

## Affirmative Action or Passive Participation in Perpetuating Discrimination? The Future of Race-Based Preferences in Government Contracting

Major (U.S. Army Retired) Patricia C. Bradley\*

*Affirmative action should not be regarded as nihilistic. We should not abandon all attempts to set standards, nor should we hire and promote unqualified individuals over qualified ones. But the inconsistencies cast doubt on how well opponents of affirmative action adhere to the principles of color blindness and meritocracy, hinting that the standards we choose may be arbitrary. They oblige us to ask how to offer expanded opportunities.*<sup>1</sup>

### I. Introduction

Affirmative action has been described as a “redistributive measure that enhances the standard of living and quality of life for the have-nots and have-too-littles.”<sup>2</sup> It allows “equal access to America’s prosperity” by advocating preferential policies that promote the sharing of wealth, which is a hotly debated topic in government policy.<sup>3</sup> The history of affirmative action dates back to the end of legal segregation, however, there is no well-defined or agreed upon meaning of the term.<sup>4</sup> For purposes of this paper, the term affirmative action means practices taken by employers, universities, and government agencies that actively improve the economic status of minorities and women with regard to employment, education and business opportunity.

Affirmative action has been used in government contracts for over forty years.<sup>5</sup> Set-asides, subcontracting opportunities, and price evaluation adjustments for minority owned businesses are all examples of affirmative action in government contracts. These practices, however, may be coming to an end as a result of a procurement process making many small disadvantaged businesses ineligible for government contracts.<sup>6</sup> A bill denying large businesses access to government small business set-aside programs and extending the socially and economically disadvantaged business programs through 30 September 2012, received unanimous Senate committee approval on 7 November 2008.<sup>7</sup> Yet this bill to revitalize small business contracting will not be enough for Small Disadvantaged Businesses (SDBs) if Section 1207 of the National Defense Authorization Act is not included.<sup>8</sup> While the Supreme Court has upheld the constitutionality of price evaluation

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\* Judge Advocate, U.S. Army. Presently serving as Assistant General Counsel, Broadcasting Board of Governors; LL.M., 2006, The Judge Advocate General’s Legal Ctr. & Sch., U.S. Army, Charlottesville, Va.; J.D., 2001, Howard Univ.; B.A., 1994, Howard Univ. Previous assignments include: Platoon Leader, 507th Support Group, Fort Bragg, N.C., 1994–1996; Company Executive Officer, Fort Bragg, N.C., 1995–1996; Detachment Commander, Fort Bragg, N.C., 1996–1997; Support Operations Officer, Fort Bragg, N.C., 1997; Assistant Trial Counsel, Fort Lee, Va., 1997–1998; Trial Counsel, 3d Infantry Division, Fort Stewart, Ga., 2001–2004; Special Assistant United States Attorney for the Southern District of Ga., Fort Stewart, Ga., 2002–2003; Instructor, Army Logistics Management College, Fort Lee, Va., 2004–2005; Officer in Charge, Wiesbaden Army Airfield Legal Center, 1st Armored Division, Wiesbaden, Germany, 2006–2007; Trial Attorney, Contract and Fiscal Law Division, Military District of Washington, 2007. Member of the N.C. Bar.

<sup>1</sup> FRANK WU, RACE IN AMERICA BEYOND BLACK AND WHITE 162 (2002).

<sup>2</sup> CORNELL WEST, RACE MATTERS 63 (1993).

<sup>3</sup> See *id.*

<sup>4</sup> John Valery White, *From Brown to Grutter: Affirmative Action and Higher Education in the South: Article: What is Affirmative Action?*, 78 TUL. L. REV. 2117, 2120 (2004). In his comment, White states: “There is no rigorous definition of affirmative action. Affirmative action can, of course, be defined historically, if not statutorily. Historically, affirmative action is the subject of policy debate about the extent of remedies for Jim Crow.” *Id.* See also BLACKS’S LAW DICTIONARY 22 (2d ed.1996) (defining affirmative action as the positive steps designed to eliminate the existing and continuing discrimination, to remedy lingering effects of past discrimination, and to create systems and procedures to prevent future discrimination).

<sup>5</sup> See Danielle Conway-Jones & Christopher Jones, *Department of Defense Procurement Practices After Adarand: What Lies Ahead for the Largest Purchaser of Goods and Services and Its Base of Small Disadvantaged Business Contractors*, 39 HOW. L. J. 391, 392 (1995) (citing Holly Idelson, *A Thirty Year Experiment*, 53 CONG. Q. 1579 (1995)).

<sup>6</sup> The Federal Acquisition Streamlining Act (FASA) enacted into law in 1994, legalized contract bundling and allowed federal procurement personnel to take small pieces of business and throw them in with huge solicitations, thus putting them out of reach of small and minority businesses. See Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3243 (codified in scattered sections of 10, 15, and 41 U.S.C.) [hereinafter FASA].

<sup>7</sup> Small Business Contracting Revitalization Act, S. 2300, 110th Cong. (2007) [hereinafter SBCRA].

<sup>8</sup> See *infra* notes 116–119. Section 1207 of the National Defense Authorization Act will be discussed in more detail in this article. The section authorizes DOD to preferentially select bids by SDBs by adjusting bids submitted by non-SDBs up to 10%. See National Defense Authorization Act of 1997, Pub. L. No. 99-661, § 1207, 100 Stat. 3859, 3973 (1996) (codified at 10 U.S.C. § 2323).

adjustments,<sup>9</sup> members of Congress will become passive participants in perpetuating discrimination in public contracting if they do not enact legislation revitalizing the Small Business Act (SBA) and reauthorizing price evaluation adjustments.

This article discusses the history of race-conscious legislation in government procurement, highlighting the *Adarand Constructors Inc. v. Peña*<sup>10</sup> string of cases and discusses how the government changed the contracting rules following *Adarand*. It will further analyze whether the current rules as implemented effectively end SDBs preferences, despite the plan to “amend it, not end it.”<sup>11</sup> Finally, this article will argue that the government should be required to try race-neutral measures before allowing race-based preferences. However, due to the unpleasant reality that race still matters, where evidence of the effects of current and past discrimination linger, race-based preferences should be allowed in order to ensure that disadvantaged businesses are afforded the opportunity to compete in the government contracting enterprise.

## II. The History of Small Business Legislation in Government Contracting

### A. The Small Business Act of 1958

Prior to the SBA of 1958,<sup>12</sup> there was very little statutory authority designed to “stimulate and encourage small business enterprise.”<sup>13</sup>

The SBA originally assisted only small businesses.<sup>14</sup> There was no emphasis on minority businesses. Preferences towards minority owned businesses in government contracting were not initiated until 1961, when President John F. Kennedy “ordered federal contractors to make special efforts to ensure that workers be hired and treated without regard to race or ethnicity.”<sup>15</sup> The formal use of the term “affirmative action” did not exist until 1965 when President Lyndon B. Johnson signed Executive Order 11246, requiring federal contractors to “take affirmative action to ensure that applicants are employed, and that employees are treated fairly during employment, without regard to race, color, religion, sex, or national origin.”<sup>16</sup>

### B. The 1978 Amendment of the Small Business Act of 1958

It was not until the 1978 Amendment of Small Business Act of 1958 that Congress promulgated legislation that would allow greater minority participation in government contracting. This amendment required all 8(a) set-aside opportunities be

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<sup>9</sup> *Rothe v. United States*, 499 F. Supp. 2d 775 (2007). The constitutionality of Section 1207 came into question recently in *Rothe* and was upheld as its preferential price adjustment satisfied the requirements of strict scrutiny. *Id.*

<sup>10</sup> 515 U.S. 200 (1995).

<sup>11</sup> Public Papers of the Presidents, 34 WEEKLY COMP. PRES. DOC. 385 (Mar. 6, 1998) (written by President William J. Clinton.).

I am pleased that the Senate, in a strong bipartisan vote of 58 to 37, today retained the Disadvantaged Business Enterprise program within the ISTEA bill, which provides expanded economic opportunity for women-and minority-owned businesses. This program was enacted into law by President Reagan in response to extremely low participation rates by women and minorities in federally assisted highway and transit construction projects. Today’s vote reaffirms my administration’s “Amend it; don’t end it” approach to affirmative action and promoting equal opportunity.

*Id.*

<sup>12</sup> See Act of July 18, 1958, Pub. L. No. 85-536, 72 Stat. 384 (current version at 15 U.S.C.S. §§ 631–647 (LexisNexis 2008)).

<sup>13</sup> Major Patrick E. Tolan, Jr., *Government Contracting with Small Businesses in the Wake of the Federal Acquisition Streamlining Act, The Federal Acquisition Reform Act, and Adarand: Small Business as Usual?*, 44 A.F. L. REV. 75, 81 (1998) (noting that Congress created the Smaller War Plants (SWP) and the Small Defense Plants Administration (SDPA) prior to the Small Business Administration (SBA), created pursuant to the Small Business Act of 1953, but the organizations made little use of their authority to promote small businesses).

