

**PRESUMED DISADVANTAGED: CONSTITUTIONAL  
INCONGRUITY IN FEDERAL CONTRACT  
PROCUREMENT AND ACQUISITION REGULATIONS**

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*The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.*<sup>1</sup>

## I. PREFACE

Race-based preferencing in federal contract procurement is part of a larger governmental initiative colloquially known as “affirmative action.”<sup>2</sup> Affirmative action in the federal context originated under President Kennedy, when he ordered the “Committee on Equal Employment Opportunity . . . immediately to scrutinize and study employment practices of the Government of the United States, and to consider and recommend additional affirmative steps which should be taken . . . to realize more fully *the national policy of nondiscrimination.*”<sup>3</sup> Black’s Law Dictionary defines discrimination as “[t]he effect of a law . . . that denies privileges to a certain class because of race, age, sex, nationality, religion, or disability.”<sup>4</sup> Yet less than twenty years after Kennedy’s noble proclamation, Congress enacted legislation that denies federal contracting opportunities to certain small businesses solely on the basis of their racial composition: Section 8(a) and Section 8(d) of the Small Business Act (the “Act”).<sup>5</sup>

## II. INTRODUCTION

As currently written, two of the Small Business Administration’s federal contract procurement and acquisition programs, Section 8(a)<sup>6</sup> and Section 8(d),<sup>7</sup> which are both largely race-based, are violative of both the due process and the equal protection ensured to all Americans by the United States

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<sup>1</sup> *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007).

<sup>2</sup> Affirmative action is defined as “[a] set of actions designed to eliminate existing and continuing discrimination, to remedy lingering effects of past discrimination, and to create systems and procedures to prevent future discrimination.” BLACK’S LAW DICTIONARY 68 (9th ed. 2009). There have traditionally been three main focuses of affirmative action programs: employment, education, and public contracting, the latter of which is the focus of this Note. For further information on affirmative action, see Cynthia L. Estlund, *Putting Grutter to Work: Diversity, Integration, and Affirmative Action in the Workplace*, 26 BERKELEY J. EMP. & LAB. L. 1 (2005) (discussing affirmative action in employment); Mark R. Killenbeck, *Pushing Things Up to Their First Principles: Reflections on the Values of Affirmative Action*, 87 CALIF. L. REV. 1299 (1999) (general discussion of affirmative action); Goodwin Liu, *Affirmative Action in Higher Education: The Diversity Rationale and the Compelling Interest Test*, 33 HARV. C.R.-C.L. L. REV. 381 (1998) (discussing affirmative action policies in secondary education).

<sup>3</sup> Exec. Order No. 10,925, 26 Fed. Reg. 1,977 (Mar. 6, 1961) (emphasis added).

<sup>4</sup> BLACK’S LAW DICTIONARY, *supra* note 2, 534.

<sup>5</sup> 15 U.S.C. §§ 631–657 (2006 & Supp. IV 2010).

<sup>6</sup> *Id.* § 637(a).

<sup>7</sup> *Id.* § 637(d).

Constitution. In theory the Section 8(a) and Section 8(d) programs (“Programs”) are designed to increase the participation of firms owned by economically disadvantaged minorities in federal contracting, accomplished by virtue of the inclusion of a plethora of racial groups qualified to participate. However, in effect, because the list of racial minorities that are eligible for participation is so expansive, the Programs merely discriminate against one racially “distinct” group.<sup>8</sup>

Part I of this Note will examine the historical and legal underpinnings of race-based preferencing in federal contract procurement, which has ultimately led to the current version of the Programs. This Part will detail the origins of the federal government’s contract procurement programs, including the formation of the Small Business Administration (“SBA”), which is the agency responsible for enforcing the legislation upon which this article is focused. Furthermore, this Part will review the legislative and executive history leading to the enactment of the legislation challenged herein.

Although reasonable minds may differ on when the genesis of race-based preferencing in federal contracting began, one appropriate point with which to begin an analysis is the Roosevelt administration’s issuance of Executive Order 8802.<sup>9</sup> This Order prohibited current and future discrimination by the federal government, but notably had no remedial properties.<sup>10</sup> Shortly thereafter, Congress authorized creation of the Smaller War Plants Corporation, which had authority to subcontract with small businesses.<sup>11</sup>

The next major milestone in the federal government’s fight to end discrimination came with the promulgation of the Civil Rights Act of 1964<sup>12</sup> during the Johnson administration. Included in that massive and groundbreaking legislation was Title VII, which was the first federal law designed to protect citizens from employment discrimination based on race, color, religion, sex, or national origin.<sup>13</sup> In hindsight, the aforementioned actions, along with other legislative and executive acts, established the

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<sup>8</sup> To limit the scope of this Note, an in-depth review of the gender-based preferences in these programs will not be provided because gender, unlike race, is a “quasi-suspect classification” and a challenged law would therefore be reviewed under the less restrictive “intermediate scrutiny” standard. *See United States v. Virginia*, 518 U.S. 515, 532–33 (1996); *see also* Jason M. Skaggs, *Justifying Gender-Based Affirmative Action Under United States v. Virginia’s “Exceedingly Persuasive Justification” Standard*, 86 CALIF. L. REV. 1169 (1998).

