Can the Federal Transportation Disadvantaged Business Enterprise Program Be Narrowly Tailored to Remedy Discrimination?

*By George R. La Noue**

The federal transportation Disadvantaged Business Enterprise (DBE) program is a relic from another era that no longer serves a civil rights purpose. DBE is the progeny of the 10% minority set-aside provision in the 1977 Public Works Employment Act (PWEA).[1] That Congress was responding to a temporary economic downturn and the 1968 Kerner Commission, which highlighted the special plight of African-Americans. Creating a share for them and other minority communities seemed like an important part of overall economic pump-priming.

In 1982, Congress adopted that same 10% set-aside for transportation spending and included the same minority groups as beneficiaries, while adding women. The legislative history of both Acts makes references to remedying various forms discrimination, and courts have used those references to justify the Acts' racial provisions. But both these set-asides were also clearly redistributive, making certain that firms owned by members of various groups (particularly African-Americans) received a share of federal contracting dollars.

Since 1989, however, distributing shares of public contracts by race has been regarded by the Supreme Court as a violation of the individual right to equal protection.[2] The use of race, if permissible at all, is limited to the "extreme case where some form of narrowly tailored racial preference is necessary to break down problems of deliberate exclusion."[3] In short, any use of race must be part of a civil rights remedy. Political patronage, or even economic development, is not legitimate reasons for using racial classifications.[4]

The modern DBE program, however, while no longer employing set-asides, does not serve a remedial purpose. It does not identify or sanction the state and local recipients of those funds that discriminate; indeed, it does not affect their award of prime contracts at all. It does not identify contracts where discrimination occurred. It does not identify firms subjected to discrimination and provide remedies to them. It does not identify prime contractors that discriminate in the selection of subcontractors and sanction them. What it does do is redistribute subcontracting dollars to firms owned at least 51% by women or minorities. Examining a small, federally funded paving contract, the Ninth Circuit found that the "prime contractor did not select Western States [a non -DBE], even though its bid was $100,000 less than that of the minority firm that was selected. The prime contractor explicitly identified the contract's minority [DBE] utilization requirement as the reason that it rejected Western States' bid."[5]

Deciding the case on the facts before it, the Ninth Circuit had only a micro view of the racial and gender redistribution involved in DBE programs. No macro view of the extent of the problem existed. A new study of the results of the DBE programs in 413 airports, however, has found that DBE subcontractors were massively over-utilized in every one of the seven regions across the county.[6] In the two regions covered by the Ninth Circuit, DBE subcontractors received 468% of their expected number of contracts and 328% of their expected amount of dollars in the Western Pacific region and 559% of their expected contracts and 580% of their expected dollars in the Northwest region.[7] If this is justice at all, it is very rough justice. So the question this article addresses is: Could the DBE program be modified so that it prevented, sanctioned, and remedied discrimination instead of causing it?

I. The Application of the Compelling Interest Prong

In 1989, the Supreme Court in *City of Richmond v. Croson* applied the strict scrutiny test to state and local contracting programs that provided racial and ethnic preferences.[8] Recognizing that Richmond's program may have been politically inspired,[9] the Court insisted that the first task of a government wishing to create race conscious contracting programs was to identify the discrimination it sought to remedy. Justice O'Connor declared:

> Proper findings are necessary in this regard to define the scope of the injury and the extent of the remedy necessary to cure its effects. Such findings also serve to assure all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself.[10]

Justice O'Connor went on to criticize the various forms of evidence Richmond offered in defense of its program. Evidence of societal discrimination was not sufficient.[11] Nor could a city depend on generalized assertions of discrimination in entire industry.[12] Finding discrimination in one market did not permit an assumption that discrimination exists in all markets.[13] Nor did a finding of discrimination against one ethnic group lead to a conclusion that discrimination affects other groups.[14] O'Connor did suggest that a properly done disparity study might lead to an inference of discrimination.

> 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*. (Emphasis added.)[15]

The *Croson* case proved to be a formidable hurdle for local preferential programs. In the first three cases invalidating preferential programs in Philadelphia, Columbus, and Miami-Dade County courts found that the local governments lacked sufficient evidence that they were remedying discrimination, and therefore lacked a compelling interest.[16] Later, other governments also failed to establish a compelling interest to support their preferential contracting programs, though courts often considered narrowly tailoring issues as well.