<sup>14</sup> See Act of July 18, 1958, Pub. L. No. 85-536, 72 Stat. 384 (current version at 15 U.S.C.S. §§ 631-647 (LexisNexis 2008)).

<sup>15</sup> Conway-Jones, *supra* note 5, at 392, (citing Holly Idelson, *A Thirty Year Experiment*, 53 CONG. Q. 1579 (1995)).

<sup>16</sup> Exec. Order No. 11,246, 3 C.F.R. 339, 340 (1964–1965), *reprinted as amended* in 42 U.S.C. § 2000e (1994); *see also* Stephen R. McAllister, *Controversial Decisions of the 1994–94 Supreme Court Term: One Anglo-Irish American’s Observations on Affirmative Action*, 5 KAN. J. L. & PUB. POL’Y 21, 22 (1996) (discussing the history of affirmative action).

subcontracted by the SBA to “socially and economically disadvantaged small business concerns.”<sup>17</sup> “The statutory conversion of the historic 8(a) program, that fostered small business, to the modern 8(a) program, that promotes small disadvantaged business or minority business, occurred as part of the 1978 Act to amend the SBA and the Small Business Investment Act (SBIA) of 1958.”<sup>18</sup> Section 8(a) of the Small Business Act established the government’s new 8(a) program for SDBs.<sup>19</sup> This amendment established a minority business enterprise (MBE) program which provided preferential treatment to MBEs. In order to qualify for the MBE program, a business had to be owned and controlled by one or more “socially or economically disadvantaged persons.”<sup>20</sup> The definition of MBE explicitly linked social and economic disadvantage to race.<sup>21</sup> “The SBA was charged with determining which businesses would qualify as ‘socially and economically disadvantaged.’”<sup>22</sup>

Since 1989, the SBA has defined socially and economically disadvantaged as, “those who have been subjected to racial or ethnic prejudice or cultural bias because of their identities as members of a group without regard to their individual qualities.”<sup>23</sup> Historically, socially and economically disadvantaged individuals included African-Americans, Hispanic Americans, Native Americans, Eskimos, Asian Pacific Americans, Subcontinental Asian Americans, and certain other minority groups.<sup>24</sup> Under the 1978 Amendment, members of those designated minority groups were presumed to be socially disadvantaged.<sup>25</sup> However, as a result of *Adarand*, along with other significant regulatory changes, the amended Act now makes the presumption rebuttable.<sup>26</sup>

The 1978 Amendment to the SBA congressionally mandates that “a fair proportion of Government contracts and subcontracts be placed with small businesses.”<sup>27</sup> As established by the 1978 Amendment, the statutorily mandated annual minimum contract award for SDBs was “five percent of the total value of all prime contract and subcontract awards.”<sup>28</sup> In order to achieve the 5% goal, the federal government has allowed certain “preferences” for small businesses.<sup>29</sup> Such “preferences” include automatic set-asides,<sup>30</sup> where certain types of contracts are only awarded to “designated groups,”<sup>31</sup> and prioritized subcontracting opportunities<sup>32</sup> specifically for SDBs. In addition to set-asides and subcontracting opportunities, price evaluation adjustments for SDBs were authorized, providing a 10% preference in competitive acquisitions.<sup>33</sup> Preferences, as applied to small businesses, have long been an accepted practice.<sup>34</sup> However, when such preferences are

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<sup>17</sup> An Act to Amend the Small Business Act and the Small Business Investment Act of 1958, Pub. L. No. 95-507, 92 Stat. 1757 (1978) (codified as amended in scattered sections of 15 U.S.C.). The 1978 Amendments required that all 8(a) set-aside opportunities be subcontracted by the SBA to “socially and economically disadvantaged small business concerns.” *Id.*

<sup>18</sup> Tolan, *supra* note 13, at 83.

<sup>19</sup> Pub. L. No. 85-536, 8(a), 72 Stat. 384, 389 (1958) (as codified, the most recent version of the § 8(a) program may be found at 15 U.S.C. § 637(a) (2000)).

<sup>20</sup> 15 U.S.C.S. § 631 (LexisNexis 2008).

<sup>21</sup> *See id.*

<sup>22</sup> Tolan, *supra* note 13, at 83 (citing 15 U.S.C.A. § 637(a) (WEST 1997)); *see also* 15 U.S.C. § 637.

<sup>23</sup> Tolan, *supra* note 13, at 83 (quoting 15 U.S.C. § 637(a)(5) and citing the SBA definition of social disadvantage, 13 C.F.R. § 124.105 (1998)); *see also* 13 C.F.R. § 124.105 (2008) (most recent and unchanged definition of social disadvantage).

<sup>24</sup> Tolan, *supra* note 13, at 83.

<sup>25</sup> *Id.*

<sup>26</sup> *See* 13 C.F.R. § 124.103(b)(3) (1998).

<sup>27</sup> JOHN CIBINIC, JR. & RALPH C. NASH, JR., *FORMATION OF GOVERNMENT CONTRACTS* 1417 (3d ed. 1998) (citing 15 U.S.C. § 631(a)).

<sup>28</sup> *Id.* at 1418 (citing 15 U.S.C. § 644(g)(1)).

<sup>29</sup> *See id.* at 1417–25.

<sup>30</sup> *Id.* at 1419 (citing 15 U.S.C. § 644).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 1424 (citing 15 U.S.C. § 637(d)(1)) (noting that many small businesses are incapable of serving as prime contractors, therefore the preference allows them to enter the procurement process through subcontracting, while awarding incentives to prime contractors for subcontracting to small businesses).

<sup>33</sup> *Id.* at 1435.

applied to SDBs, protestors contend that it is a violation of equal protection rights and that the government, while promoting affirmative action, is engaging in reverse discrimination.<sup>35</sup>

### III. Affirmative Action Case Law

When asking what the appropriate standard of review should be for assessing racial classifications, the Supreme Court has firmly applied a strict scrutiny standard of review, where suspect classifications or infringement on fundamental rights were at issue.<sup>36</sup> However, with preferences to benefit those same classes or what has been referred to as reverse discrimination, the Courts remained divided.<sup>37</sup>

During the 1970's the Court began to examine whether the preferences should be subject to the same scrutiny as the invidious discrimination of the previous era, but no majority of justices could agree.<sup>38</sup> Not until 1989, in the landmark case of *City of Richmond v. J.A. Croson Co.*,<sup>39</sup> did the Supreme Court establish a standard of review holding that "all racial classifications, regardless of purpose, are suspect and should be strictly scrutinized."<sup>40</sup> The Court held that in order to pass strict scrutiny, state programs would have to demonstrate a compelling governmental interest, narrowly tailored to achieve that objective.<sup>41</sup>

In *Croson*, at issue was the state's sponsorship of a minority set-aside program in highway construction projects. The Court held that race-conscious policies were "allowable only to the extent necessary to remedy a Fourteenth Amendment violation."<sup>42</sup> Being able to statutorily provide such relief on a prospective basis, however, requires prior proof of such discrimination.<sup>43</sup>

The Court held that Richmond's program in question was not supported by a formal finding of past governmental discrimination.<sup>44</sup> Past societal discrimination was not sufficient to justify race based measures.<sup>45</sup> The Court would now

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<sup>34</sup> While there is on-going litigation regarding preferences given to small disadvantaged businesses, this author finds little opposition to preferences given to small businesses.

<sup>35</sup> See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 459 (1989).

<sup>36</sup> *Korematsu v. United States*, 323 U.S. 214, 216 (1944). *Korematsu* declared that racial classifications were immediately suspect and subject to the highest judicial scrutiny. *Id.*

<sup>37</sup> See DONALD E. LIVELY ET AL., *CONSTITUTIONAL LAW: CASES, HISTORY, AND DIALOGUES* 630 (2d ed. 2000); see also GIRARDEAU A. SPANN, *THE LAW OF AFFIRMATIVE ACTION: TWENTY-FIVE YEARS OF SUPREME COURT DECISIONS ON RACE AND REMEDIES* 21 (2000).

[T]he first judicial revolution started with *Brown v. Board of Education I* in 1954, when the Supreme Court rejected the "separate but equal" doctrine of *Plessy v. Ferguson* and held that maintaining segregated schools constituted a violation of the right of black children to equal protection under the Fourteenth Amendment. . . . In recent years, however, a separate strain of constitutional jurisprudence has emerged. Differing from the explicitly race-conscious policies supported by many post-*Brown* courts were other rulings, such as *City of Richmond v. Croson* and *Adarand Constructors v. Peña*, [which] purports to strive toward a color-blind ideal in government decisionmaking. The two lines of judicial rulings also diverge in their use of the Fourteenth Amendment. While the *Brown*-influenced jurisprudence sought to advance minority interests on the grounds of equal protection, the new jurisprudence has been invoking the same constitutional principles to advance the interest of whites who have been disadvantaged by minority-favoring policies and programs.

*Id.*

<sup>38</sup> Compare *De Funis v. Odegaard*, 416 U.S. 312 (1974), with *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), *Fullilove v. Klutznick*, 448 U.S. 448 (1980), *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986), *J.A. Croson Co.*, 488 U.S. 459.

