District that found large disparities for both prime and subcontracting in the Denver marketplace. Based upon this evidence, the City enacted the 1996 Ordinance.

In 1997, Denver commissioned another study to examine whether discrimination limited the opportunities of M/WBEs in construction projects of the type undertaken by the City.[75] The court found this Study used a "more sophisticated" method to calculate availability by: (1) specifically determining the City's geographic and procurement marketplace; (2) using Dun & Bradstreet's *Marketplace* data to obtain the total number of available firms and numerous directories to determine the number of M/WBEs; (3) conducting surveys to adjust for possible misclassification of the race and gender of firms; and (4) presenting a final result of weighted averages of availability for each racial group and women for both prime and subcontracts.

The 1997 Study then compared M/WBE availability and utilization in the Colorado construction industry. It also examined 1987 Census data, the most current then available. All comparisons yielded large and statistically significant disparities. The 1997 Study also found that the potential availability of M/WBEs, as measured by the rates at which similarly situated white males form businesses, was significantly greater than their actual availability. The Study next examined whether minorities and women in the construction industry earned less than white males with similar characteristics. Large and statistically significant disparities were found for all groups except Asian-Americans. A mail survey was conducted to obtain anecdotal evidence of the experiences of MBEs and WBEs and non-M/WBEs in the construction industry. Again, with the exception of Asian-Americans, minorities and women with similar characteristics experienced much greater difficulties than their white male counterparts. A follow up telephone survey indicated that the disparities were even greater than first indicated. Based upon the 1997 Study, the City enacted the 1998 Ordinance.

At trial, the City also introduced additional, comprehensive anecdotal evidence. M/WBEs

testified that they experienced difficulties in prequalifying for private sector jobs; their low bids were rejected; they were paid more slowly than non-M/WBEs; they were charged more for materials than non-M/WBEs; they were often required to do additional work not required of white males; and there were barriers to joining trade unions and associations. There was extensive testimony detailing the difficulties M/WBEs suffered in obtaining lines of credit. The "most poignant" testimony involved blatant harassment suffered at work sites, including physical assaults.

C. Legal analysis and holdings.

Whether the government has demonstrated the "strong basis in evidence" necessary to meet strict scrutiny[76] is a question of law. Once this burden is satisfied, a plaintiff must rebut this initial showing by: (1) providing a neutral explanation for the disparities; (2) demonstrating that the statistics are flawed; (3) proving that the disparities are not significant or actionable; or (4) presenting contrasting statistical data. "[T]he burden of proof remains at all times with CWC to demonstrate the unconstitutionality of the ordinance."[77]

The district court's legal framework "misstate[d] controlling precedent and Denver's burden at trial."[78] It rejected the City's evidence because it did not answer the following questions: "(1) Is there pervasive race, ethnic and gender discrimination throughout all aspects of the construction and professional design industry in the six county Denver MSA? (2) Does such discrimination equally affect all of the racial and ethnic groups designated for preference by Denver and all women? (3) Does such discrimination result from the policies and practices intentionally used by business firms for the purpose of disadvantaging those firms because of race, ethnicity or gender? (4) Would Denver's use of those discriminating firms without requiring them to give work to certified MBEs and WBEs in the required percentages on each project make Denver guilty of prohibited discrimination? (5) Is the compelled use of certified MBEs and WBEs in the prescribed percentages on particular projects likely to change the discriminatory policies and programs that taint the industry? (6) Is the burden of compliance with Denver's preferential program a reasonable one fairly placed on those who are justly accountable for the proven discrimination?"[79] This was error.

The government need not prove that the statistical inferences of discrimination are "correct." Strong evidence supporting the government's determination that remedial action is necessary need not be "irrefutable or definitive" proof of discrimination. Statistical evidence creating inferences of discriminatory motivations is sufficient and therefore evidence of marketplace discrimination can be used to meet strict scrutiny.[80] It is the plaintiff who must prove by a preponderance of the evidence that such proof does not support those inferences.