After the Supreme Court's 1995 decision in *Adarand Constructors, Inc. v. Pena* establishing that strict scrutiny was

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also the proper standard of review for federal contracting programs,[17] the Clinton administration adopted a "mend, don't end" strategy toward affirmative action. Three new studies were created to show the DBE program was still necessary[18] and the program was amended to make it more narrowly tailored. The 10% national DBE goal was replaced by a requirement that each recipient of federal funds set its own goal, after determining the availability of DBEs to do its projected work. That goal was also to reflect a recipient's determination of the level of DBE participation expected "absent the effects of discrimination."[19]

From the outset of the program, DBEs had to be socially and economically disadvantaged. The definition of social disadvantage successfully kept firms owned by white males out of the program and was essentially left unchanged in the amended program.[20] After Republicans complained that the fabulously wealthy Sultan of Brunei could buy a business and become a DBE, a new definition capping the net worth of firm owners and the total revenues of firms was added to create some semblance of economic disadvantage, though most Americans would consider the caps a very generous definition of disadvantage.

Despite *Adarand*'s strict scrutiny admonition and that Court's willingness to closely scrutinize Congressional findings in other areas,[21] federal courts reviewing challenges to the DBE program have proved to be quite deferential to whatever evidence the Justice Department has told them was "before" Congress.[22] There has been no judicial requirement that Congress actually adopt any set of findings in committee reports or legislative preambles.[23] That action might have created the virtue of some debate about the merits of the asserted evidence of discrimination. Instead, it has been sufficient for judicial reviewers that individual Congressional DBE program advocates have alluded to anecdotes or studies in floor speeches or in hearings that support existence of various inequalities that may be caused by discrimination.[24] No further Congressional identification of discrimination related to federal transportation expenditures has been thought necessary.

Indeed, when the Clinton administration sought to do a *Croson*-like disparity study, the results did not support a national finding of discrimination in federal transportation construction procurement. In 1998, guided by the Justice Department, the Commerce Department conducted the so-called benchmark limits study.[25] The theory behind this study was that *Adarand* required contracting preferences to be used only in industries where evidence of discrimination in federal contracting existed. Federal procurement, therefore, was classified by the Census Bureau's two digit Standard Industrial Codes (SIC) and the dollar shares Small Disadvantaged Businesses (SDB)[26] received in each of 68 industries was compared to estimates of SDB availability and capacity.

The Justice Department also decided that, while all other industries could be analyzed on a national basis, the three construction industry specialties were uniquely local, and so the benchmark limits study divided them into nine geographical regions. As the table below shows, the patterns of availability and utilization differed in each region, but overall SDBS were overutilized, not underutilized. [27]

There were a number of methodological problems in this study that inflate the availability of minority firms,[28] but at least it was an objective effort to narrow tailor the use of racial preferences in federal procurement prime contracting. Further, it shows that a similar study could have been done on the use of federal transportation funds by state and local recipients, but such was rarely attempted. The benchmark study was released by the Clinton administration two weeks after the 1998 reenactment of the transportation DBE program, and never affected that consideration.

Region	Capacity	Utilization	Disparity %
E. North Central	10.5	16.5	154
E. South Central	11.8	11.5	97
Middle Atlantic	9.1	11.0	121
Mountain	13.3	27.0	203
New England	9.6	26.0	271
Pacific	14.3	16.9	112
South Atlantic	7.0	16.1	230
W. North Central	8.0	9.8	123
W. South Central	13.3	11.1	83

As a part of reenactment, however, Congress asked the General Accountability Office (GAO) to investigate the operation and results of the DBE program. Their 2001 report came back titled, "Disadvantaged Business Enterprises: Critical Information Is Needed to Understand Program Impact."[29], GAO concluded that the majority of recipients surveyed had made no analysis of barriers to DBE participation and of those recipients who had done so there was "little agreement among the officials we contacted on whether [barriers] were attributable to discrimination."[30] Further, it found that the fourteen transportation disparity studies they examined were all methodologically deficient.[31]

Nevertheless, every court reviewing the issue has accepted without reservation assertions by the Clinton and Bush Justice Departments that Congress had an abundance of evidence available that created a compelling interest for the DBE program.[32] When Republicans controlled Congress they sought to deal with this problem by not holding hearings on the subject in the hope that the Clinton administration evidence would become obsolete.[33] But now that the political pendulum has swung, it is possible that a Democratic Congress will create a

new predicate supporting the DBE program. Since the federal courts do not seem to require any particular statistical evidence of discrimination which might have to meet some objective standards, the past record suggests little likelihood, short of a new Supreme Court ruling, that the DBE program will be affected by the compelling interest prong.