<sup>39</sup> 488 U.S. 459.

<sup>40</sup> *Id.* at 509.

<sup>41</sup> See *id.* at 507-08.

<sup>42</sup> *Id.*

<sup>43</sup> See *id.*

<sup>44</sup> See *id.* at 536-37.

<sup>45</sup> See *id.* at 498.

require such agencies to demonstrate a compelling governmental interest by justifying with specificity a particularized finding of past discrimination.<sup>46</sup> In addition to providing proof of past governmental discrimination, the *Croson* test would require the government's program to be narrowly tailored to achieve that objective.<sup>47</sup> The government would further be required to demonstrate that their program was flexible and contained waiver provisions for prime contractors who attempted to but could not meet minority business utilization goals.<sup>48</sup>

A year after *Croson*, the Supreme Court in *Metro Broadcasting, Inc. v. FCC*,<sup>49</sup> upheld two federal race-based policies against a Fifth Amendment challenge. The Court held that congressionally mandated "benign" racial classifications need only satisfy intermediate scrutiny.<sup>50</sup> By imposing a lesser duty on the Federal Government than that imposed on the state, *Metro Broadcasting* departed from the *Croson* decision, rejecting the strict scrutiny standard of review of governmental racial classifications, thus allowing the Federal Government more leeway than the States.

#### IV. *Adarand Constructors*<sup>51</sup>

While the Supreme Court established a standard of review for state programs providing race-based preferences, the Court did not conclusively hold that the same standard applied to federal government sponsored programs until *Adarand*. In 1989, the same year as, but following the *Croson* decision, the Central Federal Lands Highway Division (CFLHD) of the United States Department of Transportation (DOT) awarded the prime contract for a highway construction project in Colorado to Mountain Gravel & Construction Company (Mountain Gravel). Mountain Gravel then solicited bids for the guardrail work under the contract.<sup>52</sup> *Adarand Constructors, Inc.*, a Colorado-based highway construction contractor, submitted the low bid for the work.<sup>53</sup> Gonzales Construction Company (Gonzales) also submitted a bid for the project.<sup>54</sup> Gonzales was certified by the SBA as a "socially and economically" disadvantaged small business.<sup>55</sup> While *Adarand* was a small business, it was not certified as a small and disadvantaged business.<sup>56</sup> The prime contract between Mountain Gravel and CFLHD granted Mountain Gravel additional compensation if it retained subcontractors controlled by small disadvantaged businesses pursuant to its subcontracting clause.<sup>57</sup> Therefore, despite *Adarand's* lower bid, Mountain Gravel awarded the subcontract to Gonzales, who certified that it would retain SDB subcontractors.<sup>58</sup>

*Adarand*, having lost the bid on the contract, filed suit in the United States District Court for the District of Colorado.<sup>59</sup> As a key witness to *Adarand's* claim, the Chief Estimator of Mountain Gavel submitted an affidavit to the Court stating "it would have accepted *Adarand's* bid had it not been for additional payment it received by hiring Gonzales instead."<sup>60</sup>

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<sup>46</sup> *See id.*

<sup>47</sup> *See id.* at 507–08.

<sup>48</sup> *See id.*

<sup>49</sup> 497 U.S. 547 (1990).

<sup>50</sup> *See id.* at 564. To withstand intermediate level scrutiny, also termed heightened scrutiny, benign racial classifications that serve important governmental objectives, must be substantially related to achievement of those objectives. *Id.*

<sup>51</sup> *Adarand Constructors Inc. v. Pena*, 515 U.S. 200, 205 (1995).

<sup>52</sup> *Id.*

<sup>53</sup> *See id.*

<sup>54</sup> *See id.*

<sup>55</sup> *See id.*

<sup>56</sup> *See id.*

<sup>57</sup> *See id.*

<sup>58</sup> *See id.*

<sup>59</sup> *See id.* at 210.

<sup>60</sup> *Id.* at 205.

Adarand argued that the presumption of socially and economically disadvantaged set forth in the Small Business Act “discriminates on the basis of race in violation of the Federal Government’s Fifth Amendment obligation not to deny anyone equal protection of the law.”<sup>61</sup> The government disagreed, and motioned for summary judgment which was granted by the district court. On appeal, the Tenth Circuit, affirmed the lower court’s decision.<sup>62</sup> The United States Supreme Court granted certiorari.<sup>63</sup>

Despite the *Metro Broadcasting* holding, the *Croson* case set the stage for the Court’s decision in *Adarand*. The *Adarand* decision was the turning point for all federal programs that sponsored affirmative action. The Court held that the strict scrutiny standard applied in *Croson* applied to federal programs as well.<sup>64</sup> In *Adarand*, the Court reversed the equal protection holding in *Metro Broadcasting* and determined that racial preferences—whether formulated by federal or state government, must be strictly scrutinized.<sup>65</sup> While the Court opined in *Croson* that Congress had special powers under Section 5 of the Fourteenth Amendment permitting it to use racial classifications that would be unconstitutional if used by the state,<sup>66</sup> it decided under *Adarand* that even those special powers were impermissible if not strictly scrutinized.

In *Croson*, the Supreme Court held that strict scrutiny applied where the state government sponsored race-based preferences.<sup>67</sup> In *Adarand*, that same premise was applied where the federal government granted race-based preferences.<sup>68</sup> The only issue before the Supreme Court was whether strict scrutiny should be applied where federal action allowed race-based preferences. The Court offered no judgment on whether the Subcontracting Compensation Clause (SCC) met the strict scrutiny test in *Adarand*.<sup>69</sup> Instead, the Court remanded the case to the district court. While the Supreme Court made it clear that the appropriate standard to apply to race-based classifications would be strict scrutiny, it did not address the underlying merits of the case itself. On remand, the United States District Court for the District of Colorado addressed the issue of whether the racial preference employed by the government passed strict scrutiny and concluded that the SCC program was not sufficiently narrowly tailored to pass the test, where the program lacked “individualized inquiries” into whether the participants were socially or economically disadvantaged.<sup>70</sup> Further the Court noted that the SCC program did not have a compelling interest in eliminating discriminatory barriers because there was no “particularized finding that the federal government had discriminated on the basis of race in awarding federal highway construction contracts in Colorado.”<sup>71</sup>

In response to the Supreme Court ruling, the state of Colorado changed its Disadvantaged Business Enterprise (DBE) regulations to remove the presumption of social and economic disadvantage for racial and ethnic minorities.<sup>72</sup> Instead, the state of Colorado premised DBE status on the applicant’s certification that he or she was socially disadvantaged.<sup>73</sup> Adarand ultimately re-applied and certified itself as socially and economically disadvantaged and as a result, was certified as a DBE.<sup>74</sup> As a non-minority, Adarand could gain DBE status because its exclusion from the SCC program caused it to be socially

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<sup>61</sup> *Id.* at 210.

<sup>62</sup> *See Adarand Constructors, Inc. v. Pena*, 16 F.3d 1537 (10th Cir. Colo 1994), *aff’g Adarand Constructors, Inc. v. Skinner*, 790 F. Supp. 240 (D. Colo. 1992).

<sup>63</sup> *See Adarand*, 515 U.S. at 211. After granting certiorari, in a split five to four decision, the Supreme Court vacated and remanded the case to the lower courts for further consideration on the merits. *Id.*

<sup>64</sup> *See id.* at 200.

<sup>65</sup> *See id.* at 237 (citing and overruling *Metro Broad. Inc. v. FCC*, 497 U.S. 547 (1990), which concerned the federal program of granting radio stations broadcasting licenses and awarding points based on race in order to encourage diversity in programming).

<sup>66</sup> *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 459, 488 (1989).

<sup>67</sup> *See J.A. Croson Co.*, 488 U.S. 459.

<sup>68</sup> *See Adarand*, 515 U.S. 200.

<sup>69</sup> *See id.* The Supreme Court reversed and remanded the case to the District Court of Colorado to determine whether the SCC program met the strict scrutiny test. *Id.*

<sup>70</sup> *Id.* at 237. The 8(a) program mandates an inquiry into each participant’s economic disadvantage. *See* 15 U.S.C. § 634(b)(6) (2000).

<sup>71</sup> *Id.* at 238.

<sup>72</sup> *See Adarand Constructors, Inc. v. Pena*, 965 F. Supp. 1556, 1577, 1584 (D. Colo. 1997).