Croson does not require that each group included in the ordinance suffer equally from discrimination. In contrast to Richmond, Denver introduced evidence of bias against each group; that is sufficient.[81]

Nor must Denver demonstrate that the "ordinances will *change* discriminatory practices and policies" in the local marketplace. Such a test would be "illogical" because firms could defeat the remedial efforts simply by refusing to cease discriminating.[82]

Next, a municipality need not prove that "private firms directly engaged in any discrimination in which Denver passively participates do so intentionally, with the purpose of disadvantaging minorities and women. . . . Denver's only burden was to introduce evidence which raised the inference of discriminatory exclusion in the local construction industry and link its spending to that discrimination.... Denver was under no burden to identify any specific practice or policy that resulted in discrimination. Neither was Denver required to demonstrate that the purpose of any such practice or policy was to disadvantage women or minorities. To impose such a burden on a municipality would be tantamount to requiring proof of discrimination and would eviscerate any reliance the mu-

nicipality could place on statistical studies and anecdotal evidence."[83] Similarly, the trial court was wrong to reject the statistical evidence because such evidence cannot identify the individuals responsible for the discrimination.[84]

Contrary to the district court's sixth question, the burden of compliance need not be placed only upon those firms accountable for the discrimination. The proper focus is whether the burden on third parties is "too intrusive" or "unacceptable."[85]

Croson's admonition that "mere societal" discrimination is not enough to meet strict scrutiny,[86] does not apply where the government presents evidence of discrimination in the industry targeted by the program. "If such evidence is presented, it is immaterial for constitutional purposes whether the industry discrimination springs from widespread discriminatory attitudes shared by society or is the product of policies, practices, and attitudes unique to the industry.... The genesis of the identified discrimination is irrelevant." The trial court was wrong to require Denver to "show the existence of specific discriminatory policies and that those policies were more than a reflection of societal discrimination."[87]

The court further rejected the notion that a municipality must prove that it is itself guilty of discrimination to meet its burden. Denver can show its compelling interest by "evidence of private discrimination in the local construction industry coupled with evidence that it has become a passive participant in that discrimination . . . [by] linking its spending practices to the private discrimination."[88] Denver further linked its award of public dollars to discriminatory conduct through the testimony of M/WBEs that identified general contractors who used them on City projects with M/WBE goals but refused to use them on private projects without goals.

The lending discrimination studies and business formation studies are relevant and probative because they show a strong link between the disbursement of public funds and the channeling of those funds due to private discrimination. "Evidence that private discrimination results in barriers to business formation is relevant because it demonstrates that M/WBEs are precluded *at the outset* from competing for public construction contracts. Evidence of barriers to fair competition is also relevant because it again demonstrates that *existing* M/WBEs are precluded from competing for public contracts."[89] Plaintiff failed to present evidence to rebut the lending discrimination data, instead resting on its belief that such evidence is irrelevant. Contrary to the trial court's ruling, the business formation studies were not flawed because they did not control for "quality of education," "culture" and "religion." Plaintiff failed not only to define such vague terms but also to conduct its own study controlling for these factors or to produce expert testimony that to do so would eliminate the disparities.[90]

The district court also erred in rejecting the disparity studies because they did not control firm size, area of specialization, and whether the firm had bid on City projects. The circuit court agreed with Denver's experts that, while it may be true that M/WBEs are smaller in general than white male firms, most construction firms are small and can expand and contract to meet their bidding opportunities. Importantly, Denver established that size and experience are not race- and gender-neutral variables: "M/WBE construction firms are generally smaller and less experienced *because* of discrimination."[91] Further, plaintiff failed to conduct any study showing that the disparities disappear when such variables are held constant. Likewise, it presented no evidence that controlling for firm specialization explained the disparities. Finally, the number of City bidders is not an accurate measure of availability because it may include unqualified firms; as long as the same assumptions are applied to M/WBEs and non-M/WBEs disparities must still be explained by the plaintiff. "Additionally, we do not read *Croson* to require disparity studies that measure whether construction firms are able to perform a *particular contract*."[92]

That M/WBEs were overutilized on City projects with goals goes only to the weight of the evidence because it reflects the effects of a remedial program. Denver presented evidence that goals and non-goals projects were similar in purpose and scope and that the same pool of contractors worked on both types. "Particularly persuasive" was evidence that M/WBE participation declined significantly when the program was amended in 1989. The "utilization of M/WBEs on City projects has been affected by the affirmative action programs that have been in place in one form or another since 1977. Thus, the non-goals data is the better indicator of discrimination in public contracting" and supports the position that discrimination was present before the enactment of the ordinances.[93]

There is no requirement that anecdotal testimony be verified. "Denver was not required to present corroborating evidence and CWC was free to present its own witnesses to either refute the incidents described by Denver's witnesses or to relate their own perceptions on discrimination in the Denver construction industry."[94] This "failure" of the legislative body to somehow verify testimony had been a favorite shibboleth of plaintiffs in other cases.[95]

The court held that because plaintiff had waived its claim that the ordinances were not narrowly tailored at an earlier stage in this litigation, the district court's holding in *Concrete Works I* that the ordinances satisfy the other prong of strict scrutiny was affirmed.

