

Public Contracting Litigation After *Croson*:
Data, Disparities, & Discrimination

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Other Views:

- Fullilove v. Klutznick, 448 U.S. 448 (1980), available at <https://supreme.justia.com/cases/federal/us/448/448/>.
- City of Richmond v. Croson, 488 U.S. 469 (1989), available at <https://supreme.justia.com/cases/federal/us/488/469/> (dissenting opinion).
- Concrete Works of Colorado, Inc v. City and County of Denver, Colorado, 321 F.3d 950 (2003), available at <https://casetext.com/case/concrete-works-v-city-cty-of-denver>.

What causes racial disparities, and what, if anything, can and should be done to remedy them? These questions have been the subject of intense debate recently. Discussions of differences among groups in education, employment, health, housing, incarceration, income, and policing often rest on the unstated assumption that members of all groups have, on average, identical talents, behaviors, and preferences, and that therefore disparities are always caused by discrimination. But that assumption is wrong, and the existence of a disparity does not by itself prove discrimination. The question remains: when *does* a disparity prove discrimination?

These thorny questions occasionally make their way into legal disputes too. Judges confront these matters in several contexts because our Constitution and laws forbid racial and other forms of discrimination, which is one potential cause of disparities. Disputes about the outcomes of public procurement expenditures often raise these questions about what causes disparities and what remedies should ensue, and judges have addressed these issues in the context of public contracting disputes for more than thirty years.

When a government—federal, state, or local—decides to undertake a major project, it generally has to decide what firm to hire to complete the project. Because it will pay the firm using taxpayer funds, major public contract awards usually, but not always, are subject to careful procedures to ensure transparency, quality, and low cost. The government first hires a prime contractor that is responsible for the project—say, a public building—and the prime contractor in turn hires subcontractors that specialize in various parts of the project—say, a demolition firm. Prime contracts are usually advertised well in advance with the expected qualifications stipulated. Sealed bid openings revealing the low bid usually determine the award, though appeals are permitted. Subcontracting awards are usually made through detailed contracts between the prime and the sub. While in theory a prime could choose a relative or friend as a sub for personal reasons, selecting a firm that is higher priced or less qualified creates risks for a prime: a higher priced sub could prevent the prime from being the low bidder and winning the contract or, if the bid is successful, a less qualified sub could prevent the prime from completing the work to the government’s satisfaction.¹ So a combination of rules and incentives works to ensure that taxpayers get the best value for the money that goes into public projects rather than enriching the cronies of officeholders.

Nevertheless, there is always a political context to the award of public contracts. Although the overt forms of partisan patronage have been largely eliminated, there has been an increasing interest in governments at all levels to distribute contracts on the basis of the race, ethnicity, and gender of firm owners. At the federal level,

¹ See generally DONALD DORSEY, CONSTRUCTION BIDDING FOR PROFIT (1979).

the Disadvantaged Business Enterprise Program (DBE), the Small Business Administration's 8(a) program, and, according to the Congressional Research Service, hundreds of other departmental programs favor awarding contracts based on a firm owner's race, ethnicity, or gender.²

There are also numerous state, local, and special district Minority and Women Business Enterprise (MWBE) programs that use set-asides, bid preferences, and goals to steer contracts to firms owned by minorities and women. In New York State, for example, Governor Andrew Cuomo in 2016 proposed that a new 30% MWBE goal be required for all local contracts (cities, counties, towns, villages, school districts, and college campuses) receiving state funding. These goals were not just to be applied to subcontracting amounts, but to total contract expenditures. To support his action, Governor Cuomo proclaimed:

We must extend our MWBE program to all state dollars, in order to ensure fairness in opportunity. This proposal will help minority and women-owned businesses compete for another \$65 billion in state contracts. This is about continuing New York's legacy as a national leader on economic justice and I am proud to lead the fight again.³

I. *CROSON*

The question whether all these race, ethnicity, and gender based contracting programs are consistent with the 14th Amendment's mandate that no government shall "deny to any person within its jurisdiction the equal protection of the law" has been the subject of frequent litigation in recent decades.

In the landmark case *City of Richmond v. Croson*, the Supreme Court determined when state and local governments may use racial preferences.⁴ Although the city's population was 50% black, only .67% of its prime construction contracts had been awarded to minority-owned businesses in recent years. The city implemented a MBE program that required that 30% of all subcontracting dollars be awarded to minority firms. When Croson, an Ohio-based non-minority small plumbing contractor, lost out on his low bid to install urinals in the Richmond city jail because it did not meet the 30% requirement, he challenged the MBE program as a violation of the Equal Protection Clause of the 14th Amendment.