<sup>9</sup> Exec. Order No. 8,802, 6 Fed. Reg. 3,109 (June 25, 1941).

<sup>10</sup> *Id.*

<sup>11</sup> Small Business Mobilization Act, Pub. L. No. 77-603, 56 Stat. 351 (1942) (50 App. U.S.C. §§ 1101–09, 1111 (omitted), § 1110 (transferred 12 U.S.C. § 265), § 1112 (repealed by 61 Stat. 449 (1947))).

<sup>12</sup> Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at Chapter 21 of 42 U.S.C.).

<sup>13</sup> 42 U.S.C. §§ 2000e to e-17 (2006 & Supp. III 2009).

foundation upon which the 1978 amendments to the Act<sup>14</sup> were enacted. Among the 1978 amendments were provisions that altered the Programs to include race-based preferencing schemes for both federal prime contractors<sup>15</sup> and their subcontractors.

Part II of this Note will explore the constitutional obligations of race-based federal contracting programs. This inquiry will begin with an examination of *Fullilove v. Klutznick*<sup>16</sup> and *City of Richmond v. J.A. Croson Co.*<sup>17</sup> and will ultimately lead to the seminal case on the subject: *Adarand Constructors, Inc. v. Peña*.<sup>18</sup> The United States Supreme Court has held that race-based preferencing in government contract procurement and acquisition programs is not per se constitutionally defective.<sup>19</sup> However, the Court has also held that the standard of review to be applied when evaluating such programs, whether federal, state, or local, is “strict scrutiny” because race-based preferencing involves a classification based on race—a classification which has been deemed “suspect.”<sup>20</sup> To pass constitutional muster under strict scrutiny, race-based preferencing programs must be narrowly tailored to serve a compelling governmental interest.<sup>21</sup>

Part III of this Note will begin with an overview of the federal contract procurement and acquisition process and will then focus at length on *Adarand Constructors v. Peña*<sup>22</sup> and its subsequent judicial history. *Adarand* is perhaps the most influential case regarding race-based federal contracting preferences. Moreover, it provides a clear example of how Section 8(d) functions and how race-based preferences violate constitutionally protected interests.

Part IV of this Note will examine the constitutionality of the Programs. Within Part IV, the argument will be presented that in their current form, i.e., with the inclusion of race-based preferences based on a *presumed* social disadvantage, the Programs cannot withstand strict scrutiny. Moreover, Part IV

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<sup>14</sup> Pub. L. No. 95-507, 92 Stat. 1757 (1978).

<sup>15</sup> See U.S. SMALL BUS. ASS'N, SUBCONTRACTING ASSISTANCE PROGRAM 92 (2006), available at <http://www.sba.gov/sites/default/files/files/Subcontracting%20Assistance%20Program.pdf> (defining a prime contractor as a “large or small business which has one or more contracts with the Federal Government”); see also *Prime Contractor*, BUSINESSDICTIONARY.COM, <http://www.businessdictionary.com/definition/prime-contractor.html> (last visited Nov. 6, 2012) (defining a prime contractor as the “[c]hief contractor who has a contract with the owner of a project or job . . . and may employ (and manage) one or more subcontractors to carry out specific parts of the contract”).

<sup>16</sup> 448 U.S. 448 (1980).

<sup>17</sup> 488 U.S. 469 (1989).

<sup>18</sup> 515 U.S. 200 (1995).

<sup>19</sup> See *id.* at 237.

<sup>20</sup> See *id.* at 227.

<sup>21</sup> See *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

<sup>22</sup> 515 U.S. 200 (1995).

will argue that the Programs could be more narrowly tailored while still achieving the same legislative goals by replacing the race-based preferences with race-neutral alternatives. Finally, Part IV will also argue that the requirement of an annual small disadvantaged business (“SDB”) participation goal is analogous to the racial quotas found unconstitutional in *Gratz v. Bollinger*.<sup>23</sup>

Part V of this note will propose alterations to the Programs that would bring them into congruence with the Constitution. The first proposal is to implement an individualized need-based assessment as a threshold to eligibility for the Programs. Furthermore, Part V will argue that the proper focus of the SBA should be on implementing a need-based review process for determining Program eligibility because need is wholly race-neutral. This Part will also argue that the subcontractor compensation clause currently mandated for most non-Section 8(a) prime contractors should be abandoned. In conclusion, Part V will present the argument that if the Programs were repealed, a civil rights action under either 42 U.S.C. § 1981 or 42 U.S.C. § 1983, depending on the nature of the contractual relationship, would still provide sufficient and meaningful protection to a minority-owned business that feels it was unfairly discriminated against during the contract acquisition phase.