II. Application of the Narrow Tailoring Prong

The current version of the federal transportation program (Safetea-Lu) provides for the grants of $ 244 billion federal dollars over a five year period to local recipients; mainly to build highways, expand airports, and maintain mass transit systems. Despite the limitations of the compelling interest prong of strict scrutiny as currently interpreted, there is more possibility that the narrow tailoring prong might serve to tie the DBE program to remedying actual discrimination in the expenditures of this massive program. The major issues are discussed below.

A. Market Area Tailoring

According to *Croson*, "Congress explicitly recognized that the scope of the [discrimination] problem would vary from market area to market area,"[34] but lower courts did not require any evidence of local discrimination in the administration of the DBE program. Then in 2005, the Bush Justice Department told the Ninth Circuit in *Western States Paving Co. v. Washington State Department of Transportation* that local findings of discrimination were necessary before local recipients could make the decision to use race-conscious rather than race-neutral measures to meet DBE goals. The circuit panel responded, "As the United States correctly observed in its brief and in oral argument, it can not be said that TEA-21 is a narrowly tailored remedial measure unless its application is limited to those States in which the effects of discrimination are actually present."[35] Otherwise, the court noted:

> Whether Washington's DBE program is narrowly tailored to further Congress's remedial objective depends upon the presence or absence of discrimination in the State's transportation industry. If no such discrimination is present in Washington, then the State's DBE program does not serve a remedial purpose; it instead provides an unconstitutional windfall to minority contractors based solely on race.[36]

The consequence of this decision is that every Ninth Circuit state (Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, and Oregon) has or will produce a new disparity study.[37] Furthermore, some local airports and transit districts in that region are doing their own studies.

So, the question is raised: What is a market area? It does not seem larger than the boundaries of a state, but what about federal funding recipients that operate only within a local area in a state? Utilization data will be different for each of these local recipients and availability may be too. It is unlikely that many small DBEs would be equally willing to work in San Diego and Humboldt Counties, which are about 750 miles apart. Moreover, airports and transit districts may attract very different competitors for their large contracts.

In the two post-*Western States* highway transportation studies completed thus far, the Nevada study divided its analysis into three regions, while the California analyzed twelve districts.[38] Not surprisingly, the regional results produced a patchwork of under and over-utilization of DBEs. Will courts permit the imposition of DBE race preferences in local market areas where there is no evidence of discrimination? The only federal court to have considered that question so far, albeit about a state highway program, criticized a statewide conclusion about discrimination, when the relevant disparity study failed to analyze data by specific districts which varied substantially in their demographic composition.[39]

B. Group Specific Tailoring

Firms wishing to be DBEs need formal certification by local recipients. Federal regulations require that a DBE has to 51% owned by an economically and socially disadvantaged person. Economic disadvantage is defined objectively. If the person has a net worth of less than $750,000 (excluding the value of the principal residence and the business) and a construction business (depending on specialty) has revenues of less than $6.5 million to $31 million, the economic test is met. Persons are presumptively socially disadvantaged if they are women or self-identified members of a minority group. If challenged, a person might have to show he or she was accepted by the minority community as a member, but in this era of mixed marriages who has the authority to say that person is or is not a member of a particular minority community is a bit fuzzy.

In modern, multi-cultural America, what is a minority group? The short answer is a group thought to be composed of persons of color and long answer is codified in the following list:

> "Black Americans," which includes persons having origins in any of the Black racial groups of Africa); "Hispanic Americans," which includes person of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race); "Native Americans," which includes persons who are American Indians, Eskimo, Aleut or Native Hawaiian); "Asian- Pacific American," which includes persons are from Japan, China, Taiwan, Korea, Burma, (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, The Philippines, Brunei, Samoa, Guam, U.S. Trust Territory of the Pacific Islands (Republic of Palau), Federated States of Micronesia, the Commonwealth of the Northern Mariana Islands, Macao, Fiji, Tonga, Kiribati, Juvalu, [sic] Nauru, Federated States of Micronesia, or Hong Kong; "Subcontinent Asian-Americans," which includes persons whose origins are India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka.[40]

In *Croson*, the Supreme Court established the principle that separate findings of discrimination had to be made for each minority group eligible for preferences. Richmond's uncritical adoption of an earlier version of the above list drew Justice O'Connor's retort that:

> The random inclusion of racial groups, that, as a practical matter, may never have suffered from discrimination in the construction industry in Richmond suggests that perhaps the city's purpose was not in fact to remedy past discrimination…. The gross

> overinclusiveness of Richmond's racial preferences strongly impugns the city's claim of remedial motivation. [41]

The Court noted that Richmond's adoption of the federal group categories created a situation in which:

> There is *absolutely no evidence* of past discrimination against Spanish-speaking, Orientals, Indians, Eskimos, or Aleut persons in any aspect of the Richmond construction industry.... It may well be that Richmond has never had an Aleut or Eskimo citizen. (emphasis in the original)[42]

Since that time, almost every state and local disparity study has examined evidence of discrimination for each separate major racial and ethnic group. When they have failed to do so, courts have been harsh in their criticism. [43]

Nevertheless, the Department of Transportation (DOT) has contended that DBE is a category that does not require separate analysis of the groups composing it.[44] DBE annual and contract goals are set for DBEs as a category and not for individual groups. Thus, a prime contractor could consistently discriminate against all subcontractors that were not Hispanic, for instance, but still meet the DBE goals and be free from sanction or even scrutiny. DOT does require recipients to report annually their dollars and contract awards for six major groups, but the federal agency does not appear to do anything with that data.

DOT's DBE single category policy, however, was challenged in *Western States,* and the Ninth Circuit ruled that

> each of the principal minority groups benefited by Washington's DBE program—Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans and women—must have suffered discrimination in the State. If that is not the case, then the DBE program provides minorities who have not encountered discriminatory barriers with an unconstitutional competitive advantage at the expense of both non-minorities and any minority groups that have actually been targeted for discrimination.[45]

The consequence of the group specific narrowly tailoring requirement may be as dramatic for DBE programs as it has been for local MWBE programs. If the data show that there has been no under-utilization of one of the large group components of the DBE category and no other evidence of discrimination against that group in a particular marketplace exists, firms owned by that group would no longer be eligible for preferences and would be treated like non-DBEs in making subcontract choices. That result would create a considerable administrative and political shift. First, it should reduce the size of race and gender conscious contract goals, since there would be fewer firms eligible to fill them. Second, exclusion of some major groups from being beneficiaries of preferential programs may reduce the political support for such policies. For example, legislative members of an African-American caucus or trade association may be less inclined to support contracting preferences, if only Hispanics or white women are the beneficiaries.

While it is too soon to measure the political consequences of the *Western States* group specific rule, the results of the first two post-*Western States* disparity studies and the state DOT responses are now public. Both the Nevada and California DBE goals submission proposals illustrate the enormous impact of the requirement of treating each group separately in the analysis of who is eligible for preferences. The Nevada study found mwbes overall were under-utilized at a 50% ratio, but women-owned firms were over-utilized and African-American firms were in the parity range at 85%.[46] Since after *Western States* firms owned by members of those groups could not be used to fulfill race or gender conscious goals and still have a narrowly tailored program, Nevada will seek to meet its 5.7% DBE goal solely through race-neutral means. In California, the overall mwbe utilization on race-neutral state contracts (the data used by Caltrans to set its proposed 2008 federal DBE goal) was 79.5 %, but Hispanics were at parity and Subcontinent Asians were over-utilized. Caltrans has proposed a 13.5% DBE goal split evenly between race-conscious and race-neutral means. Race-conscious contract goals will exclude firms owned by Hispanics and Subcontinent Asians.[47]

C. Industry Specific Tailoring

Croson bars the use of generalized assertions about discrimination in an entire industry as a basis for race-conscious remedies.[48] Within an industry there may be important specialties with different proportions of DBEs and non-DBEs. Discrimination against DBEs in one construction specialty might have no effect on DBEs in another. Consequently some disparity studies, including the federal benchmark study divide construction into its three major components (building, heavy and highway, and special trades).[49] When that has occurred, the disparities often vary by specialty. For example, according to the benchmark study in the mid-Atlantic region, minority building contractors were underutilized, while minority highway contractors and specialty contractors were over-utilized.

Transportation-related contracts can be even more complex, involving many specialties that have separate professional identities and are not viewed by the Census as part of the "construction industries;" for example, architects, engineers, aerial photographers, and truckers. A discriminatory problem affecting truckers may have no impact on architects. Consequently, the post-*Western States* Nevada and California disparity studies each made about 120 separate disparity analysis. The outcomes were a patchwork of under- and over-utilization.