It was clear that a disparity existed between minority representation in the general population and among owners of firms awarded government contracts. The question the court had to consider was whether that disparity was caused by systematic

discrimination against minority-owned firms. If so, the disparity might be remediable by a general MBE preference, but if not, the preference would be unconstitutional.

Previously, courts had been rather deferential when the federal government created contracting preferences.⁵ In *Croson*, however, the Court said firmly that strict scrutiny was the standard of review and that Richmond's race-conscious government contracting policy had to have a compelling interest and be narrowly tailored.⁶ The Court held that Richmond's policy failed to meet this high bar set by strict scrutiny. The city had not identified any specific contracting discrimination the correction of which might qualify as a compelling interest. The disparity between city prime contracts awarded to MBEs and the general population was not meaningful. Nor had the city tried to use race neutral programs to help MBEs before turning to preferences, so there was no evidence showing that the challenged program was narrowly tailored.

In a passage relevant to many current debates about disparities, Justice Sandra Day O'Connor declared, "It is sheer speculation how many minority firms there would be in Richmond absent past societal discrimination." She continued, "Defining these sorts of injuries as 'identified discrimination' would give local governments license to create a patchwork of racial preferences based on statistical generalizations about any particular field of endeavor."⁷ Justice O'Connor's opinion, however, left the door to preferences slightly ajar. She wrote:

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*.⁸

With her insistence that such an inference could only arise with respect to firms that are qualified, willing, and able to perform the relevant work, Justice O'Connor recognized that variations in the characteristics and behavior of firms were non-discriminatory factors that might affect utilization in government contracting. In 1995, in *Adarand v. Peña*, the Court extended the strict scrutiny standard to federal race preferential contracting programs.⁹

II. DISPARITY STUDIES

The possibility of finding an unjustified disparity in public contracting proved an irresistible temptation to politicians who were motivated to find ways to implement contracting preferences in their jurisdictions.¹⁰ After *Croson*, it was clear some sort of study was needed, but who would do it, and what methodologies would they use? At first, major scholars and

2 Charles V. Dale & Cassandra Foley, *Survey of Federal Laws and Regulations Mandating Affirmative Action Goals, Set-asides, or Other Preference Based on Race, Gender, or Ethnicity*, Cong. Research Serv. (Sept. 7, 2004), available at <https://www.everycrsreport.com/reports/RL32565.html> ("a broad, but by no means exhaustive, survey" of such programs). See also Robert Jay Dilger, *SBA's "8(a) Program": Overview, History, and Current Issues*, Cong. Research Serv. (updated Dec. 17, 2020), available at <https://fas.org/spp/crs/misc/R44844.pdf> (a recent overview of the largest such federal program).

3 Rick Karlin, *Cuomo wants to expand MWBE contracts*, ALBANY TIMES UNION, January 11, 2016.

4 488 U.S. 469 (1989).

5 *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

6 *Croson*, 488 U.S. at 493-94.

7 *Id.* at 500.

8 *Id.* at 509 (emphases added).

9 515 U.S. 200.

10 *Engineering Contractors Ass'n v. Metropolitan Dade County*, 122 F.3d 895, 928 (11th Cir. 1997).

accounting firms attempted these studies, but they proved to be political minefields. Persons with notable academic credentials worked on early disparity studies, including Andrew Brimmer, President Johnson's appointee to the Federal Reserve Board; Ray Marshall, President Carter's Secretary of Commerce; and Samuel Myers, Jr., Director of the Center for Human Relations and Social Justice of the University of Minnesota.

One of the Big Four auditing firms, KMPG Peat Marwick, made a brief foray into the disparity study business but quickly left the field. Its 1991 study for Miami-Dade County found that firms owned by white women, but not firms owned by African-Americans or Hispanics, were underutilized. Miami Mayor Xavier Suarez rejected the KMPG study declaring, "We never should have done it."¹¹ Similarly the Los Angeles City Council rejected a disparity study that found Hispanic but not black-owned firms underutilized.¹²

Eventually the field became dominated by a handful of for-profit consulting firms which have completed over 600 disparity studies at a cost to taxpayers of roughly \$300 million. One reason for the growing dominance of these few consulting firms is that jurisdictions write Requests For Qualifications asking firms to demonstrate substantial experience in performing this specialized type of study and then in defending such studies in litigation. This disadvantages university research centers and independent think tanks, even if they could demonstrate that their staff had superior scientific qualifications for objective program evaluation.¹³ Still, for-profit disparity study consultants need to be keenly aware of political timing and context of their studies and what governments usually want affirmed when they commission such studies. As the cases described below show, however, results-oriented procurement disparity studies often fall apart when confronted with social science methods and evidence.