### III. HISTORICAL AND LEGAL BACKGROUND

Equality in federal contracting became law in the twentieth century, but in a larger sense, it is merely one point in the continuum of this nation’s advancement toward a just and fair society. Any thoughtful analysis of the constitutional issues surrounding race-based federal preferencing programs must be based upon a thorough understanding of the subject’s history. That history shows that the government’s efforts to promote fairness and equality in the realm of federal contracting—noble efforts to be sure—have been expanded beyond what is constitutionally permissible.

#### A. *Early Anti-Discrimination Policies: Roosevelt to Johnson*

In the mid-twentieth century, the legislative and executive branches of the United States government recognized that the budgetary power of the federal government could be used as a tool to aid in eliminating racial discrimination. The roots of the federal government’s anti-discrimination contracting policies date back at least to the administration of President Franklin D. Roosevelt, during which the first executive orders prohibiting discrimination in federal contract procurement were issued.<sup>24</sup>

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<sup>23</sup> 539 U.S. 244, 275–76 (2003).

<sup>24</sup> Exec. Order No. 8,802, 6 Fed. Reg. 3,109 (June 25, 1941).

Roosevelt issued Executive Order 8802 on June 25, 1941, which began by stating that the Order's purpose was to "encourage full participation in the national defense program by all citizens . . . *regardless of race, creed, color, or national origin*" because the only way the country could be defended was "with the help and support of *all* groups within its borders."<sup>25</sup> Accordingly, Roosevelt ordered that "[a]ll contracting agencies of the Government of the United States shall include in all defense contracts hereafter negotiated by them a provision obligating the contractor not to discriminate against any worker because of race, creed, color, or national origin."<sup>26</sup> However, the Order was issued because of the compelling governmental interest in preparing the nation for war with Germany and Japan, not for the altruistic reasons of later legislation. Notably, the Order merely prohibited contemporaneous and future discrimination; it did not have an eye towards any past societal, individual, or industry-specific discrimination, all three of which became future justifications for race-based legislation.

The origins of the federal government's modern relationship with small businesses can also be traced to the Roosevelt era. In June 1942, Congress passed the Small Business Mobilization Act to aid national defense through increased production of war materiel.<sup>27</sup> Congress recognized that small businesses might not have the ability to produce war materiel at the same price as larger firms; therefore, it was in the nation's interest to pay a higher price to "mobilize the productive facilities of small business in the interests of successful prosecution of the war."<sup>28</sup> Accordingly, the Smaller War Plants Corporation, a subsidiary of the War Plants Corporation, was created pursuant to the Small Business Mobilization Act and was granted authority to directly subcontract with small businesses of five hundred or fewer employees for production of war materiel.<sup>29</sup>

Perhaps the greatest advancements toward a society free of discrimination were made during the administration of Lyndon Johnson. During his presidency, Johnson constantly pushed for enhanced civil rights protections, the most significant of which lay in the Civil Rights Act of 1964.<sup>30</sup> Among the sweeping changes contained therein, Title VII made it unlawful "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual's race, color, religion,

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<sup>25</sup> *Id.* at 3,109 (emphasis added).

<sup>26</sup> *Id.* (emphasis added).

<sup>27</sup> Small Business Mobilization Act, Pub. L. No. 77-603, 56 Stat. 351 (1942) (50 App. U.S.C. §§ 1101-09, 1111 (omitted), § 1110 (transferred 12 U.S.C. § 265), § 1112 (repealed by 61 Stat. 449 (1947))).

<sup>28</sup> *Id.* at 351.

<sup>29</sup> *Id.* at 354.