When a local government conducts a disparity study and finds no statistical support for a finding of discrimination against firms in some industries where it makes purchases, narrow tailoring requires that it no longer employ race-conscious purchasing in those categories.[50] But very few DOT recipients have previously conducted disparity studies, so DBE goals were applied regardless of whether there was any evidence of local discrimination in the various industries involved in their contract. These goals were based solely on DBE availability and neither identified nor remedied any particular discrimination.

D. Goal Setting Tailoring

The key to any recipient's administration of its DBE program is the annual exercise it must go through which results in a goals submission proposal that DOT reviews.[51] DOT

permits a wide variation in the data sources and methods used in this exercise. Sometimes simple headcounts of minority and women owned firms (mwbes) and those owned by white males and stockholders are used for goal setting. When that occurs, it almost always inflates the availability of the newer smaller mwbes which do not have the same capacity as other firms. Other goal setting efforts are sophisticated measures of availability based on a weighted mix of contracts the recipient will award and the variety of specialties that will be required. The difference in approaches can be seen in the post-*Western States* disparity studies. In Nevada, the percentage of mwbes compared to non-mwbes based on their headcount was 24.4%. But when weighted by size, specialty, and location, mwbes availability was reduced to 14.6%, and when the mwbes too large to be certified DBEs were eliminated the mwbes availability figure dropped to 5.7%. It was this percentage that Nevada adopted for its proposed FY 2008 goals [52]

But Nevada's availability estimate is still too large. In a DBE program, only hiring certified DBE firms can be counted by a prime contractor in fulfilling contract goals. But Nevada and many other recipients set goals based on the total of minority- and women-owned firms, not just on the fraction of certified DBEs. In Nevada three of four mwbe firms were not certified.[53] Counting uncertified firms for goal-setting, but not for utilization on specific contracts, can create a windfall for the fraction of firms that are DBE-certified.

Inflated DBE annual goals mean that race-neutral measures will almost never fulfill them, increase the number of contracts to which race-conscious measures must be applied, and accelerate pressure on non-DBE primes to over-select DBE subcontractors. Nevertheless, DOT apparently approves almost all goals submissions, unless it suspects the goals are set too low.

There is another problem. While inflated annual DBE goals create the problems described above, it is the goals set on particular contracts that drive contractor behavior. These goals are always set on total dollar amount of the contracts. But the prime contract is awarded through a race-neutral low bid process. So if a non-DBE firm wins the prime contract, he must seek to meet the DBE goal on the work subcontracted. Frequently, the recipient will require a prime contractor to do certain proportion of the work himself, so subcontracting opportunities are decreased. Further, efficiency and profitability may limit the amount of work prime contractors subcontract. Nevertheless, if the DBE goal is 20% of the total contract dollars and 40% of the work is subcontracted, then the prime contractor must award half of the subcontracting work to DBEs to meet the 20% overall goal. This policy is the principal cause of DBE subcontractor over-utilization. If goals were set only on the subcontracted work, the DBE program would be much more narrowly tailored.

E. Race Neutral Tailoring

As a part of the post-*Adarand* narrow tailoring initiative, the DBE regulations were amended to require recipients to maximize the use of race neutral alternatives to achieve annual DBE goals.[54] Serious consideration of race neutral alternatives is now a standard requirement of equal protection law.

The key to any successful use of race neutral alternatives is problem identification. You usually can not solve a problem you do not know exists. Recipients are supposed to set goals to overcome barriers caused by discrimination. But what barriers actually exist in a particular locality?

As Justice O'Connor articulated in *Croson*, there are two parts to the race-neutral contracting process: (1) enforcing anti-discrimination provisions,[55] and (2) reducing barriers that might discourage DBEs and other small firms from public contracting.[56] DOT does not require that either of those steps take place. Thus, recipients need take no steps to identify any discrimination that might affect their contracting process. DOT does not systematically track discrimination complaints. When GAO surveyed state and transit authorities, 81% said they had not received any discrimination complaints in a two-year period.[57]

Nor do recipients have much statistical evidence of discrimination. Until the *Western States*' mandate, only three state DOTs had completed disparity studies and they were almost unknown for airports or transit districts. So the DBE process is not being used to identify or remedy specific discrimination. Nor is it necessarily being used to reduce barriers. While some recipients have identified barriers and put in responsive programs, it is not required.