Despite this consolidation of study producers, there really is no disparity study industry. No professional association exists, and there are no agreed upon standards for gathering and interpreting data. The key to any procurement disparity study is the measurement of the availability of firms—categorized by the race, ethnicity, and gender of their owners—which are competing for contracts compared to their utilization in contract awards. Utilization can be measured by the percentage of firms identified with a group that receive awards, the percentage of contacts awarded to a group, or the amount of dollars awarded to group member firms. Most studies measure utilization by calculating dollar amounts. But the validity of any disparity is dependent on the accuracy of measuring availability. Is a disparity caused by differences in firm characteristics (qualification and ability) or

behavior (willingness), or by discrimination? While determining availability is key to a valid disparity ratio, measurement is complex since data about firm qualifications, willingness, and ability to compete for the various types of public contracts are not readily available. Consequently, most procurement disparity studies settle for compiling lists of otherwise dissimilar firms which have in common only the race, ethnicity, or gender of their owners. Such availability comparisons with utilization create disparity ratios which cannot really indicate discrimination unless more sophisticated statistical analyses are employed.¹⁴

III. LITIGATING THE PROGRAMMATIC RESULTS OF PROCUREMENT DISPARITY STUDIES

Firms that lose specific contracts because of racial preference policies or business associations whose members are disadvantaged by them can challenge those policies. Determining the history of the outcome of preferential contracting litigation against governments is difficult, because when a public agency decides it is likely to lose if the issues come to trial, it will often settle the case using taxpayer funds without creating a citable judicial precedent for future cases. This has happened in Atlanta, Cincinnati, Charlotte, Cleveland, Memphis, Miami-Dade County, Milwaukee, Montana, New York City, Phoenix, San Francisco, Texas, and Washington State. Because of this tactic, governments have lost more often than a search of court decisions reveals. Nevertheless, there has been some notable litigation which can be briefly described, focusing on the social science issues decided.

In 1994, the Contractors Association of Eastern Pennsylvania sued to stop Philadelphia's new preferential contracting program which relied on a disparity study completed by Andrew Brimmer. The federal trial court found that the study did not properly measure which firms were qualified, willing, and able; it called these "the three pillars of *Croson*" and enjoined the city's program.¹⁵ The Third Circuit affirmed.¹⁶

In the next year's *Associated General Contractors of America v. City of Columbus*, the city had imposed 21% MBE and 10% WBE subcontractor goals, effectively shutting out non-MWBE firms from winning subcontracts on many projects. Though Columbus had disparity studies completed by two different consultants, after an extensive trial, the federal district court judge did not find their conclusions credible. First, the court declared:

The City maintains records of all firms which have submitted bids on prime contracts. This would be a ready source of information regarding the identity of firms which are qualified to provide contracting services as prime contractors. . . . On prime contracts only firms which submit bids are "available." "The concept of investigating discrimination in the award of prime contracts by indirect statistical analysis is inappropriate in this case. The process

11 Dorothy Gaiter, *Court Ruling Makes Discrimination Studies a Hot Industry*, WALL ST. J., August 8, 1993.

12 James Rainey, *Council calls Study of Contracts Inadequate*, L.A. TIMES, December 10, 1994.

13 Adam Yarmolinsky, a presidential advisor to the Kennedy, Johnson, and Carter administrations and former Regents Professor of Public Policy at the University of Maryland Baltimore County, once described for-profit consultants as entrepreneurs who will ask to borrow your watch and then tell you what time it is. As quoted in GEORGE R. LA NOUE, IMPROBABLE EXCELLENCE: THE SAGA OF UMBC 61 n.138 (2016).

14 George R. La Noue, *Who Counts: Determining the Availability of Minority Businesses for Public Contracting After Croson*, 21 HARV. J.L. & PUB. POL'Y 793, 798-804 (1998).

15 893 F. Supp. 419 (E.D. Pa. 1995).

16 91 F.3d 586 (3d Cir. 1996).

of awarding prime contracts is not the equivalent of a lottery in which each bidder has an equal chance to win. Prime contracts are awarded to the lowest responsible bidder.¹⁷

The court then found: “There is no evidence that the City ever failed to award a prime contract to a minority firm that was the low bidder.”¹⁸ The judge also refuted the study’s use of census data. Citing Thomas Sowell and *Croson*, he pointed out that consultant

BBC’s evaluation of the rates of business ownership and self-employment by ethnicity and gender is based on the assumption that in the absence of discrimination, individuals of both sexes and all ethnic backgrounds will form businesses and seek employment in all the sectors of the economy as they are represented in the total economy.¹⁹

On appeal, the Sixth Circuit upheld the invalidation of the Columbus program at issue, but it did not permit the judge to permanently enjoin such programs, if new evidence established a need for them.²⁰

That same year, a consortium of construction organizations sued in *Engineering Contractors Association of South Florida v. Metropolitan Dade County*. The federal district court found the county’s use of anecdotal evidence was not persuasive:

First, whether discrimination has occurred is often complex and requires a knowledge of the perspectives of both parties involved in an incident as well as knowledge about how comparably placed persons of other races, ethnicities, and genders have been treated. Persons providing anecdotes rarely have such information. . . .