<sup>30</sup> Pub. L. No. 88-352, 78 Stat. 241 (1965) (codified as amended at Chapter 21 of 42 U.S.C.).

sex, or national origin.”<sup>31</sup> Furthermore, similar to Executive Order 8802 that Roosevelt had issued in 1941, Johnson issued the “Equal Employment Opportunity” Order on September 24, 1965.<sup>32</sup> This Order established several policies of the federal government, including a prohibition on discrimination in governmental employment, a prohibition on discrimination in employment by government contractors and subcontractors, and nondiscrimination provisions in federally-assisted construction contracts.<sup>33</sup>

*B. Establishment of the Small Business Administration and the 1978 Amendments*

The SBA was created on July 30, 1953, when President Eisenhower signed the Act.<sup>34</sup> The SBA’s original stated purpose was to “aid, counsel, assist, and protect insofar as possible the interests of small business concerns.”<sup>35</sup> In 1958 the SBA was established as a permanent federal agency under executive control.<sup>36</sup>

Much of the SBA’s pre-1978 legislation signaled the federal government’s desire to affect a prospective prohibition on discrimination in federal contract procurement. However, due to perceived weaknesses in the Act’s effectiveness at including SDBs, Congress charted a new course in 1978 when it approved several amendments, thereby creating the Programs.<sup>37</sup>

Pursuant to the 1978 amendments, the Act<sup>38</sup> now says that “[i]t is the policy of the United States that small business concerns . . . owned and controlled by socially and economically disadvantaged individuals, . . . shall have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency.”<sup>39</sup> The 1978 amendments also created a requirement that the SBA extend financial, managerial, technical and other services to certified SDBs.<sup>40</sup> Furthermore, the 1978 amendments produced a presumption that most racial minorities are socially disadvantaged.<sup>41</sup>

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<sup>31</sup> 42 U.S.C. § 2000e-2(a) (2006).

<sup>32</sup> Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (Sept. 24, 1965).

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

<sup>34</sup> Small Business Act of 1953, Pub. L. No. 83-163, § 204, 67 Stat. 230, 233–34.

<sup>35</sup> *Id.*

<sup>36</sup> Pub. L. No. 85-536, 72 Stat. 384 (1958) (codified as amended at 15 U.S.C. §§ 631–57q (2006 & Supp. IV 2010)).

<sup>37</sup> Pub. L. No. 95-507, 92 Stat. 1757 (1978) (codified as amended at 15 U.S.C. § 637(a), (d) (2006 & Supp. IV 2010)).

<sup>38</sup> 15 U.S.C. §§ 631–57q.

<sup>39</sup> *Id.* § 637(d)(1).

<sup>40</sup> *Id.* § 637(b)(1)(A)(i).

<sup>41</sup> *Id.* § 637(d)(3)(C).

Currently, the Act defines a “socially disadvantaged individual” as one “who [has] been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities.”<sup>42</sup> The Act also defines “economically disadvantaged individuals” as “[a] socially disadvantaged individual[] whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged.”<sup>43</sup>

In order to achieve the goal of increasing SDB participation in federal contracting, the 1978 amendments further mandated that the following language be included in nearly all federal contracts: “The contractor hereby agrees to carry out [the] policy [of increasing SDB participation] in the awarding of contracts to the fullest extent consistent with the efficient performance of this contract.”<sup>44</sup> To implement the aforementioned statutory commands, the SBA has employed two mechanisms: the Section 8(a) and Section 8(d) programs.

#### 1. Section 8(a)

The purpose of Section 8(a) is to “assist eligible [SDBs] compete in the American economy.”<sup>45</sup> Additionally, it provides businesses participating in the program with a plethora of benefits, such as eligibility to bid on sole-source<sup>46</sup> and “set aside”<sup>47</sup> contracts, and help from the SBA in general business procurement and managerial guidance. Section 8(a) essentially allows the government, after relevant contract procurement procedures have been completed,<sup>48</sup> to choose a more expensive alternative to an equivalent product or service merely because the more expensive alternative has been certified as a SDB.

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<sup>42</sup> *Id.* § 637(a)(5).

<sup>43</sup> *Id.* § 637(a)(6)(A).

<sup>44</sup> *Id.* § 637(d)(3)(B).

<sup>45</sup> 13 C.F.R. § 124.1 (2012).

<sup>46</sup> “*Sole source acquisition* means a contract for the purchase of supplies or services that is entered into or proposed to be entered into by an agency after soliciting and negotiating with only one source.” *See* 48 C.F.R. § 2.101 (2011).

<sup>47</sup> “Set-asides are contract dollars allocated to specific would-be suppliers, including small businesses owned by minorities . . . . The Small Business Administration (SBA) sets annual-procurement preference goals for the federal government to follow.” Jill R. Aitoro, *Federal Government to Award \$20 Billion in Set-Aside Contracts*, CRN.COM (Feb. 15, 2006, 4:50 PM), [http://www.crn.com/news/channel-programs/180202489/federal-government-to-award-20-billion-in-set-aside-contracts.htm?jsessionid=ZGJXWFsoKEovmru+PhEJMw\\*\\*.ecappj02](http://www.crn.com/news/channel-programs/180202489/federal-government-to-award-20-billion-in-set-aside-contracts.htm?jsessionid=ZGJXWFsoKEovmru+PhEJMw**.ecappj02).