In summary, the court stated that

> to meet its initial burden, Denver was not required to unequivocally establish the existence of discrimination nor was it required to 'negate all evidence of non-discrimination.' [citation omitted] … Denver met its initial burden of producing strong evidence of racial discrimination in the Denver construction industry. Denver has also shown that the gender-based measures were based on reasoned analysis. Moreover, although CWC does not raise the issue, we conclude that Denver had a strong basis in evidence to conclude that action was necessary to remediate discrimination against M/WBEs *before* it adopted both the 1990 Ordinance and the 1998 Ordinance. [citation omitted] … CWC cannot meet its burden of proof through conjecture and unsupported criticisms of Denver's evidence.… Denver has shown that it has a compelling interest in remedying racial discrimination in the Denver construction industry and that it has an important governmental interest in remedying gender discrimination. CWC has failed to rebut Denver's showing.[96]

V. CONCLUSION

It appears that the Supreme Court meant what it said: strict scrutiny of race-based governmental decision-making need not be fatal in application. While there remain proponents of the stance that the government can never take race into account, the unhappy realities of the continuing effects of discrimination need not be ignored in the disbursement of public funds. The results of abandoning affirmative action in public contracting have been striking and severe. This has led judges to recognize that, based on sound statistical and anecdotal evidence, efforts to create equal opportunities are permissible. Perhaps with the emerging renaissance of such programs, our country will, in time, reach the goal of offering full and fair changes to compete for government largess.

As a practical matter, governments seeking to adopt or retain such programs would do well to heed these factors, as described in the opinions:

- **Collect complete and accurate data on the utilization of MBEs, WBEs and non-M/WBEs on government prime contracts and subcontracts.** Be sure to include in-

formation on non-certified subcontractors, including the scopes of work performed on the projects, as well as awards versus actual dollars expended with subcontractors.

- **Consult with highly qualified experts in designing such collection protocols and adopting any race-conscious remedial measures.** Assume that legal challenges will be mounted, and take proactive steps to provide the proper evidentiary bases, including statistical data, to support the initiatives.
- **Reach out actively to MBEs, WBEs and other small firms to ensure that contracting opportunities are widely available and inclusive.** Educate constituencies about the requirements of strict scrutiny to increase community support based upon legal realities.
- **Adopt race-neutral measures such as technical, financial and bonding assistance to "level the field" for small businesses.** While hardly panaceas for the effects of discrimination, they can accomplish such benefits and the courts will look to these efforts as proof of government's good faith in meeting strict scrutiny.
- **Draft narrowly tailored remedies.** Careful consideration should be given to eligibility for program benefits, such as requiring that owners be both socially and economically disadvantaged and firms be small. Subcontracting goals should be flexible, with good faith efforts to meet goals recognized as equivalent to meeting percentages, and such goals should be set on a contract by contract basis to reflect the possible subcontracting scopes of work and the current availability of minority and women firms to perform those scopes.
- **The program must be subject to periodic review and have a sunset date.** Conduct regular study updates to evaluate the continuing need for the program and to make improvements that recognize changed circumstances. Resist the urgings of political interest groups to expand beneficiaries and remedies without strong evidentiary support.