Second, social scientists are frequently concerned about the problem of “interviewer bias” or “response bias” in any interviewing or survey situation. When the respondent is made aware of the political purpose of questions or when questions are worded in such a way as to suggest the answers the inquirer wishes to receive, “interviewer bias” can occur. If a sample is not carefully constructed, the persons providing the anecdotes may reflect a “response bias” because the persons most likely to respond are those who feel the most strongly about a problem, even though they may not be representative of the larger group. . . .

Third, individuals who have a vested interest in preserving a benefit or entitlement may be motivated to view events in a manner that justifies the entitlement. Consequently, it is important that both sides are heard and that there are other measures of the accuracy of the claims. Attempts to investigate and verify the anecdotal evidence should be made.²¹

Consequently, the court found:

Without corroboration, the Court cannot distinguish between allegations that in fact represent an objective assessment of the situation, and those that are fraught with heartfelt, but erroneous, interpretations of events and circumstances. The costs associated with the imposition of race, ethnicity, and gender preferences are simply too high to sustain a patently discriminatory program on such weak evidence.²²

On appeal, the Eleventh Circuit focused on the statistical evidence and unanimously found that “In a perfectly non-discriminatory market, one would expect the (bigger) on average non-MWBE firms to get a disproportionately higher proportion of total construction dollars awarded than smaller MWBE firms.”²³ The court added:

It is clear as window glass that the County gave not the slightest consideration to any alternative to a Hispanic affirmative action program. Awarding construction contracts based on ethnicity is what the County wanted to do, and all it considered doing, insofar as Hispanics were concerned.²⁴

The court criticized Dade County’s failure to evaluate race neutral alternatives for increasing black and Hispanic participation in county contracting and for eliminating discrimination that might be occurring in that marketplace before turning to race and ethnicity-based programs. The court declared:

The first measure every government ought to undertake to eradicate discrimination is to clean its own house and to ensure that its own operations are run on a strictly race-and ethnicity-neutral basis. The County has made no effort to do this. Nor has the County passed local ordinances to outlaw discrimination by local contractors, subcontractors, suppliers, bankers or insurers. Instead of turning to race- and ethnicity conscious remedies as a last resort, the County has turned to them as a first resort. Because the County’s BBE and HBE programs are not narrowly tailored, those programs would violate the Equal Protection Clause even if they were supported by a sufficient evidentiary foundation.²⁵

Challenging federal preferential contracting programs proved more difficult, since courts were reluctant to find that Congress, after holding hearings, did not have a compelling interest in creating contracting preferences. DBE programs have been upheld in California,²⁶ Illinois,²⁷ Minnesota²⁸ and

17 *Associated Gen. Contractors of America v. City of Columbus*, 936 F. Supp. 1363, 1389 (S.D. Ohio 1996).

18 *Id.*

19 *Id.* at 1410.

20 172 F.3d 411 (6th Cir. 1999).

21 *Engineering Contractors Ass’n v. Metropolitan Dade County*, 943 F. Supp. 1546, 1582-83 (S.D. Fla. 1996).

22 *Id.* at 1584.

23 *Engineering Contractors Ass’n*, 122 F.3d at 917.

24 *Id.* at 928.

25 *Id.*

26 *Associated General Contractors v. Cal. Dep’t of Transp.*, No. 11-16228 (9th Cir. 2013).

27 *N. Contracting, Inc. v. Illinois*, 473 F.3d 715 (7th Cir., 2007).

28 *Sherbrooke Turf, Inc. v. Minn. Dep’t of Transp.*, 345 F.3d 964 (8th Cir. 2003).