<sup>48</sup> *See infra* Part III.D.

To be eligible for Section 8(a) certification, the applicant-business must meet several threshold requirements: it must be capable of being classified as a “small” business,<sup>49</sup> it must “demonstrate[] potential for success,”<sup>50</sup> and it must be “owned and controlled by a socially and economically disadvantaged individual.”<sup>51</sup> Regarding ownership, the SBA’s regulations require that at least 51% of the business be owned by individuals who qualify as both “socially”<sup>52</sup> and “economically”<sup>53</sup> disadvantaged.

Under the Act, there exists a *presumption*<sup>54</sup> that certain racial minorities are socially disadvantaged.<sup>55</sup> The SBA’s regulations offer the following guidance for determining whether an individual is “socially disadvantaged”:

There is a rebuttable *presumption* that the following individuals are socially disadvantaged: Black Americans; Hispanic Americans; Native Americans (Alaska Natives, Native Hawaiians, or enrolled members of a Federally or State recognized Indian Tribe); Asian Pacific Americans . . . ; and members of other groups designated from time to time by SBA . . . .<sup>56</sup>

Firms that wish to participate in the 8(a) program but are not owned and controlled by members of one of the aforementioned groups must establish by a “preponderance of the evidence” that they meet several requirements to be certified as a SDB.<sup>57</sup> First, the applicant-owner must show that they are socially disadvantaged, which can be done by either presenting specific evidence or through the above-mentioned statutory presumption.<sup>58</sup> Once the social disadvantage requirement is met, the applicant-owner then must show an *actual* economic disadvantage.<sup>59</sup>

An “economically disadvantaged” individual is defined as one who is socially disadvantaged and “whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially

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<sup>49</sup> 13 C.F.R. § 124.102.

<sup>50</sup> *Id.* § 124.101.

<sup>51</sup> 15 U.S.C. § 637(a)(4)(A)(i)(I) (2006); *see also* 13 C.F.R. § 124.101.

<sup>52</sup> 13 C.F.R. § 124.103; *see also* 15 U.S.C. § 637(a)(5).

<sup>53</sup> 13 C.F.R. § 124.104; *see also* 15 U.S.C. § 637(a)(6)(A).

<sup>54</sup> *See discussion infra* Part IV.A (discussing the presumption of social disadvantage).

<sup>55</sup> 13 C.F.R. § 124.103.

<sup>56</sup> *Id.* (emphasis added).

<sup>57</sup> *See id.* § 124.103(c)(1).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

disadvantaged.”<sup>60</sup> Each individual claiming economic disadvantage must describe it in a narrative statement and must also submit personal financial information.<sup>61</sup> The factors analyzed by the SBA to determine economic disadvantage include “income for the past three years . . . , personal net worth, and [total asset value].”<sup>62</sup> To be eligible for SDB certification, the individual claiming economic disadvantage must have a net worth less than \$250,000 prior to application, and less than \$750,000 for continued eligibility.<sup>63</sup> Additionally, the individual’s adjusted gross income for the three years prior to application must be lower than \$250,000 per annum<sup>64</sup> and no greater than \$350,000 per annum<sup>65</sup> for continued eligibility.

## 2. Section 8(d)

Section 8(d) program is similar to Section 8(a) in that they both are designed to increase SDB participation in federal contracting; however, Section 8(d) is notably different in several critical aspects. Section 8(a) allows federal agencies to award contracts directly to businesses that have received SBA certification as “socially and economically disadvantaged,”<sup>66</sup> whereas Section 8(d) applies to eligibility for subcontractors hired by federal prime contractors if the prime contractor is not a certified Section 8(a) firm.<sup>67</sup> Section 8(d) also includes an expanded list of potentially eligible participants: businesses owned by women, businesses owned by veterans, and HUBZone<sup>68</sup> businesses.

Under Section 8(d), when a federal contract over a certain value is awarded to a non-Section 8(a) prime contractor,<sup>69</sup> the prime contractor must submit a subcontracting plan.<sup>70</sup> The subcontracting plan must include a goal for

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<sup>60</sup> 15 U.S.C. § 637(a)(6)(A) (2006).

<sup>61</sup> 13 C.F.R. § 124.104(b)(1).

<sup>62</sup> *Id.* § 124.104(c).

<sup>63</sup> *Id.* § 124.104(c)(2).

<sup>64</sup> *Id.* § 124.104(c)(3)(i). Income is averaged for the three years prior to application and must not exceed an average of \$350,000 for a three year period after certification is obtained. *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> 15 U.S.C. § 637(a)(1)(B) (2006).

<sup>67</sup> *See* 48 C.F.R. § 19.702(a) (2011). *See generally* 15 U.S.C. § 637(d) (2006).