What DOT does require to maximize race neutral alternatives is a completely passive accounting process. If a DBE wins a low bid prime contract, or if DBE subcontractor utilization exceeds the goal set on a contract, either outcome is considered a race-neutral attainment that can be used to lower next year's race-conscious goal.[58] But neither accounting step identifies or remedies any act of discrimination, though they do reflect the underlying numbers oriented redistributive purpose of the DBE program.

CONCLUSION

All of the narrow tailoring steps described above would be helpful in confining preferences to the market areas, groups, and industries where there was at least a statistical inference that discrimination was taking place. Improving the goal-setting process would limit the windfalls now accruing to some DBE subcontractors. But none of these actions, though useful, would really solve the civil rights issue of using preferences only as remedies for those instances where identified discrimination had occurred. To tackle that problem, the concept of group presumptions of social disadvantage has to be reconsidered.[59]

In 1976, criticizing the PWEA set-asides, Justices Stewart commented:

> In today's society, it constitutes far too gross an oversimplification to assume that every single Negro, Spanish-speaking citizen, Oriental, Indian, Eskimo, and Aleut potentially interested in construction contracting currently suffers from the effects of past or present racial discrimination. Since the MBE set-aside must be viewed as resting upon such an assumption, it necessarily paints with too broad a brush.[60]

What was true about these groups then is even truer today. The addition of all white women, whose firms usually are the largest beneficiaries of DBE contracting preferences, to the presumption of social disadvantage only makes the problem

worse. In the current DBE program, Hillary, Condoleezza, and Alberto, to take a few names not at random, would all be presumed to be socially disadvantaged despite their personal elite educations, social status, and political power. If Barak Hussein Obama were from the Middle East, instead of having a Kenyan father and white American mother, he would have to prove personally by a preponderance of evidence that he is socially disadvantaged. The Senator need merely check off a box on the DBE certification form. In *Croson*, Justice O'Connor criticized Richmond for not inquiring into "whether or not a particular MBE seeking a racial preference has suffered from the effects of discrimination by the city or prime contractors" and declared that "the interest in avoiding the bureaucratic effort necessary to tailor remedial relief to those who truly suffered the effects of prior discrimination can not justify a rigid line drawn on the basis of a suspect classification."[61]

To be a certified DBE, firms need to supply a considerable amount of financial and managerial information, but the one question those considered presumptively socially disadvantaged never have to answer is whether the owners personally or their firms specifically suffered from discrimination. The presumption preempts the question.[62] This presumption of social disadvantage adheres for life as though social mobility were uncommon in America. Nor is the extent of the preferences stemming from the presumption of social disadvantage limited in time or number. Only the economic presumption is measured objectively, and serves to limit benefits. Discrimination against persons based on their immutable characteristics damages the economy and democracy itself. In the long run, the only way to narrow-tailor the DBE program is to restrict it to people and firms that have actually suffered discrimination, or to open it up to all small disadvantaged businesses. The bureaucracy and rules are already in place to do that, if skin color or genitalia are not the defining criteria.

Endnotes

1 In 1980, the Supreme Court upheld the PWEA set-asides by deferring to Congressional spending powers *(*Fullilove v. Klutznick, 448 U.S. 448), "without using the strict scrutiny test or any other traditional standard of equal protection review." (City of Richmond v. Croson, 488 U.S. 469,487 (1989).

2 Justice O'Connor wrote "To whatever racial group these citizens belong, their "personal rights" to be treated with equal dignity and respect are implicated by a rigid rule erecting race as the sole criterion in an aspect of public decision making."(*Croson* at 493).

3 *Id*. at 509.

4 In *Croson*, Justices O'Connor at 493, Stevens at 516 and Scalia at 524 expressed concern about the role of racial politics in creating race conscious contracting programs.

5 Western States Paving, Inc. v. Washington State Department of Transportation (WSDOT) 407 F.3d 983, 988 (9th Cir. 2005).

6 George La Noue, *Follow the Money: Who Benefits From The Federal Aviation Authority's DBE Program?*, The American Review of Public Administration (forthcoming).

7 These percentages are based on comparison of the DBE goals airports set based on their own estimates of DBE and non-DBE availability for their work and the actual distribution of subcontracting dollars and awards to DBEs and non-DBEs. The data set was obtained through a Freedom of Information Act request and encompassed the "Uniform Report of DBE Awards or Commitments and Payments" for the fiscal year 2004.