Nebraska.²⁹ Actually, only one federal disparity study exists; it was commissioned by the U.S. Department of Commerce in 1999, and it found a very mixed pattern of disparities.³⁰ So litigation turned to the issue of whether the various DBE goals states created were narrowly tailored.³¹

In *Western States Paving v. Washington State Department of Transportation* (WSDOT), the state asserted that it had demonstrated discrimination because the headcount proportion of DBE firms in the state was 11.17%, while the percentage of contracting funds awarded to them on race neutral contracts was only 9%. But the Ninth Circuit replied:

This oversimplified statistical evidence is entitled to little weight, however, because it does not account for factors that may affect the relative capacity of DBEs to undertake contracting work. . . . DBE firms may be smaller and less experienced than non-DBE firms (especially if they are new businesses started by recent immigrants) or they may be concentrated in certain geographical areas of the State, rendering them unavailable for a disproportionate amount of work.³²

After the WSDOT decision, the United States Department of Transportation recognized that disparity studies “should rigorously determine the effects of factors other than discrimination that may account for statistical disparities between DBE availability and participation. This is likely to require a multivariate/regression analysis.”³³ This is a task for social scientists using objective methods.

IV. EXAMINING DISPARITY STUDIES’ UNDERLYING DATA

Despite the overall pattern of plaintiff success, most firm owners and associations are reluctant to challenge race and gender preferential government procurement programs. That is why, given the number of such programs, there have been comparatively few such cases. Footing mounting bills for a two or three year litigation period can be daunting for a small company or association. Large contractor associations funded some initially successful litigation, but they have become more cautious about new cases. The largest group of construction firms, the Associated General Contractors, which had won major judicial decisions against contracting preferences, seems reluctant to initiate new cases, though it does participate as amicus. The reality is that political support for major projects in many jurisdictions requires

political coalitions whose representatives want to know what monetary benefits their constituents will reap.

Finding the right lawyer can also create problems. The attorney must have a background in civil rights law, know something about contracting in the relevant field, and not be conflicted. Large law firms often have conflicts, since they have some partners who represent governments or hope to. So many of the most important disparity study cases have been handled by solo practitioners or lawyers from relatively small firms. Some of these plaintiff lawyers have been overwhelmed by the resources governments possess and have lost these cases.

In recent years, however, new tactics have helped to even the litigation playing field. In almost all early contracting disparity litigation, the study in question was taken at face value. Its methodology and conclusions were assumed to be as described, and the cases turned on omissions and contradictions evident in the study text. But gradually those assumptions began to be challenged.

In 2012, Gary Lofland, an attorney from Yakima, Washington, who had won the landmark *Western States* case, agreed to represent Mountain West Holding Corporation (MWHC) in challenging the DBE goals set by the Montana Department of Transportation (MDOT).³⁴ This small subcontracting firm installed guard rails and road barriers, and it was being squeezed out of business as prime contractors had to use DBE firms to meet MDOT’s goals, even when MWHC provided the lowest quote. Montana had contracted with the D. Wilson consulting firm in 2009 to conduct a \$648,783 disparity study to support its DBE goals. Despite the fact that MDOT bureaucrats had doubts about the data in the Wilson study, they adopted it and set new DBE goals based on it.³⁵

Lofland tried two tactics that proved effective. First, he used the request to admit, interrogatories, and document production discovery procedures which a defendant must respond to in civil litigation. MDOT had to concede that it could not identify any instance of past discrimination in its contracting and thus that its preferential goals rested entirely on the Wilson study.

Second, Lofland deposed the head of D. Wilson to obtain the underlying data from the study.³⁶ She claimed she no longer had the Montana underlying data and could not explain the

29 *Gross Seeds v. Neb. Dep’t of Roads.*, 345 F.3d 984 (8th Cir. 2003).

30 *Disadvantaged Business Procurement: Reform of Affirmative Action in Federal Procurement* (“Department of Commerce Benchmark Study”), 64 Fed. Reg. 52,806 (Sept. 30, 1999). For an evaluation of this study, see generally George R. La Noue, *To the “disadvantaged” go the spoils?*, 138 THE PUBLIC INTEREST 91 (Winter 2000).

31 George R. La Noue, *Setting Goals in the Federal Disadvantaged Business Enterprise Program*, 17 GEO. MASON U. CIV. RTS. L.J. 423 Spring (2007).

32 *Western States Paving, Inc. v. Washington Dep’t of Transp.*, 407 F.3d 983, 1000-01 (9th Cir. 2005).

33 *Western States Paving Company Case Q&A*, U.S. Dep’t of Transp. (2006, updated 2014), <https://www.transportation.gov/osdbu/disadvantaged-business-enterprise/western-states-paving-company-case-q-and-a>.

34 *Mountain W. Holding Co. v. Montana*, 2014 WL 6686734 (D. Mont. Nov. 26, 2014).

35 See Letter from Sheila Cozzie, MDT Operations Manager/Civil Rights Bureau Chief, to Deirdre Kyle, D. Wilson CEO, February 23, 2010 (“MDT has been unable to reconcile your figures with information that is currently available from our records.”).