<sup>68</sup> 15 U.S.C. § 632(p)(1) (2006). HUBZone is the acronym for a historically underutilized business zone which is “any area located within 1 or more— (A) qualified census tracts; (B) qualified nonmetropolitan counties; (C) lands within the external boundaries of an Indian reservation; (D) redesignated areas; or (E) base closure areas,” all of which are determined by the SBA. *Id.*

<sup>69</sup> 48 C.F.R. § 19.702(a)(1). The current value for qualifying federal awards must exceed \$650,000 or \$1,500,000 if the contract is for construction. *Id.*

<sup>70</sup> 48 C.F.R. § 19.702. The subcontracting plan currently required contains eleven separate elements. For the statutory text of the subcontracting plan, see 48 C.F.R. § 52.219-9 (2011).

how much of the prime contract will be subcontracted to Section 8(d)-qualifying businesses, both as a percentage and a total dollar amount.<sup>71</sup> Additionally, the subcontracting plan includes a subcontractor compensation clause that creates “incentives” for prime contractors to accept bids from and hire certified SDBs instead of from their non-SDB counterparts: reasonable minds may differ on whether this constitutes “compensation” or is more appropriately characterized as a “bonus.” That difference in interpretation, discussed in Part IV of this Note, has been a source of contention in a litany of litigation, most notably in *Adarand Constructors, Inc. v. Pena*.<sup>72</sup>

To recap, certified Section 8(a) firms are permitted to bid on federal prime contracts. This means that the Section 8(a) firm contracts directly with the federal agency awarding the contract. However, if a contract is awarded to a non-Section 8(a) firm, that firm must include a subcontracting plan specifying how much of the original contract award will be allocated to Section 8(d) subcontractors.

At this point, one may wonder why an analysis of these programs is important. Aside from the argument that the Programs are unconstitutional, the amount of money spent on the Programs begs attention. Funding for the Programs is staggering not only when measured by volume, but also when measured by the percentage of funding directed to Section 8(a) and Section 8(d) firms. For an example of the sheer volume of money allocated to Section 8(a) firms, in 2010 the Department of Defense spending goal on Section 8(a) firms was upwards of \$12,000,000,000, with another \$8,000,000,000 directed to Section 8(d) firms.<sup>73</sup> Furthermore, some agencies are directed to spend grossly disproportionate amounts on Section 8(a) and Section 8(d) firms. An egregious example of disparate allocation is the United States Court of Appeals for the Federal Circuit, which was directed to spend one hundred percent of its 2010 small business budget on Section 8(a) firms.<sup>74</sup> Although the total dollar amount of these contracts—due to inflation—was certainly lower when the Programs were created, it was still only a matter of time before the constitutionality of race-based preferencing programs was challenged.

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<sup>71</sup> See 48 C.F.R. § 19.704(a)–(b) (2011).

<sup>72</sup> *Adarand Constructors, Inc. v. Pena* (*Adarand III*), 515 U.S. 200 (1995); see also discussion *infra* Part IV.

<sup>73</sup> FED. PROCUREMENT DATA SYS. – NEXT GENERATION, SMALL BUSINESS GOALING REPORT FISCAL YEAR 2010, available at [https://www.fpds.gov/downloads/top\\_requests/FPDSNG\\_SB\\_Goaling\\_FY\\_2010.pdf](https://www.fpds.gov/downloads/top_requests/FPDSNG_SB_Goaling_FY_2010.pdf) (last accessed Nov. 6, 2012).

<sup>74</sup> *Id.*

C. *The First Challenges: Fullilove and Croson*

The first major challenge to the constitutionality of race-based preferencing programs came in 1980. In *Fullilove v. Klutznick*,<sup>75</sup> the petitioners argued that a race-based preferencing scheme earlier enacted by Congress violated the Equal Protection Clause of the Fourteenth Amendment and the equal protection component of the Due Process Clause of the Fifth Amendment. The petitioner's specific challenge in *Fullilove* was that some of the amendments to the Local Public Works Capital Development and Investment Act of 1976<sup>76</sup> were facially unconstitutional.<sup>77</sup>

The amendments, created by the Public Works Employment Act of 1977,<sup>78</sup> generated the "minority business enterprise" ("MBE") provision<sup>79</sup> which said:

[N]o grant shall be made under this Act for any local public works project unless the applicant gives satisfactory assurance . . . that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises. For purposes of this paragraph, the term "minority business enterprise" means a business at least 50 per centum of which is owned by minority group members or, in case of a publicly owned business, at least 51 per centum of the stock of which is owned by . . . citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts.<sup>80</sup>

Under the MBE provision, a contract could be awarded to an MBE that had submitted an unreasonably high bid "if their bids reflect[ed] merely attempts to cover costs inflated by the present effects of prior disadvantage and discrimination."<sup>81</sup> Additionally, the MBE provision required that, absent an administrative waiver, at least ten percent of federal funds granted for local public works projects must be used by the grantee to procure services from MBEs.<sup>82</sup> The implementing regulations required the grantee "to seek out . . . [MBEs], to provide technical assistance as needed, to lower or waive bonding requirements where feasible, to solicit the aid of the Office of Minority

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<sup>75</sup> 448 U.S. 448 (1980), *abrogated in part by Adarand III*, 515 U.S. 200.