8 488 U.S. 469 (1989).

9 Seven years after *Croson*, two Richmond political scientists, one black and one white, found "The attempt to shape the agenda for downtown revitalization in a manner that would benefit black Richmonders through set-aside policies was part of a nationwide strategy for using urban political power to the advantage of African American constituents." W. Avon Drake & Robert D. Holsworth, Affirmative Action and the Stalled Quest for Black Progress, 161-162 (1996).

10 *Croson*, at 510.

11 *Id*. at 499.

12 *Id.* at 498.

13 *Id.* at 504.

14 *Id.* at 506.

15 *Id.* at 509.

16 Contractors Association of Eastern Pennsylvania v. City of Philadelphia, 893 F. Supp. 438 (E.D. Pa 1995), affirmed 91 F.3d 586 (3rd Cir. 1996); AGC v. Columbus, 936 F. Supp. 1363 (S.D. Ohio 1996) and Engineering Contractors of South Florida. v. Metropolitan Dade County, 943 F. Supp. 895, (S. D. Fla. 1996), affirmed 122 F. 3rd 895 (11th Cir. 1997).

17 "All racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny." 515 U.S.200, 227(1995).

18 For a analysis of the Clinton Administration's three compelling interest documents (the benchmark limits study, the Urban Institute report and Appendix A), *see* "Disparity Studies as Evidence of Discrimination in Federal Contracting" A BRIEFING HELD BEFORE THE UNITED STATES COMMISSION OF CIVIL RIGHTS, Washington D.C. December 16, 2005. Edited with findings in May 2006. (*hereinafter* USCCR report), pp.34-36,58-60, 79-80.

19 49 C.F.R 26.45 (b).

20 A small fig leaf was added to try to cover the overt racial and gender classification by permitting those not presumptively socially disadvantaged to qualify by showing they were personally and economically disadvantaged by a preponderance of evidence. This provision has turned out to be a very narrow gateway and less than 2% of DBEs are not members of presumptively eligible groups. Mostly, they are white males with physical handicaps.

21 In legislation, even where the standard of strict scrutiny was not involved, the Supreme Court has been critical of relying on limited legislative history. For example, *in Kimel v. Florida Board of Regents*, the Court held that:

> Congress never identified any pattern of age discrimination by the States, much less any discrimination that rose to the level of constitutional violation. The evidence supplied by petitioners to demonstrate such attention by Congress to age discrimination by the States falls well short of the mark. The evidence consists almost entirely of isolated sentences clipped from floor debates and legislative reports. 582 U.S. 62, 89 (2000).

22 *Adarand VII,* 228 F.3rd 1147 (10th Cir.2000), *Sherbrooke Turf, Inc.,* 345 F.3d 964 (8th Cir.2003, Western States Paving Co., Inc. v. Washington State Department of Transportation 407 F.3d 983 (9th Cir. 2005) and Northern Contracting, Inc. v. Illinois Department of Transportation, 473 F.3d 715 (7th Cir. 2007).

23 W. H. Scott Construction C. v. City of Jackson, 199 F. 3rd 206, 218-9 (5th Cir. 1999) (City can not rely on a disparity study it has not formally adopted).

24 *Western States*, 407 at 991. (Racial minorities constitute more than 20% of the population of the United States, but own only 9% of all businesses).

25 61 Fed. Reg. 26042, 28045, 1996.

26 SDBs are based on the same presumptions of minority social disadvantage as the DBE program.

27 There are several ways to calculate disparity ratios, but the most common is to divide capacity or availability into utilization. Thus in the East North Central region there was 11.8% SDB capacity divided into 11.5% SDB utilization which yields 97% or near parity.

28 National Research Council, "Analyzing Information on Women-Owned Small Businesses in Federal Contracting, The National Academy Press, Washington, 60. *See also,* George La Noue, *To the 'Disadvantaged' Go the Spoils?,* The Public Interest, No. 138, Winter 2000, 91-98.

29 GAO Report GAO-01-586, June 8, 2001. (*hereinafter* GAO report)

30 *Id.* at 7.

31 *Id.* at 29.

32 See cases cited in footnote 22.

33 The Bush administration took a similar stance and never updated the benchmark study.

34 *Croson* at 506.

35 *Western States* at 998.

36 Ibid., at pp. 997-998.

37 USDOT is providing a large part of the funding for these studies. Washington State had a study in progress before *Western States* was decided and is basing its new race conscious program on that study.