36 Things had taken a turn for the worse for D. Wilson since it had completed the MDOT study. It had completed a disparity study for the City of Milwaukee that resulted in goals to benefit black- and women-owned contractors. The Hispanic Chamber of Commerce and the American Indian Chamber of Commerce challenged the preferences that harmed their members. After a plaintiff’s expert report eviscerated the Wilson study, the City Attorney agreed with the critique and said the study would never see the inside of a courtroom. He then sued D. Wilson, and its insurance company had to pay the city and the plaintiffs about \$290,000 in 2013. Since it could no longer get insurance, D. Wilson was effectively out of business when Lofland deposed the president.

study's methodology. She referred Lofland to her statistical subcontractor, but he no longer had the data either and could not remember if a regression analysis, as required after *Western States*, had been done, though he thought some unidentified person on his staff had done one.

Missing data and unexplained methodology—a slam dunk for the plaintiffs? Not quite. In 2014, a Montana federal district court judge decided in summary judgment to ignore the study's missing data issues and found for MDOT on the grounds that “a good ole boy network” existed in the state.³⁷ The plaintiff appealed to the Ninth Circuit, and the Associated General Contractors of America joined as amicus. In 2017, the circuit panel unanimously reversed and remanded in an unpublished decision articulating five data issues that had to be adjudicated by the lower court.³⁸ A few days before the new trial was to begin, Montana settled by abandoning its race and gender conscious DBE goals and giving the plaintiffs about \$485,000 in taxpayer money to pay MWHC's damages and attorney's fees.³⁹

Thus, by 2018, when the Mechanical Contractors Association of Memphis employed local law firm McNabb, Bragorgos, Burgess & Sorin to challenge a Shelby County contracting program with preferences for African-American-owned firms, some new tools were available to plaintiffs.⁴⁰ Shelby County's demographics and its politics were changing. As Melvin Burgess, the Chair of the Board of Commissioners at the time the preferential ordinance was passed, put it:

I mean, you know, as an African-American, I represent, you know, a community of people who look like me, and, of course, like I said earlier, you know, the constituents were concerned that—they felt that they—there was not equity involved when it comes to contracts.⁴¹

To create contracting preferences, however, the county had to have a new disparity study. It selected Mason Tillman Associates (MTA) from Oakland, California to conduct the study. MTA was a major player in the disparity study contracting niche world.⁴² In competing for the contract, it boasted that it had completed 140 disparity studies across the country and had found disparities in 139.⁴³ More importantly, its studies had never been subject

to litigation.⁴⁴ With a \$310,000 contract from Shelby County, MTA completed a 300 page study with 107 tables and 11 charts.⁴⁵ Politicians who hold part time positions and meet infrequently face serious obstacles in absorbing that much information in a type of research they had never seen before.

Some board members were concerned that the MTA recommendations of creating a 10% bid preference on prime contracts and 28% goals on construction subcontracts for African-American-owned firms were too costly.⁴⁶ So MTA won a second contract for \$60,000 to help rewrite the county's procurement procedures and then insisted successfully that the preferences articulated in its study be enacted as stated.⁴⁷

When litigation began, the plaintiff's lawyers, Nick Bragorgos and John Barry Burgess, took full advantage of multiple discovery tactics. They began by getting the county to admit that it could not identify a single instance of contracting discrimination in the last ten years and that “no employee has been reprimanded, terminated or disciplined for discrimination in connection with the awarding of construction contracts in the past ten years.”⁴⁸ Further, Shelby County admitted that it has never punished any prime construction company for discrimination in the award of a Shelby County construction subcontract in which a MWBE goal was not set. In short, although the county had a race neutral anti-discrimination policy, it had never had a reason to enforce it before turning to the race and gender preferences in its current MWBE Ordinances. Finally, the county admitted it had never seen the underlying study evidence and could not verify whether any of it was true.

The plaintiffs asked the county for all the MTA underlying study data. Despite a contractual agreement to provide such data to the county, MTA initially rebuffed repeated requests for the documentation of its study conclusions. Eventually, MTA released some raw data from the study which it said was as all the data it had. But what was released was not specifically connected to the study's 107 tables and 11 charts or to the statistical calculations leading to disparities that had been found and the goals the county had set. That left the county in the awkward position of arguing that it had a compelling interest supporting its new preferential contracting program based on data it had never seen. Deposition after deposition confirmed that conundrum. When Carolyn A. Watkins, the county official who reviewed whether the goals were met on specific contracts, was asked in deposition if she knew “if anybody at the County reviewed the study to see if it was accurate,” she answered, “I don't know if it happened, but I

37 *Mountain W. Holding Co.*, 2014 WL 6686734, at *3.