<sup>76</sup> Pub. L. No. 94-369, 90 Stat. 999 (codified as amended at 42 U.S.C. §§ 6701-10 (2006)).

<sup>77</sup> *Fullilove*, 448 U.S. at 453.

<sup>78</sup> Pub. L. No. 95-28, 91 Stat. 116 (codified as amended at 42 U.S.C. §§ 6701-10 (2006)).

<sup>79</sup> It is worth noting that the MBE provision at issue in *Fullilove* did not require a showing of actual economic disadvantage, which would later be required under Section 8(a) and Section 8(d).

<sup>80</sup> Pub. L. No. 95-28, § 103, 91 Stat. 116, 117.

<sup>81</sup> *Fullilove*, 448 U.S. at 448.

<sup>82</sup> *Id.*

Business Enterprise [and] the Small Business Administration . . . , and to give guidance through the intricacies of the bidding process.”<sup>83</sup>

*Fullilove* was an important case for several reasons. Not only was it a direct challenge to Congressional action, but the fragmented opinion<sup>84</sup> failed to resolve a major question: under which standard of review are challenges to race-based preferencing to be scrutinized? The opinion of the Court, delivered by Chief Justice Burger, upheld the MBE provision but failed to adopt a specific standard of review and instead employed a two-part test.<sup>85</sup> The Court first found that the objectives of the Local Public Works Capital Development and Investment Act of 1976 were within Congress’s authority under the Spending Power<sup>86</sup> and the Commerce Clause.<sup>87</sup> The Court then found that Congress’s use of racial and ethnic criteria was a constitutionally valid means to accomplish its objectives.<sup>88</sup> In so holding, the Court reiterated its previous position that in the MBE’s remedial context, there is no requirement that Congress act in a wholly “color-blind” fashion.<sup>89</sup>

Justice Powell wrote a separate concurrence to express his view that although the plurality had failed to specify the standard of review under which the program was reviewed, the plurality had in fact applied “strict scrutiny.”<sup>90</sup> Powell elucidated that even though the Court had perhaps unknowingly applied strict scrutiny, the program was still valid.<sup>91</sup> Powell explained that the Court had correctly determined that the ten percent set-aside was “a necessary means of advancing a compelling governmental interest,”<sup>92</sup> and thus passed constitutional muster under strict scrutiny.<sup>93</sup>

Justice Marshall filed an extensive concurrence in which intermediate scrutiny was advocated when analyzing the constitutionality of racial classifications that were made for the benefit of minorities by remedying the present effects of past discrimination.<sup>94</sup> Marshall believed that the classifications made in the MBE provision must “serve important governmental

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

<sup>84</sup> Five separate opinions were filed, with two pluralities.

<sup>85</sup> *Fullilove*, 448 U.S. at 473.

<sup>86</sup> U.S. CONST. art. I, § 8, cl. 1 (“The Congress shall have power to . . . provide for the . . . general welfare of the United States . . .”).

<sup>87</sup> *Id.* at art. I, § 8, cl. 3.

<sup>88</sup> *Fullilove*, 448 U.S. at 450.

<sup>89</sup> *See, e.g.*, *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

<sup>90</sup> *Fullilove*, 448 U.S. at 507 (Powell, J., concurring).

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

<sup>92</sup> *Id.* at 496.

<sup>93</sup> *Id.* at 507.

<sup>94</sup> *Id.* at 518–19 (Marshall, J., concurring).

objectives and [be] substantially related to achievement of those objectives.”<sup>95</sup> Because Marshall found the governmental interest to be important and the MBE provision to be substantially related to that interest, he therefore held that it survived intermediate scrutiny.<sup>96</sup>

In dissent, Justice Stewart argued that the Constitution required the federal government to meet the same standard as that required of the States when enacting race-based legislation.<sup>97</sup> Stewart believed the issue of race-based legislation had been identified and correctly resolved by Justice Harlan when the latter said “[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens. . . . The law regards man as man, and takes no account of his surroundings or of his color . . . .”<sup>98</sup> Because Stewart believed all race-based classifications were unconstitutional, he found the statute at issue to be invalid.<sup>99</sup>