<sup>73</sup> *See id.*

<sup>74</sup> *See Adarand Constructors, Inc. v. Slater*, 169 F.3d 1291, 1296–97 (10th Cir. 1999).

disadvantaged.<sup>75</sup> After *Adarand* certified itself as socially disadvantaged, the Tenth Circuit Court of Appeals “threw out as moot the long-running reverse discrimination suit”<sup>76</sup> holding that *Adarand*, now entitled to the benefits it previously challenged, could no longer “assert a cognizable constitutional injury.”<sup>77</sup> Since there was no injury, the government then appealed the earlier decision of the United States District Court for the District of Colorado which had concluded that the SCC program was not sufficiently narrowly tailored to pass the strict scrutiny test.<sup>78</sup> Finding that *Adarand* benefited from the DBE status it once challenged, the Tenth Circuit Court of Appeals vacated the lower court’s decision and remanded it with directions to dismiss.<sup>79</sup>

## V. The Immediate Response to *Adarand*

Despite the end of legal segregation,<sup>80</sup> statistics document that disparity between ethnicity and gender continue to exist.<sup>81</sup> After *Adarand*, the Urban Institute conducted a study to determine the share of government dollars that minority-owned businesses received.<sup>82</sup> The study revealed “substantial disparities between the share of contract dollars received by minority-owned firms and the share of all firms that they represent.”<sup>83</sup> “Based on their number, minority-owned firms received only fifty-seven cents for every dollar they would be expected to receive.”<sup>84</sup> Notwithstanding the disparities, opponents of affirmative action took the position that “our Constitution is color-blind; thus race-focused affirmative action is constitutionally suspect.”<sup>85</sup> Strong opposition to affirmative action and judicial decisions forced the federal government to change regulations post-*Adarand*. Now, with the focus on protecting equal rights, the federal government increasingly relies on race-neutral measures in awarding government contracts.

### A. Responses to *Adarand*

Despite the fact that the Supreme Court offered no judgment on whether the SCC passed the strict scrutiny test in *Adarand*,<sup>86</sup> all levels of government began an immediate review of their affirmative action programs. The President of the United States, Congress, the Department of Justice (DOJ), the Department of Defense (DOD) and many other federal agencies, all took action with regard to federal contracting.

#### 1. Presidential Response

Following the *Adarand* decision and attempts to weaken the DBE program, President William J. Clinton, in a statement on Senate action to continue the disadvantaged business enterprise initiative, reaffirmed his goal of the “amend it; don’t end it” approach to affirmative action and promoting equal opportunity.<sup>87</sup> He later wrote to the Speaker of House on the DBE

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<sup>75</sup> Major Mary E. Harney et al., *Contract and Fiscal Law Developments of 1999: The Year in Review: Contract Formations: Small Business: Adarand: The Saga Continues*, ARMY LAW., Jan. 2000, at 39 (citing *Adarand*, 169 F.3d at 1296–97).

<sup>76</sup> *Id.*

<sup>77</sup> *See id.*

<sup>78</sup> *See id.*

<sup>79</sup> *See id.*

<sup>80</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (holding the separate but equal doctrine unconstitutional, ending legal segregation).

<sup>81</sup> LIVELY ET AL., *supra* note 37, at 812 (citing Peter T. Kilborn, *For Many in Work Force, ‘Glass Ceiling’ Still Exists*, N.Y. TIMES, Mar. 16, 1995).

<sup>82</sup> Maria E. Enchautegui et al., *Urban Inst.: Do Minority-Owned Businesses Get a Fair Share of Government Contracts?*, Dec. 1, 1997, available at <http://www.urban.org/url.cfm?ID=307416>.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> LIVELY ET AL., *supra* note 37, at 812.

<sup>86</sup> *See Adarand Constructors Inc. v. Pena*, 515 U.S. 200 (1995). The Supreme Court reversed and remanded the case to the District Court of Colorado to determine whether the SCC program met the strict scrutiny test. *Id.*

Program adamantly opposing any attempts to weaken or repeal the DBE program extension of the Building Effective Surface Transportation and Equity Act of 1998.<sup>88</sup> In this letter he wrote:

We have seen time and time again that women and minorities are excluded from the contracting process when a DBE program is not in place. The DBE program is not a quota. The existing statute explicitly provides that the Secretary of Transportation may waive the 10 percent goal for any reason and that this benchmark is not to be imposed on any state or locality. Rather, the DBE program encourages participation without imposing rigid requirements of any type. I ask that you oppose any efforts to strike the DBE program from the bill.<sup>89</sup>

After issuing the statements to the Senate and Speaker of the House, the Clinton administration released the results of a five-month review of existing affirmative action programs.<sup>90</sup> The review recommended the following:

(1) creating a uniform certification process for all SDBs (conducted by specially licensed firms where possible); (2) tightening the economic disadvantage test used to qualify for these programs; (3) applying the 8(a) Program's 9-year graduation limit to all SDB programs; (4) developing objective industry-specific criteria for determining when firms are no longer in need of set-asides; (5) placing caps on the dollar value of contracts, as well as caps on total dollars a firm can receive through set-asides; (6) increasing penalties against "front" companies; and (7) establishing measures to ensure that programs terminate when the affirmative action goals have been met.<sup>91</sup>

In addition to publishing this review, on July 19, 1995, President Clinton issued a directive to all federal agencies mandating that an affirmative action program must be eliminated or reformed if it: (1) creates a quota; (2) creates a preference for unqualified individuals; (3) creates reverse discrimination; or (4) continues after its equal opportunity purposes have been achieved.<sup>92</sup>

The President's "amend it, don't end it" approach is noteworthy in that the administration admitted that affirmative action programs need restructuring. Realizing that the need for remedial measures arguably still exists, the reformation allowed for the continuation of the program while ensuring that the preferences do not violate the equal rights of the non-beneficiaries.

## 2. Department of Justice (DOJ) Response

Following the Presidential order to review programs, DOJ issued a memorandum on June 28, 1995 providing guidelines for federal government agencies reviewing affirmative action programs.<sup>93</sup> The DOJ memorandum stated that "*Adarand*

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<sup>87</sup> Public Papers of the Presidents, 34 WEEKLY COMP. PRES. DOC. 385 (Mar. 6, 1998) (written by President William J. Clinton.).

I am pleased that the Senate, in a strong bipartisan vote of 58 to 37, today retained the Disadvantaged Business Enterprise program within the ISTEA bill, which provides expanded economic opportunity for women-and minority-owned businesses. This program was enacted into law by President Reagan in response to extremely low participation rates by women and minorities in federally assisted highway and transit construction projects. Today's vote reaffirms my administration's "Amend it; don't end it" approach to affirmative action and promoting equal opportunity"

*Id.*

<sup>88</sup> Public Papers of the Presidents, 34 WEEKLY COMP. PRES. DOC. 385 (Apr. 1, 1998) (letter to the Speaker of the House on the Disadvantaged Business Enterprise).

<sup>89</sup> *Id.*

<sup>90</sup> See Gilbert J. Ginsburg & Janine S. Benton, *A Review of Recent Decisions of the United States Court of Appeals for the Federal Circuit: Article: One Year Later: Affirmative Action in Federal Government Contracting*, 45 AM. U. L. REV. 1903, 1925 (1996) (citing GEORGE STEPHANOPOULOS & CHRISTOPHER EDLEY, JR., AFFIRMATIVE ACTION REVIEW: REPORT TO THE PRESIDENT (July 19, 1995), reprinted in Daily Lab. Rep. (BNA) No. 139, S-1 (July 20, 1995)).

<sup>91</sup> *Id.*

<sup>92</sup> See William Jefferson Clinton, Remarks on Affirmative Action at the National Archives Rotunda (July 19, 1995), <http://frwebgate3.access.gpo.gov/cgi-bin/waisgate.cgi?WAISdocID=94409912987+6+0+0&WAISaction=retrieve>.

<sup>93</sup> See Memorandum from the Office of Legal Counsel, U.S. Dept. of Justice, to General Counsels, subject: Legal Guidance on the Implications of the Supreme Court's Decision in *Adarand Constructors, Inc. v. Peña* (June 28, 1995), reprinted in Daily Lab. Rep. (BNA) No. 125, at E-1 (June 29, 1995)).

makes it necessary to evaluate federal programs that use race or ethnicity as a basis for decision-making to determine if they comport with the strict scrutiny standard.”<sup>94</sup> The memorandum set forth six factors agencies must consider in the narrow tailoring requirement of the strict scrutiny standard of review set forth in *Adarand* and other Supreme Court cases:

(1) whether the governmental entity considered race neutral alternatives before implementing a “race-based measure”; (2) whether the program includes a flexible waiver mechanism for individualized consideration of a “particular minority contractor’s bid”; (3) whether the program makes race a requirement for eligibility in the program or whether race is just one factor to be considered; (4) what appropriate measure is chosen to numerically compare the target to the number of minorities in the field; (5) the duration of the program and whether it is subject to meaningful periodic review; and (6) what degree and what type of burden is imposed on people who do not belong to racial or ethnic groups.<sup>95</sup>

### 3. Congressional Response

Following the decision in *Adarand*, the Federal Government began to revise their rules for applying race-based preferences in order to ensure there was a compelling governmental interest narrowly tailored to achieve the goal of remedying the effects of discrimination.<sup>96</sup> The Presidential and DOJ responses took the form of regulatory change when the Clinton Administration announced on June 24, 1998, that the rules permitting price evaluation adjustments to eligible SDBs would be overhauled.<sup>97</sup> The new rules, under the Federal Acquisition Regulation (FAR), required the Department of Commerce (DOC) to determine the price adjustment available to SDBs specified by Standard Industrial Classification (SIC) major groups and regions.<sup>98</sup> To establish price evaluation adjustments, the Office of the Chief Economist and the Office of Policy Development in the Economics and Statistics Administration of the DOC conducted an economic analysis to identify industries eligible for price evaluation adjustment based on ongoing evidence of discrimination in those specific industries.<sup>99</sup> The rules made the DOC responsible for: “(1) developing methods to calculate benchmark limitations, (2) developing methods to calculate the size of the price evaluation adjustment employed in a given industry, and (3) determining the applicable adjustment.”<sup>100</sup> DOC was also charged with “providing information to the SBA for its use in administering the 8(a) program.”<sup>101</sup>