If an entity follows these guidelines, it may have an excellent prognosis in defending its affirmative action initiatives. The courts have become sensitized to the need for realistic assessments of the lingering and pervasive harms of discrimination, and are willing to permit governments to attempt to address them. However, the old ways of conducting disparity studies and ignoring the likely litigation outcomes have spelled disaster for minorities and women, especially African-Americans entrepreneurs. Experience has been a strict teacher, but we have learned from it. ▲

ENDNOTES

1 123 S. Ct. 2325 (2003).
2 488 U.S. 469 (1982) (striking down Richmond's setaside program for minority firms).
3 515 U.S. 200 (1995) (applying *Croson's* strict scrutiny to federal legislation).
4 123 S Ct. at 2331.
5 438 U.S. 265 (1978).
6 123 S. Ct. at 2337.
7 *Id.* at 2340.
8 *Id.*
9 *Id.* at 2341.
10 *Id.* at 2338.
11 *Id.* at 2341.
12 *Id.* at 2343.
13 *Id.* at 2344-2345.
14 *Id.* at 2347.
15 Gratz v. Bollinger, 123 S. Ct. 2411 (2003).
16 *Id.* at 2428.
17 *Id.* at 2432.
18 DBE programs employ the presumption that racial and ethnic minorities and white females are socially disadvantaged.
19 488 U.S. at 509 (citations omitted, emphases added).
20 Econometrics is the study of the application of statistical methods to the analysis of economic phenomena.
21 See, e.g., Associated General Contractors of America v. City of Columbus, 936 F. Supp. 1363 (S.D. Ohio 1996).
22 See, e.g., Associated General Contractors of Ohio, Inc. v. Drabik, 214 F.3d 730 (6th Cir. 2000); Associated General Contractors of Maryland, Inc. v. Mayor of Baltimore, 83 F.Supp.2d 613 (D. Md. 2000); Contractors Association of Eastern Pennsylvania, Inc. v. City of Philadelphia, 91 F.3d 586 (3d Cir. 1996); Engineering Contractors Association of South Florida, Inc .v. Metro. Dade County, 122 F.3d 895 (11th Cir. 1997); O'Donnell Construction Co. v. District of Columbia, 963 F.2d 420 (D.C. Cir. 1992); W.H. Scott Construction Co. v. City of Jackson, 199 F.3d 206 (5th Cir. 1999); Webster v. Fulton County, 51 F.Supp.2d 1354 (N.D. Ga. 1999), aff'd, 218 F.3d 1267 (11th Cir. 2000).
23 Builders Association of Greater Chicago v. County of Cook, et al, 256 F.3d 642, 645 (7th Cir. 2001); but cf. Concrete Works of Colorado, Inc. v. City and County of Denver, 321 F.3d 950, 973 (10th Cir. 2003) (Concrete Works IV), *cert. denied, 2003 U.S. LEXIS 8547 (November 17, 2003)* ("erroneous legal conclusion that a municipality may only remedy its own discrimination") (discussed infra).
24 Expert Report, Dr. David Blanchflower, Builders Association of Greater Chicago v. City of Chicago, et al, No. 96C 1122 (June 2003).
25 *Id.*
26 *Id.*
27 *See* 64 Fed. Reg. 5096 (Feb. 2, 1999).