38 "Availability and Disparity Study, Nevada Department of Transportation" was completed by BBC Research and Consulting on June 15, 2007. (*hereinafter* Nevada study); "Availability and Disparity Study: California Department of Transportation" June 29, 2007 (*hereinafter* Caltrans study.)

39 Phillips and Jordan v. Watts, 13 F. Supp. 2d 1308, 1315 (N. D. Fla. 1999).

40 49 CFR 26.5.

41 *Croson* at 506.

42 *Id.*

43 O'Donnell Construction Co v. District of Columbia, 963, F.2d 420, 427(D.C.1992), Engineering Contractors Association of South Florida v. Metropolitan Dade County, 122 F. 3d 895, 928 (11th Cir. 1997), Monterey Mechanical Co. v. Wilson, 125 F.3d at 704, (9th Cir. 1997), Associated General Contractors of Ohio, Inc. v. Drabik, (6th Cir. 2000), and Builders Association of Greater Chicago v. County of Cook, 256 F. 3d 642, 767 (7th Cir. 2001).

44 26.45 (h).

45 *Western States* at 999.

46 Nevada study, Figure IV-8. These disparity ratios refer to all construction and engineering contracts awarded in the pre-*Western States* era. Different configurations of over and underutilization emerge in the post-*Western States* data (IV-10), the Nevada state highway race neutral program (IV-9), and the subcontractor awards data (V-4 showing mwbes at 115% of availability). Prior to *Western States*, Nevada had a 6% DBE goal equally divided between race conscious and race neutral means. The lack of any pattern in the group specific findings, however, did not provide a basis for Nevada to reestablish its race conscious program.

47 In FY 2006, Caltrans DBE goal was 12% all race-conscious.

48 *Croson* at 498.

49 Criticizing the results of a disparity ratio that aggregated the three construction SIC codes, one federal court noted "firms that build hospital (SIC 15) do not compete for County contracts with firms that lay asphalt (SIC 16) or firms that install plumbing. (SIC 15)." *Engineering Contractors*, 943 F. Supp. at 1560.

50 Hershall Gill Consulting Engineers, Inc. v. Miami-Dade County, 333 F. Supp. 2nd 1305 (S. D. Fla. 2004). (making separate findings for construction and architects and engineers).

51 For a comprehensive review of goal setting issues, *see,* George R. La Noue, *Setting Goals in Federal DBE Programs*, George Mason Civil Rights Law Review, Spring 2007.

52 In California, raw figures showed mwbes were 32% of the firms in highway -related specialties, but when that number was adjusted for the size, specialties and location of the firms and those mwbes too large to be certified DBEs were removed, the mwbe availability percentage fell to 13.5%. (California study ES, p2)

53 Nevada study, III-1. Minority and women owned firms may not seek certification because they can not meet the regulatory definition of "economic disadvantage" or because they may not be interested in government contracts. In California, 4of 5 mwbe firms were not certified DBEs either and Caltrans is proposing to count these uncertified mwbes firms for annual goal setting purposes.

54 49 C.F.R. Sec. 26.51 (a)

55 "... a city is justified in penalizing the discriminator and providing appropriate relief t the victim of such discrimination." *Croson* at 509.

56 "Even in the absence of evidence of discrimination, the city has at its disposal a whole array of race-neutral devises to increase the accessibility of city contracting opportunities to small entrepreneurs of all races." *Croson* at 509-10.

57 GAO report at 5-7. Of the 31 discrimination complaints across the nation, 29 had been investigated and discrimination was found in only four of these investigations. In *Croson*, that the lack of evidence that Richmond had tried to enforce its contracting anti-discrimination ordinance cast doubt in the Court's mind about whether any exclusionary practices actually existed. (469 U.S. at 503).

58 The regulations also permit counting as a race neutral outcome utilization of a DBE subcontractor selected for reasons other than DBE status, but few recipients actually collect that data. Nevertheless, about six states and 9% of all airports meet all their DBE goals through race neutral means.

59 George R. La Noue & John C. Sullivan, *Deconstructing the Affirmative Action Categories*, American Behavioral Scientist, Vol. 41, No. 7 April 1998.

60 *Id*. at 530.

61 *Croson* at 508.

62 The presumption is technically rebuttable, but no criteria have been established for challenging the social presumption and it not clear that such a challenge has ever been attempted or been successful.