DOC’s methodology for determining which industries were allowed the price evaluation adjustment was designed to ensure the reforms were “narrowly tailored to remedy discrimination.”<sup>102</sup> Only SDBs in DOC identified specific industries suffering the effects of on-going discrimination are eligible for the up to 10% price evaluation adjustment.<sup>103</sup>

In addition to changing the benchmarking rules, the new rules ended the self-certification process. Prior to the change, SDBs could self-certify<sup>104</sup> that they were small and disadvantaged based on the presumption that they were disadvantaged by being a member of a disadvantaged group as defined by the SBA. The new rules required the SBA to “certify the business or that the business complete an application at the SBA for certification, or be a private certifier at the time of its offer.”<sup>105</sup> The

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<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> See Major David A. Wallace & Major Steven L. Schooner, *Affirmative Action in Procurement: A Preview of the Post-Adarand Regulations in the Context of an Uncertain Judicial Landscape*, ARMY LAW., Sept. 1997, at 3, 4.

<sup>97</sup> Major David Wallace et al., *Contract and Fiscal Law Developments of 1998: The Year in Review: Contract Formations: Small Business: More Rules and Regulations in 1998*, ARMY LAW., Jan. 1999, at 41, 42.

<sup>98</sup> *Id.*

<sup>99</sup> 63 Fed. Reg. 35,714 (June 30, 1998).

<sup>100</sup> Wallace, *supra* note 97, at 41, 42.

<sup>101</sup> 63 Fed. Reg. 35,714.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> See GENERAL SERVS. ADMIN. ET. AL., FEDERAL ACQUISITION REG., 48 C.F.R. § 19.301(a)–(d) (July 2007) [hereinafter FAR].

<sup>105</sup> Wallace, *supra* note 97, at 41, 42 (citing FAR, *supra* note 103, 19.304).

new rules considered individual qualities as opposed to mere presumed disadvantage, and thereby, arguably allow only the truly disadvantaged to be certified.

#### 4. Department of Defense Response

In light of *Adarand*, and in the wake of the DOJ's government-wide review of all federal agencies' affirmative action programs, DOD issued a directive suspending certain SDB set-aside provisions of the Defense Federal Acquisition Regulations (DFARs).<sup>106</sup> One such set-aside provision was the "rule of two."<sup>107</sup> Under the rule of two, if two or more SDBs were available and qualified to bid for a DOD prime contract, then that contract had to be set-aside for SDBs, provided that the SDB price was not more than 10% above the fair market price.<sup>108</sup>

Two months after the suspension of the rule of two program, DOD announced a new program for small disadvantaged businesses.<sup>109</sup> This new program, while still aimed at SDBs, targeted environmental, manufacturing, health care, telecommunications, and management information system companies.<sup>110</sup> The targeting of these specific industries was supported by DOC's assessment that these specific industries suffered the continuing effect of past and on-going discrimination.<sup>111</sup>

The new DFARs rules were "initiatives designed to facilitate awards to SDBs while taking into account the Supreme Court's decision in *Adarand*."<sup>112</sup> Pursuant to these rules, evaluation preferences rather than quotas were considered when awards were made by negotiated procurements with small, small disadvantaged, and women-owned businesses.<sup>113</sup> This rule was designed to allow contracting officers to comport with the narrow tailoring requirement of strict scrutiny to the extent that such factors could be weighed more heavily in favor of SDBs in locations or industries where SDBs have demonstrated continued discrimination.<sup>114</sup> Where there is no such evidence of discrimination, the factors could be weighed more lightly.<sup>115</sup>

Section 1207 of the National Defense Authorization Act of 1987 (1207 Program) authorized DOD to preferentially select bids by SDBs by adjusting bids submitted by non-SDBs up to 10%.<sup>116</sup> However, following the Supreme Court's decision in *Adarand*, a revised version of the price preference program was implemented.<sup>117</sup>

In terms of federal dollars, the 1207 Program, allowing the 10% price evaluation adjustment, was the largest minority contracting program administered by the federal government.<sup>118</sup> Since the Strom Thurmond National Defense Authorization Act of 1999, this adjustment has been suspended for almost eight years.<sup>119</sup> This revision prohibits DOD from making awards with a 10% preference for one year after the 5% goal for SDB awards had been attained. The suspension of the 10% pricing

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<sup>106</sup> See Defense Federal Acquisition Regulation Supplement, 60 Fed. Reg. 54,954 (Oct. 27, 1995) (codified at 48 C.F.R. pts. 219, 252) (ordering suspension of SDB set-asides to be effective 23 October 1995).

<sup>107</sup> *See id.*

<sup>108</sup> *See id.*

<sup>109</sup> 65 Fed. Cont. Rep. (BNA) 3 (Jan. 22, 1996) (announcing the new DOD program, "The Industry Thrust," for SDBs).

<sup>110</sup> *See id.*

<sup>111</sup> *See id.*; see also 63 Fed. Reg. 35,714 (June 30, 1998).

<sup>112</sup> Tolan, *supra* note 13, at 108.

<sup>113</sup> *See id.*

<sup>114</sup> *See id.*

<sup>115</sup> *See id.*

<sup>116</sup> National Defense Authorization Act of 1997, Pub. L. No. 99-661, 100 Stat. 3859, 3973 § 1207 (1996) (codified at 10 U.S.C. § 2323).

<sup>117</sup> See Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, Pub. L. No. 105-261, § 801, 112 Stat. 1920 (1998) (codified at 10 U.S.C. § 2323(e)(3)(B)(ii)) [hereinafter NDAA 1999].

<sup>118</sup> 1 ANTHONY W. ROBINSON, THE NEW VANGUARD (1st ed. 2006) (No. 1).

<sup>119</sup> See NDAA 1999, *supra* note 117.

preference has a glass ceiling effect. Once DOD meets its 5% goal for contract awards to SDBs, disadvantaged enterprises must then compete with all other small businesses as if they are on an equal playing field. The suspension ensures that the SDBs be given just enough, but not too much advancement. In short, the quota has been met and little effort has been made to further advance SDBs.

### 5. The SBA's Response

As the FAR was modified, and the DFAR reflected those changes, the SBA also revised its rules to comport with *Adarand*. The SBA was amended to change the standard of proof required for non-minority applicants to claim eligibility in the SDB program.<sup>120</sup> The new preponderance of evidence standard lowered the burden of proof from clear and convincing evidence and improved opportunities for non-minorities to in poorer geographic areas to qualify more easily for preferences.

In addition to changing the standard of proof for social and economic disadvantage, the new regulation made the race-based presumption of disadvantage a rebuttable presumption that could be overcome with evidence to the contrary.<sup>121</sup> While recognizing there is a compelling interest to take remedial action in federal procurement,<sup>122</sup> rebutting a race-based presumption was "intended to prevent over-inclusion by eliminating those presumed to be, but who actually are not, disadvantaged."<sup>123</sup>

### 6. DOT's Response

The Department of Transportation's (DOT) MBE program was at issue in *Adarand*.<sup>124</sup> Under the program, federal law requires that a subcontracting clause appear in most federal agency contracts.<sup>125</sup> Therefore, pursuant to the Surface Transportation and Uniform Relocation Assistance Act (STURAA) of 1987,<sup>126</sup> the DOT in *Adarand* authorized the use of subcontractor bonuses to prime contractors who used SDBs.<sup>127</sup> The clause itself stated that "monetary compensation is offered for awarding subcontracts to small business concerns owned and controlled by socially and economically disadvantaged individuals."<sup>128</sup> The payment was intended to be compensation for the prime contractor's expense in monitoring SDBs and providing assistance.<sup>129</sup> However, opponents of the bonus viewed it as an incentive for subcontracting to SDBs, in violation of equal protection rights, rather than actual compensation for additional expenses.<sup>130</sup>

Since *Adarand*, the DOT's affirmative action program has gone through several statutory changes.<sup>131</sup> Currently, the Transportation Equity Act for the Twenty-First Century (TEA-21),<sup>132</sup> is the statutory authority used by DOT for extension of

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<sup>120</sup> See 13 C.F.R. § 124.103(c) (2008). Individuals who are not members of designated socially disadvantaged groups must establish individual social disadvantage by preponderance of the evidence. See *id.*, § 124.105(c)(1). Previously, individuals had to establish their disadvantage by clear and convincing evidence.

<sup>121</sup> See *id.* § 124.103(b)(3).