[28] Transportation Equity Act for the 21st Century (TEA-21), Pub. L. No. 105-178 (b)(1), 112 Stat. 107, 113.
[29] 49 C.F.R. Part 26.
[30] Concrete Works of Colorado, Inc. v. City & County of Denver, 823 F.Supp. 821 (D. Colo. 1993) ("Concrete Works I") (summary judgment for City); Concrete Works of Colorado, Inc. v. City & County of Denver, 36 F.3d 1513 (10th Cir. 1994) ("Concrete Works II) (reversing summary judgment); Concrete Works of Colorado, Inc. v. City & County of Denver, 86 F.Supp. 2d 1042 (D. Colo. 2000) ("Concrete Works III") (judgment for plaintiff).
[31] The author was counsel to the study team at trial.
[32] Adarand Constructors, Inc. v. Slater, 528 U.S. 216, 120 S. Ct. 722, 145 L.Ed.2d 650 (2000) ("Adarand VI") (new regulations did not moot case).
[3] Adarand Constructors, Inc. v. Slater, 228 F.3d 1147 (10th Cir. 2000) ("Adarand VII"), cert. granted then dismissed as improvidently granted, 532 U.S. 941, 534 U.S. 103 (2001).
[34] *Id.*, 228 F.3d at 1166.
[35] *Id.*
[36] *Id.* at 1168-1172.
[37] *Id.* at 1172-1174.
[38] *Id.* at 1174.
[39] *Id.* n. 15.
[40] *Id.* at 1174.
[41] *Id.* at 1176.
[42] *Id.* at 1178-1179.
[43] *Id.* at 1179-1180.
[44] *Id.* at 1180.
[45] *Id.* at 1180-1181.
[46] *Id.* at 1181 (emphasis in the original).
[47] *Id.* at 1182.
[48] *Id.* at 1183.
[49] 49 C.F.R. § 26.61(d).
[50] *Id.* at 1186-1187.
[51] *Id.* at 1185-1186.
[52] *Id.* at 1186.
[53] 2003 U.S. App. LEXIS 20287 (8th Cir. October 6, 2003).
[54] *Cf.* Klaver Construction Co., Inc. v. Kansas Department of Transportation, et al, No. 99-2510-JAR (D. Kan. 2002) (complaint dismissed; plaintiff lacked standing because, even absent the race-based presumption of social disadvantage, it would still not qualify as a DBE because it exceeded the Small Business Administration size standards).
[55] Sherbrooke Turf, Inc. v. Minnesota Department of Transportation, et al, 2001 U.S. Dist. LEXIS 19565 (D. Minn. 2001) (Sherbrooke II).
[56] Gross Seed Company v. Nebraska Department of Roads, et al, 4: 00CV3073 (D. Neb. 2002).
[57] *See* Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, § 105(f), 96 Stat. 2097, 2100.
[58] In re Sherbrooke Sodding Co., 17 F.Supp.2d 1026 (D. Minn. 1998) (Sherbrooke I).
[59] Sherbrooke III, slip. op. at 5.
[60] *Id.* at 7.
[61] *Id.* at 8 (emphasis in the original).
[62] *Id.* at 9-12.
[63] *Id.* at 10.
[64] *Id.* at 11.
[65] *Id.*
[66] The author was counsel for the Study.
[67] *Id.* at 13.
[68] C00-5204 RBL, W.D. Wash., September 3, 2003.
[69] The court relied in part upon the author's expert testimony.
[70] Slip op. at 12.
[71] 321 F.3d 950 (10th Cir. 2003) (Concrete Works IV), *cert. denied, 2003 U.S. LEXIS 8547, (November 17, 2003) (Justice Scalia dissenting, questioning whether the Court has abandoned Croson).*
[72] Concrete Works of Colorado, Inc. v. City and County of Denver, 823 F.Supp. 821 (D. Colo. 1993) ("Concrete Works I").
[73] Concrete Works of Colorado, Inc. v. City and County of Denver, 36 F.3d 1513, (10th Cir. 1994) ("Concrete Works II").
[74] Concrete Works of Colorado, Inc. v. City and County of Denver, 86 F.Supp.2d 1042 (D. Colo. 2000) ("Concrete Works III").
[75] The 1997 Study and the expert witness testimony at trial were provided by NERA. The author was counsel to NERA and the City on this phase of the litigation.
[76] The court applied "intermediate" scrutiny to the WBE portion of the program. The parties did not explicitly address this issue and neither did the court since Denver produced evidence of sex discrimination in the local construction marketplace. *Id.* at 969-970; *cf.* Cook County, 256 F.3d at 644 (Supreme Court's distinction between the standards for race discrimination and gender discrimination has "become vanishingly small"); U.S. v. Virginia, 518 U.S. 515, 533 (1996) (gender-based government action must be based upon an "exceedingly persuasive" justification).
[77] *Id.* at 959.
[78] *Id.* at 970.
[79] Concrete Works III, 86 F.Supp. at 1066-67
[80] *Id.* at 975.
[81] *Id.* at 976.
[82] *Id.* at 973 (emphasis in the original).
[83] *Id.* at 971.
[84] *Id.* at 974.
[85] *Id.* at 973.
[86] *See* 488 U.S. at 497.
[87] *Id.* at 972-973.
[88] *Id.* at 976.
[89] *Id.* at 977 (emphasis in the original).
[90] *Id.* at 979.
[91] *Id.* at 981 (emphasis in the original).
[92] *Id.* at 983 (emphasis in the original).
[93] *Id.* at 987-988.
[94] *Id.* at 989.
[95] See, e.g., Builders Association of Greater Chicago v. County of Cook, 123 F.Supp.2d 1087 (N.D. Ill. 2000).
[96] *Id.* at 991-992.