38 *Mountain W. Holding Co. v. Montana*, 691 Fed. App'x 326 (9th Cir. 2017).

39 Associated Press, *Montana pays \$485K to white-owned firm that claimed discrimination*, BILLINGS GAZETTE, March 21, 2018, https://billingsgazette.com/news/state-and-regional/govt-and-politics/montana-pays-485k-to-white-owned-firm-that-claimed-discrimination/article_aeed8122-68de-5ebb-aecd-6da602e781e3.html.

40 *Mechanical Contractors Ass'n of Memphis, Inc. v. Shelby County, Tenn.*, 2:19-CV-02047 (W.D. Tenn. 2019).

41 Burgess deposition at 49-50, *Mechanical Contractors Ass'n of Memphis*, 2:19-CV-02047.

42 MTA Response to Shelby County RFQ for a Disparity Study, Section 3.1.3 List of Mason Tillman Studies.

43 *Id.*

44 *Shelby County Tennessee Legal Analysis and Disparity Study* (March 2016).

45 *Id.*

46 Eryn Taylor & Shay Arthur, *Tempers flare as County Commissioners discuss disparity study*, WREG NEWS, May 18, 2016.

47 Linda A. Moore, *Shelby County Commission hires consultants to help with new purchasing policies*, MEMPHIS COMMERCIAL APPEAL, May 23, 2016, <http://archive.commercialappeal.com/news/government/county/shelby-county-commission-hires-consultants-to-help-with-new-purchasing-policies-334e0f02-ef5e-04c6-e-380573761.html>.

48 *Shelby County Admissions #4, #6, and #8, Mechanical Contractors Ass'n of Memphis*, 2:19-CV-02047.

don't know anybody in the County that would have the ability to do so." When asked whether she knew if MTA's conclusions were accurate, Watkins responded she could not verify if any were accurate, "But I pray they're accurate."⁴⁹

Bragorgos and Burgess then decided to subpoena MTA in California, where its home office was located, to obtain the Shelby County study's underlying data directly. When no MTA representative appeared for the deposition and no data was produced, a motion to compel was filed in a San Francisco federal district court. Whatever judges might think about the merits of a case, they are always protective of judicial prerogatives and procedures. The magistrate judge required MTA to turn over the data within the boundaries of a protective order for "commercial proprietary information."⁵⁰ MTA appealed to the Ninth Circuit, which promptly dismissed the petition.⁵¹ MTA still refused to comply with the subpoena, and the district court said MTA "has acted in bad faith in failing to comply with the subpoena" and found it in contempt.⁵² That outcome made it clear that MTA could no longer provide expert testimony to defend its study.⁵³ So in an unprecedented tactic, the county hired a new disparity study firm to try to solve its predicament. The new expert, working at \$350 an hour, produced a 111 page "final report" about the MTA study, but he was less than enthusiastic about it and, of course, he had not seen MTA's underlying data either.⁵⁴

Shelby County ultimately had to settle the case. On November 9, 2020, the Board of Commissioners approved a settlement eliminating all of its MWBE program, though the plaintiffs had challenged only the construction components.⁵⁵ The board also agreed "to never again rely" on the MTA study or to use the MTA study to "support or justify any possible 'MWBE' or similar program in the future."⁵⁶ While using the standard "defendants deny any wrongdoing" language, the county agreed

to pay \$331,959 to the plaintiffs to settle the case.⁵⁷ Altogether, Shelby County has spent probably more than a million dollars on activities related to this litigation, including the MTA study, the aftermath of trying to salvage that study with another consultant, and then paying two outside attorneys to defend what they could. The County Attorney played an inconspicuous role in the case.

While this outcome might be considered as just another example of a successful plaintiff challenge to a MWBE program without a judicial ruling, it may have much broader significance. MTA's website claims the company has done 30% of all the disparity studies completed in the country.⁵⁸ It is not clear that MTA can or will produce the complete underlying data for any of the more than 140 disparity studies it has completed, even when found in contempt. If so, the question of whether secret data can be used to demonstrate a compelling interest to use contracting racial preferences will become pivotal in any challenges to programs MTA studies have been used to support.

V. CONCLUSION

Racial or ethnic contracting preferences can only be used legally in the "extreme case" where some form of narrowly tailored remedy might be necessary to break down "patterns of deliberate exclusion."⁵⁹ The history of litigation over contracting disparity studies holds some important lessons. These cases demonstrate that finding a disparity is just the beginning of the inquiry about whether discrimination is the causal factor, not the end. Yet disparity studies never identify any specific contract, public official, or private firm that discriminated or was discriminated against. To do so would raise the question of why the jurisdiction had not previously sanctioned the persons involved and instead resorted to a system of bid preferences and goals benefitting firms that had not suffered discrimination and penalizing firms that had not discriminated. Disparity studies instead just produce generalized disparity ratios without ever identifying any specific cause which might lead to a narrowly tailored remedy. Under the rigorous discovery process in civil litigation and judicial scrutiny, claims that discrimination caused the disparity have generally failed.