<sup>122</sup> See, e.g., Department of Justice, Proposed Reforms to Affirmative Action in Federal Procurement, 61 Fed. Reg. 26,042 app. at 26,050 (1996).

<sup>123</sup> Tolan, *supra* note 13, at 112.

<sup>124</sup> See *Adarand Constructors v. Peña*, 515 U.S. 200, 208 (1995).

<sup>125</sup> See 15 U.S.C.S. § 687 (d)(2) (LexisNexis 2008).

<sup>126</sup> Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. No. 100-17, § 106(c), 101 Stat. 132, 145 (1987) [hereinafter STURRA].

<sup>127</sup> See *Adarand*, 515 U.S. at 207 (citing STURRA, *supra* note 126, a DOT appropriation measure).

<sup>128</sup> *Id.*

<sup>129</sup> See *id.* at 200, 201.

<sup>130</sup> See *id.*

<sup>131</sup> The Transportation Equity Act of the Twenty-First Century (TEA-21), Pub. L. No. 105-178, 112 Stat. 107 (1998) [hereinafter TEA-21], replaced the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Pub. L. No. 102-240, § 1003(b), 105 Stat. 1914, 1919-21 (1991), preceded by the Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. No. 100-17, § 106(c), 101 Stat. 132, 145 (1987), preceded by the Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, § 105(f), 96 Stat. 2097, 2100 (1982).

<sup>132</sup> TEA-21, *supra* note 131.

its affirmative action program. Under prior law, the 10% federal set-aside was mandatory. Under the revised program, a state receiving federal highway funds submits a goal for DBE participation in its federally funded highway contracts. The goal is based on “demonstrable evidence” of the number of DBEs who are ready, willing, and able to participate as contractors or subcontractors on federally-assisted contracts.<sup>133</sup> The goal can be adjusted upward or downward and the state must meet its goals through race-neutral means. If such race-neutral means are ineffective, the state then must give preferences to certified DBEs. However, the preferences cannot include quotas, and set-aside contracts are limited to only those instances “where no other method could be reasonably expected to redress egregious instances of discrimination.”<sup>134</sup> The regulation expressly declares that the statutory 10% provision “is an aspirational goal at the national level,” not a mandatory requirement for the grantee state.<sup>135</sup>

## B. Suspension of the Price Evaluation Adjustment

The Federal Acquisition Streamlining Act of 1994 (FASA),<sup>136</sup> enacted a year before the final *Adarand* decision, was not truly a “response” to *Adarand*. This Act, legislated while *Adarand* was before the Supreme Court, brought about several statutory changes to both procurements relating to small businesses and small and disadvantaged businesses.<sup>137</sup> FASA extended SDB initiatives beyond the DOD, to the National Aeronautics and Space Administration (NASA) and the Coast Guard.<sup>138</sup> FASA also extended SDB price evaluation preferences and competition restrictions to all federal and civilian agencies.<sup>139</sup>

In response to *Adarand*, though preferences were not held unconstitutional,<sup>140</sup> both civilian agencies and DOD agencies implemented change. While the statutory goal for contracting with SDBs at not less than 5% remained for all agencies, the price evaluation adjustment was suspended for both civilian and federal agencies.<sup>141</sup>

The price evaluation adjustment for civilian agencies, authorized under FASA, expired on December 9, 2004.<sup>142</sup> Although the SBA did not end its SDB program, the price evaluation adjustment was omitted from the Small Business Reauthorization and Manufacturing Assistance Act of 2004, and as a result the statutory authority of civilian agencies to apply the adjustment expired.<sup>143</sup> This expiration of authority applied only to civilian agencies, not to DOD, NASA, or the U.S. Coast Guard, which were all governed under separate authority.<sup>144</sup>

Pursuant to the price evaluation adjustment prescribed in FAR 19.11, the separate authority to apply price evaluation adjustments, granted to DOD, NASA and the Coast Guard, was first suspended in February 2000.<sup>145</sup> Due to DOD exceeding its 5% goal for contract awards to SDBs in the previous eight fiscal years,<sup>146</sup> the suspension remains in effect through March

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<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> FASA, *supra* note 6.

<sup>137</sup> *See generally id.*

<sup>138</sup> *See id.* § 7105.

<sup>139</sup> *See id.* § 7102.

<sup>140</sup> *See Adarand Constructors v. Pena*, 515 U.S. 200 (1995).

<sup>141</sup> *See* Memorandum, Laura Auletta, Chair, Civilian Agency Acquisition Council (CAAC), to Directors, Civilian Agencies et al., subject: Expired Program Authority for the Price Evaluation Adjustment for Small Disadvantaged Businesses (Dec. 27, 2004) (on file with author).

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *See* Memorandum, R. D. Kerrins, Jr., Acting Director, Defense Procurement, to Directors of Defense Agencies et al., subject: Suspension of the Price Evaluation Adjustment for Small Disadvantaged Businesses (Jan. 25, 2000) (on file with author).

<sup>146</sup> 10 U.S.C. 2323 (a) (2000) The DOD is prohibited from granting price preferences for a one year period following a fiscal year in which DOD achieved the 5% goal for contract award. *Id.*

2009.<sup>147</sup> If the statutory language authorizing the price evaluation adjustment is not included in the bill recently introduced to Congress,<sup>148</sup> the omission may result in the authority for the adjustment to expire. If this occurs, agencies that fall below the 5% goal, will not be allowed to apply the 10% preference, likely placing SDB's in the same positions they were in pre-affirmative action.

### C. Thirteen Years After *Adarand*, The True Affect of the "Amend It, Don't End It" Plan

#### 1. *There is Still a Compelling Interest*

In order to implement remedial programs in light of *Adarand*, "government agencies have had to invest significant resources to produce statistical evidence establishing a level of racism sufficient enough to justify minority set-asides and preferences."<sup>149</sup> "Many have implemented set-asides with relatively little quantifiable empirical evidence, gathering the requisite data at the commencement of litigation and sometimes after enactment of the plan."<sup>150</sup> Other agencies have met some of the set aside goals but have far from exceeded them.<sup>151</sup>

The seminal pre-*Adarand* case that shaped the requirement of statistical evidence to support race-based preferential programs was *City of Richmond v. J.A. Croson Co.*<sup>152</sup> The Court found in *Croson* that Richmond's program in question was not supported by a formal finding of past discrimination in construction contracts, and thereby required agencies to demonstrate a compelling governmental interest by justifying with specificity a particularized finding of past discrimination in that particular industry.<sup>153</sup> Past societal discrimination was not sufficient enough to justify race based measures.<sup>154</sup> In his dissent, Justice Marshall noting that Richmond had been the capital of the Confederacy and renowned for strict segregation, could not believe that his colleagues would "doubt that blacks continued to suffer discrimination in the city."<sup>155</sup> He stated, "[A] majority of this court signals that it regards racial discrimination as largely a phenomenon of the past. . . . I, however, do not believe this nation is anywhere close to eradicating racial discrimination or its vestiges. In constitutionalizing its wishful thinking, the majority today does a grave disservice..."<sup>156</sup> Despite his dissent, the Court did not acknowledge past societal discrimination and would only rely on particularized findings of past discrimination within particular industries.

The first federal court of appeals to rule opposite of *Croson* regarding the admissibility of post-enactment evidence was the Ninth Circuit, in *Coral Construction Co. v. King County*.<sup>157</sup> Here, the county, defending its preferential program, introduced two post-enactment reports documenting the impact of discrimination in the local construction and goods and services industries.<sup>158</sup>

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<sup>147</sup> For the past eight years, the price evaluation adjustment for SDBs has been suspended for DOD procurements because the DOD exceeded its 5% goal for contract awards to SDBs. See Memorandum, Shay D. Assad, Director, Defense Procurement and Acquisition Policy, to Directors of Defense Agencies et al., subject: Class Deviation-Suspension of the Price Evaluation Adjustment for Small Disadvantaged Businesses (Feb. 9, 2007) (on file with author).

<sup>148</sup> SBCRA, *supra* note 7.

<sup>149</sup> Mark Johnson, *Legislate First, Ask Questions Later: Post-Enactment Evidence in Minority Set-Aside Litigation*, U. CHI. LEGAL F. 303, 304 (2002).

<sup>150</sup> See *id.* (citing for example, *Coral Constr. Co. v. King County*, 941 F.2d 910 (9th Cir. 1991), and *Harrison & Burrowes Bridge Constructors, Inc. v. Cuomo*, 981 F.2d 50 (2d Cir. 1992)). Such requisite data has been referred to as "post-enactment data."

<sup>151</sup> See *Small Business Contracting: Observations from Reviews of Contracting and Advocacy Activities of Federal Agencies: Testimony, Before the Subcomm. on Government Management, Organization, and Procurement; H. Comm. on Oversight and Government Reform*, GAO-07-1255T, Sept. 26, 2007 [hereinafter GAO-07-1255T] (statement of William B. Shear, Dir., Financial Markets and Community Investment), available at <http://www.gao.gov/cgi-bin/getrpt?GAO-07-1255T>.

<sup>152</sup> Johnson, *supra* note 149, at 305 (discussing the *Croson* Court's requirement for statistical evidence in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 459 (1989)).

<sup>153</sup> See *id.* (citing *J.A. Croson Co.*, 488 U.S. at 498).

<sup>154</sup> *Id.*

<sup>155</sup> JUAN WILLIAMS, THURGOOD MARSHALL: AMERICAN REVOLUTIONARY 388 (1st ed. 1998) (citing Justice Marshall's dissent in *J.A. Croson Co.*, 488 U.S. 459).

<sup>156</sup> See *id.*

<sup>157</sup> 941 F.2d 910 (9th Cir. 1991).

The Ninth Circuit held that while a “municipality must have some concrete evidence of discrimination in a particular industry before it may adopt a remedial program,” it would not automatically strike down a program if the evidence available at the time of the enactment did not completely satisfy both prongs of the strict scrutiny test.<sup>159</sup> Instead, the Ninth Circuit held that courts should evaluate such programs on the basis of all the evidence presented, whether that evidence was available to the legislature before or after enactment.<sup>160</sup> The *Coral Construction* court required sufficient evidence to establish that, at the time of enactment, the legislature had a good-faith reason to believe discrimination had occurred.<sup>161</sup>

Several circuits have followed the Ninth Circuit and found that less evidence is required for enactment than is required for judicial review.<sup>162</sup> In *Shaw v. Hunt*<sup>163</sup> the Supreme Court held that the state must identify the targeted discrimination with some specificity.<sup>164</sup> The Court further held that the legislature must have a “strong basis in evidence to conclude that remedial action was necessary “before it embarks on an affirmative-action program.”<sup>165</sup> While decisions prior to *Shaw* allowed the admission of post-enactment evidence,<sup>166</sup> “the post-*Shaw* jurisprudential landscape is not nearly so neat and tidy.”<sup>167</sup> “Some courts continue to consider post-enactment evidence,<sup>168</sup> while others have held that the Supreme Court decision in *Shaw* precludes such evidence.”<sup>169</sup>

## 2. A Narrowly Tailored Glass Ceiling

Whether the government still has a compelling reason to implement remedial measures and whether racism exists will continue to be an issue, the revised rules pertaining to MBEs are tailored to place strong emphasis on using race neutral means to increase minority participation in government contracting.<sup>170</sup>

The revised rules, as discussed above, require that only contractors from certain industries, as prescribed by DOC, be given preferences; that the SBA certify MBEs as disadvantaged as opposed to self-certification; that non-minorities be allowed to demonstrate individual social disadvantage by preponderance of the evidence rather than by clear and convincing evidence; that 10% set-aside in the transportation industry be a goal for states in federally funded highway contracts as opposed to a mandate; and that price evaluation adjustments be suspended for one year following a fiscal year in which the 5% goal of all contract awards are achieved. The revised rules, as applied to post-*Adarand* cases, should arguably pass the narrowly tailored prong of the strict scrutiny test.

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<sup>158</sup> See *id.* at 915.

<sup>159</sup> See *id.* at 919. Concrete evidence could include limited disparity studies or anecdotal evidence. *Id.*

<sup>160</sup> See *id.*

<sup>161</sup> See *id.* at 921 (“Where a state has a good faith reason to believe that systematic discrimination has occurred, and is continuing to occur, in a local industry, we will not strike down the program for inadequacy of the record if subsequent factfinding bears out the need for the program.”).

<sup>162</sup> See Johnson, *supra* note 149, at 310 (referencing several courts that have followed the Ninth Circuit); see *Harrison & Burrowes Bridge Constructors, Inc. v. Cuomo*, 981 F.2d 50 (2d Cir. 1992); *Concrete Works of Colo. v. Denver*, 36 F.3d 1513 (10th Cir. 1994); *Ensley Branch NAACP v. Siebels*, 31 F.3d 1548 (11th Cir. 1994); *Eng’g Contractors Ass’n of S. Fla. Inc. v. Metro. Dade County*, 122 F.3d 895 (11th Cir. 1997); *Contractors Ass’n of E. Penn., Inc. v. Philadelphia*, 91 F.3d 586 (3d Cir. 1996).

<sup>163</sup> 517 U.S. 899 (1996).

<sup>164</sup> See *id.* at 909.

<sup>165</sup> *Id.* at 910.

<sup>166</sup> See, e.g., *Harrison & Burrowes Bridge Constructors, Inc. v. Cuomo*, 981 F.2d 50; *Concrete Works of Colo. v. City of Denver*, 36 F.3d 1513; *Ensley Branch NAACP v. Siebels*, 31 F.3d 1548; *Eng’g Contractors Ass’n of S. Fla. Inc. v. Metro. Dade County*, 122 F.3d 895; *Contractors Ass’n of E. Penn., Inc. v. Philadelphia*, 91 F.3d 586.

<sup>167</sup> Johnson, *supra* note 149, at 314.

<sup>168</sup> *Id.* (citing for example, *Eng’g Contractors*, 122 F.3d at 912 (ruling in 1997 that post-enactment evidence is admissible); *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1166 (10th Cir. 2000) (admitting post-enactment evidence)).

<sup>169</sup> *Id.* (citing *Rothe Dev. Corp. v. Dep’t of Defense*, 262 F.3d 1306, 1325–28 (Fed Cir 2001)).

<sup>170</sup> See *Sherbrooke Turf, Inc. v. Minn. Dep’t of Transp.*, 345 F.3d 964 (8th Cir. 2003), *W. States Paving Co., Inc. v. Wash. State Dep’t of Transp.*, 407 F.3d 983 (9th Cir. 2005).

In *Sherbrooke Turf*,<sup>171</sup> the United States Court of Appeals for the Eighth Circuit found that the revised DOT regulations were narrowly tailored. First the court stated that the regulations placed strong emphasis on “the use of race-neutral means to increase minority business participation in government contracting,” explaining that “narrow tailoring does not require exhaustion of every conceivable race-neutral alternative,” but it does require “serious, good faith consideration of workable race-neutral alternatives.”<sup>172</sup> Second, the court stated that “the revised program was flexible in that it had threshold earning limitations so that any individual whose net worth was more than \$750,000 could not qualify as economically disadvantaged.”<sup>173</sup> Third, the revised rules were tied to participation in relevant labor markets where minorities would have received contracts but for past discrimination. And finally, the court stated that “DOT and Congress took significant steps to minimize the race-based nature of the DBE program by creating a rebuttable presumption for certain racial minorities and excluding wealthy minority owners while allowing non-minorities the opportunity to demonstrate social and economic disadvantage.”<sup>174</sup> While race, under the new rules is still relevant, it is not a determinative factor. Instead, serious, good-faith, and workable race-neutral measures are considered first.

*Sherbrooke Turf* supports the contention that the government measures are narrowly tailored as long as alternative race-neutral remedies are considered; the measures are flexible and will expire when the disparity has been remedied; the remedial measures relate to the relevant labor market; and the impact of the remedy on third parties is considered. Arguably, the statutory and regulatory changes that took place after *Adarand* ensured the federal government’s preferential policies would pass the narrowly tailored prong of the strict scrutiny standard. However, the issues that remain disputed are whether DOC’s findings regarding the existence of past discrimination are substantial enough to withstand the compelling interest prong of strict scrutiny and whether state or federal data is admissible to establish such findings that support race-based preferential programs.

In *Western Paving Co., Inc. v. Washington State Department of Transportation*,<sup>175</sup> the United States Court of Appeals for the Ninth Circuit agreed with *Sherbrooke* and the Eighth Circuit, at least with regards to holding that Congress identified a compelling remedial interest when it enacted TEA-21 and that the revised DOT regulations were narrowly tailored to achieve that objective.<sup>176</sup> The court however held that the state actor in *Western Paving* “ha[d] not proffered any evidence of discrimination within its own contracting market and thus failed to meet its burden of demonstrating that its DBE program is narrowly tailored to further Congress’s compelling remedial interest.”<sup>177</sup> Unlike *Sherbrooke*, where the state actors, Minnesota and Nebraska, conducted market studies in their state’s contracting market, the State of Washington relied on federal studies.

The *Western Paving* holding read in conjunction with the *Shaw* holding, arguably places an insurmountable burden on the states. These decisions may ultimately force the states to conduct separate studies, making affirmative action a state program as opposed to a federally mandated program to remedy discrimination. With knowledge of how “our” United States has been divided over the issue of race since before the Civil War, it again calls to question how our “inconsistencies cast doubt on how well opponents of affirmative action adhere to the principles of color blindness and meritocracy, hinting that the standards we choose may be arbitrary.”<sup>178</sup>

Unless the Supreme Court allows pre-enactment evidence to include federal studies, state agencies will continue to invest significant resources to prove that racism still exists and that remedial measures are necessary. This places an undue burden on state agencies and will ultimately force them to reject any measures that ensure an equal distribution of wealth to minority contractors. Despite the fact that national studies conducted by the DOJ and the DOC justify and support the need for continued remedial measures, the additional requirement on the states makes it clear that the agencies themselves will be forced to ignore a congressionally mandated program in premonition that the Supreme Court will negate legislative intent by determining that federal programs violate equal protection rights.