It is essential that actual discrimination be identified and remedied, but it is also important that false allegations and improperly calculated disparities unconnected with bias be challenged. It is significant that there is no history of successful litigation by minority or women contractors against governmental bodies, except, as previously noted, when Hispanic-American and Native-American contractors successfully sued to overturn Milwaukee's MWBE program that excluded them to benefit African-American- and women-owned firms. This suggests that MWBE firms have not identified discrimination against them that could be vindicated in court, which undermines the widespread

49 Watkins deposition at 64-66 (Oct. 22, 2019), *Mechanical Contractors Ass'n of Memphis*, 2:19-CV-02047.

50 Order Granting Motion to Compel, *Mechanical Contractors Ass'n of Memphis, Inc. v. Shelby County, Tenn.*, Case 3:19MC80226 (N.D. Ca. Dec. 18, 2019).

51 See Order Granting Second Motion to Compel and Awarding Further Sanctions, *Mechanical Contractors Ass'n of Memphis*, Case 3:19MC80226 (N.D. Ca. June 12, 2020) (mentioning failed Ninth Circuit appeal).

52 *Id.*

53 *County settles lawsuit charging favoritism of minority-owned firms*, TRI-STATE DEFENDER, Nov. 13, 2020, <https://tri-statedefender.com/county-settles-lawsuit-charging-favoritism-of-minority-owned-firms/11/13/> ("We had issues with our expert witness, so we thought that the best option this time was to move towards a settlement," said Commissioner Van Turner, Jr., District-12, who sponsored the item.).

54 Final Report of John Vincent Eagen (June 6, 2019), *Mechanical Contractors Ass'n of Memphis*, 2:19-CV-02047.

55 *Settlement Agreement and Release of Claims* (Nov. 23, 2020) (signed by Lee Harris, Mayor of Shelby County).

56 *Id.* To try to defend the rest of the MWBE program with a disparity study the county regarded as unreliable would have only led to further litigation and expense.

57 Ryan Poe, *The 901: Shelby County can't seem to figure out minority contracting*, MEMPHIS COMMERCIAL APPEAL, Nov. 10, 2020, <https://www.commercialappeal.com/story/news/local/the-901/2020/11/10/shelby-county-cant-seem-figure-out-minority-contracting-901/6231603002/>.

58 Mason Tillman Associates, *Our Services*, <https://masontillman.com/our-services>.

59 *Croson*, 488 U.S. at 509.

use of disparity studies to prop up race and gender preferential contracting programs.⁶⁰ If we cannot distinguish between real discrimination and politically motivated rhetoric, then our country will become even more racially polarized. Furthermore, persons who think of themselves as marginalized will be discouraged from competing for top positions in our society.

In seeking relevant data, few scholars will have access to the powerful tools of court-sanctioned discovery, subpoenas, and testimony under oath. In 2019, when David Randall of the National Association of Scholars wrote the U.S. Department of Transportation asking that federally-funded state DBE disparity studies make their underlying study data publicly available, he received no reply, and there was no policy change.⁶¹ Still, many governments are subject to open records acts and freedom of information requests, and they hold hearings on various race conscious initiatives. If underlying study data are not forthcoming, it will be difficult for a government to prove it had a compelling interest to use racial preferences on the basis of missing or secret evidence.

Scholars can request data and expose flawed assumptions, missing variables, and inappropriate samples in ways that will improve accuracy and transparency, inform public officials, and help to identify and eliminate discrimination where it has actually occurred. As Justice O'Connor said in *Croson*, disparities are meaningful only when differences in qualifications, willingness, and ability are controlled for, and even then they only create an inference that must be further investigated to justify preferences. The history of procurement disparity litigation demonstrates that even very expensive studies completed with the full cooperation of the governments that commissioned them rarely identify the perpetrator of discrimination or recommend remedies to its particular victims. The disparities found often do not reflect discrimination and can be alleviated through race neutral programs.

As *Croson* states, the Equal Protection Clause of the 14th Amendment and other civil rights laws permit race-based programs only as remedies where there is "deliberate exclusion."⁶² More general disparities should be addressed with race-neutral programs.

⁶⁰ See *supra* note 36.

⁶¹ Email from David Randall, Director of Research, NAS, to George R. La Noue, January 16, 2019.

⁶² *Croson*, 488 U.S. at 509.