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<sup>171</sup> See *Sherbrooke*, 345 F.3d at 964.

<sup>172</sup> *Id.* (quoting *Grutter v. Bollinger*, 539 U.S. 306 (2003)).

<sup>173</sup> *Id.* The newly proposed bill will increase the net worth due to inflation. See *SBCRA*, *supra* note 7.

<sup>174</sup> See *id.*

<sup>175</sup> *W. States Paving Co., Inc. v. Wash. State Dep’t of Transp.*, 407 F.3d 983.

<sup>176</sup> See *id.*

<sup>177</sup> *Id.*

<sup>178</sup> *WU*, *supra* note 1, at 162.

## VI. Changes and Recommendations

Over thirteen years ago, following the decision in *Adarand*, the federal government revised their rules for applying race-based preferences.<sup>179</sup> The rules were revised in response to the Supreme Court's ruling that a strict scrutiny standard of review would be applied where the federal government sponsored race-based preferences in any program.<sup>180</sup> Despite the fact that such preferences have not been held unconstitutional,<sup>181</sup> government agencies have responded with hesitance in allowing continuation of the programs. While preferences are contested in Court, statutory provisions *permit* government agencies to apply race based preferences in government contracts in order to meet statutory goals for SDB procurements.<sup>182</sup> The FAR *requires* such preferences under certain circumstances.<sup>183</sup> However, the combination of litigation threats, statutory exceptions for DOD agencies, and the DOC's incomplete implementation of the FAR requirements have resulted in a situation where the statutorily permissible 10% price preference for SDB's, one of the most powerful tools available to agencies, is not widely applied.<sup>184</sup> It seems that Congress itself has ended their own program in premonition that the Supreme Court will negate legislative intent by determining that federal programs violate equal protection rights. Rather than allowing the preferential programs to end completely or to allow violations of equal protection rights, certain suggestions and alternatives should be considered.

### 1. Legislative Recommendations

Past societal discrimination is not necessarily an indication of present discrimination and pre-enactment evidence should only be considered to determine whether there has been compliance with preferential policies. However, government agencies have invested significant resources to produce statistical evidence establishing a level of racism sufficient enough to justify minority set-asides and preferences.<sup>185</sup> Expenses should not be on the agencies and states alone. In addition to the courts outlining admissible evidence, Congress should implement legislation that will not penalize jurisdictions financially for attempting to comply with judicial procedures. Where evidence of discrimination is substantiated, those specific industries that discriminate should be held accountable. Discriminating industries should be forced to contract with MBEs and fines should be implemented as reimbursement for the research required to make regulatory change. Additionally, the courts should enforce legislation that specifically prohibits race discrimination in public contracting and Congress should establish effective enforcement procedures.

### 2. Race-Neutral Measures for Awarding Contracts

Currently, the Supreme Court mandates that agencies consider race-neutral alternatives before employing preferences. However, it does not appear that either the DOJ or the Supreme Court offers direction regarding what agencies may do to demonstrate they are considering race-neutral alternatives. If such alternatives are going to be effective, the DOJ should develop guidance for agencies on how to implement race-neutral alternatives.

Debatably, race-neutral would require that preferential programs focus on disadvantaged status rather than race or ethnicity. If so, the disadvantaged status would be based solely on economic or social disadvantage. The post-*Adarand* regulations that make race a rebuttable presumption arguably gets us closer to a race-neutral alternative. Eliminating the race element completely would certainly be consistent with *Adarand*, however completely eliminating race as a consideration would not take into account the discriminatory practices of individuals who still use race as a reason for exclusion. Removing race as a consideration, in effect, makes affirmative action a program for the poor. Any preferences granted in

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<sup>179</sup> See Wallace & Schooner, *supra* note 95, at 3.

<sup>180</sup> See *id.* at 4.

<sup>181</sup> See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995). The ruling in *Adarand* held that strict scrutiny should be applied where federal government sponsored race based preferences, however the preferences themselves were not held unconstitutional. *Id.*; see also Rothe, *supra* note 9.

<sup>182</sup> See 10 U.S.C.S. § 2323 (LexisNexis 2008); 15 U.S.C.S. §§ 631–657.

<sup>183</sup> See FAR, *supra* note 104, §§19.000–19.1204.

<sup>184</sup> “On October 23, 1995, the DOD issued a directive suspending certain SDB set-aside provisions of the Defense Federal Acquisition Regulation Supplement, in light of *Adarand*.” Tolan, *supra* note 13, at 107.

<sup>185</sup> Johnson, *supra* note 149, at 304.

order to redistribute wealth from the haves to the have-nots, is a positive step that would benefit both minorities and non-minorities. But, while poverty can be overcome, race is an immutable characteristic that will always put some at a disadvantage.

### 3. *Defending Diversity - A Business Case for Diversity*

The overall goal of both state and federal agencies should be to eliminate the need for affirmative action altogether. One method of doing so is by teaching diversity in the workplace. If the racist mentality is removed, the need for affirmative action may become obsolete.

The business case for diversity in the workplace rests on the premise that organizations need well-managed diversity if they are to meet or exceed the expectations of key stakeholder groups: shareholders or taxpayers, customers and clients, employees, suppliers, and the communities and societies within which they operate. Further, at the level of public policy development, there is a clear recognition that workplace diversity is a critical variable in developing harmonious, stable, and progressive societies.<sup>186</sup>

Government agencies continue to face the pressure of protecting the equal rights of non-minority or non-disadvantaged contractors while also achieving the statutory goals for SDB procurements. In order to do both, it is integral that diversity training be given at all levels of government procurement. The key decision makers in contract award, to include the head of respective agencies and their contracting officers, should all receive diversity training. With this training, it is possible that affirmative action programs may not be necessary in the future.

As a business concept, diversity rejects quotas and much of the legislative and regulatory mandated targets of affirmative action.<sup>187</sup> Although the concept of affirmative action should not be rejected immediately, a new paradigm of diversity may be a better alternative.

## VII. Conclusion

The Government spent an estimated \$412 billion on contracting in 2006, yet only 20% went to small businesses, falling short of the 23% goal.<sup>188</sup> Further, only 6.75% of those contracting opportunities went to SDB's.<sup>189</sup> While this arguably exceeds the 5% goal, it does not exceed the number of eligible contractors who were not considered. Many believe that preferential policies aimed at assisting minorities are no longer necessary and that the government should not meddle in private wealth and business. However, it appears that without government interference, use of MBEs dramatically decreases.<sup>190</sup> The SBA is charged with negotiating procurement goals with each federal agency, reviewing each agency's results and ensuring that the statutory goals are met. Current reports indicate that the federal government is still not meeting its mandate despite the availability of SBE.<sup>191</sup> Opponents and supporters of government affirmative action policies have debated the issue of preferences awarded by the federal government to small disadvantaged businesses since inception. "Proponents regard the continuation of affirmative action as a litmus test of our nation's commitment to racial justice."<sup>192</sup> "Opponents see it as an unacceptable violation of the idea of equality of opportunity, and the principle that the government should treat its citizens in a color-blind fashion."<sup>193</sup> Unfortunately we do not live in a color-blind society and it is incumbent

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<sup>186</sup> Dr. Jeffrey Gandz, *A Business Case for Diversity*, HUM. RESS. & SOC. DEV. (Canada), Fall 2001, available at [http://www.equalopportunity.on.ca/eng\\_g/documents/BusCase.html](http://www.equalopportunity.on.ca/eng_g/documents/BusCase.html).

<sup>187</sup> *Id.*

<sup>188</sup> SBCRA, *supra* note 7 (statement of Sen. John Kerry, Chairman of the Senate Committee of Small Business and Entrepreneurship (citing Eagle Eye Publishing)).

<sup>189</sup> *Id.*

<sup>190</sup> Proposed Reforms to Affirmative Action in Federal Procurement, 61 Fed Reg. 26,042 (May 23, 1996).

<sup>191</sup> GAO-07-1255T, *supra* note 151.

<sup>192</sup> William A. Gaston, *The Affirmative Action Debate*, in AN AFFIRMATIVE ACTION STATUS REPORT: EVIDENCE AND OPTIONS 7, 1 PHIL. & PUB. POL'Y Q. (Winter/Spring 1997) (quoting Glen C. Loury), available at <http://www.puaf.umd.edu/IPP/1QQ.HTM>.

<sup>193</sup> *Id.*

upon the government to broaden access to America's prosperity. It will take more than the fifty-four years since the end of segregation to cure the effects of centuries of discrimination.

In his dissent of *Bakke*, Justice Marshall stated:

It must be remembered that during most of the past 200 years, the Constitution as interpreted by this court did not prohibit the most ingenious and pervasive forms of discrimination against the Negro. Now when a state acts to remedy the effects of that legacy of discrimination, I cannot believe that this same Constitution stands as a barrier.<sup>194</sup>

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<sup>194</sup> WILLIAMS, *supra* note 155, at 367 (quoting Justice Thurgood Marshall's dissenting opinion in *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978)).