Justice Stevens also dissented, arguing that “[r]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification.”<sup>100</sup> Essentially, Stevens believed that strict scrutiny was the appropriate standard and that because the classification at issue was not narrowly tailored, it therefore failed strict scrutiny.<sup>101</sup>

In the absence of a unified opinion regarding the correct standard under which race-based legislation was to be reviewed, *Fullilove* set little precedential value for future challenges to similar statutes. A similar issue would again receive attention from the Court a decade later in *City of Richmond v. J.A. Croson Co.*,<sup>102</sup> in which the Court struck down a state law that required prime contractors “to subcontract at least 30% of the dollar amount of each contract to one or more [MBEs].”<sup>103</sup>

In *Croson*, the Court held that “the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification” and that the appropriate standard of review for all racial classifications was “strict scrutiny.”<sup>104</sup> However, because of the absence of federal action, *Croson* did not resolve the lingering uncertainty regarding the correct standard of review for federal race-based legislation.

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<sup>95</sup> *Id.* at 519.

<sup>96</sup> *Id.*

<sup>97</sup> *See id.* at 522–32 (Stewart, J., dissenting).

<sup>98</sup> *Id.* at 522–23 (citing *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)).

<sup>99</sup> *Id.* at 527.

<sup>100</sup> *Id.* at 537 (Stevens, J., dissenting).

<sup>101</sup> *See id.* at 541.

<sup>102</sup> 488 U.S. 469 (1989).

<sup>103</sup> *Id.* at 469.

<sup>104</sup> *Id.* at 494.

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*D. A Unified Standard: Adarand and Strict Scrutiny*

A summary of the basic federal procurement process is beneficial before an examination of *Adarand Constructors, Inc. v. Pena*,<sup>105</sup> a case in which the basis of suit arose from a Section 8(d) subcontract for guardrail installation awarded to a SDB. Currently, the federal procurement process begins when acquisition personnel, after determining a federal agency's needs, posts a solicitation for bids on the Federal Business Opportunities website.<sup>106</sup> Prime contractors interested in obtaining the contract then prepare and submit their bids. After the submission period is closed, the acquisition personnel of the agency evaluate the prime contractors' offers in accordance with the Federal Acquisition Regulations.<sup>107</sup> If the prime contract is awarded to a certified SDB under Section 8(a), no subcontracting plan<sup>108</sup> is required. However, if the prime contract is not awarded to a certified SDB, a subcontracting plan must be submitted to comply with Section 8(d).

*1. Background*

The basis for the petitioner's suit in *Adarand* began in 1989 when the United States Department of Transportation awarded a highway construction contract to Mountain Gravel and Construction Company.<sup>109</sup> As the prime contractor, Mountain Gravel solicited bids from subcontractors for the guardrail portion of the project.<sup>110</sup> Among the submissions were bids from both Adarand Constructors (the lowest bid) and Gonzales Construction.<sup>111</sup> However, Mountain Gravel's contract from the federal government included the subcontractor compensation clause which provided additional compensation if it hired SDBs;<sup>112</sup> Gonzales Construction was certified as a SDB, but Adarand Constructors was not.<sup>113</sup> As a direct result of this contractual language, Mountain Gravel awarded the contract to Gonzales Construction.<sup>114</sup>

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<sup>105</sup> *Adarand III*, 515 U.S. 200 (1995).

<sup>106</sup> FEDERAL BUSINESS OPPORTUNITIES, <https://www.fedbizopps.gov> (last visited Nov. 6, 2012).

<sup>107</sup> The Federal Acquisition Regulations System is codified at Title 48 of the Code of Federal Regulation.

<sup>108</sup> See 48 C.F.R. § 19.704(a)–(b) (2011).

<sup>109</sup> *Adarand III*, 515 U.S. at 205.

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

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> See *id.* Mountain Gravel's Chief Estimator submitted an affidavit stating that but for the additional compensation provided by the contract, Adarand would have been selected as the subcontractor.

Adarand challenged the constitutionality of Section 8(d) under the Fifth Amendment's proscription against the federal government's denial of equal protection of the law, specifically citing the race-based presumptions involved in the use of subcontractor compensation clauses.<sup>115</sup> Adarand's argument was rejected by the United States District Court for the District of Colorado when the government's motion for summary judgment was granted.<sup>116</sup>

Adarand then appealed to the Court of Appeals for the Tenth Circuit, where the District Court's judgment was affirmed in *Adarand II*.<sup>117</sup> The Tenth Circuit based its holding on the "intermediate scrutiny" standard that was set forth in *Fullilove* nearly fifteen years earlier.<sup>118</sup> The Tenth Circuit reasoned that the federal government, acting under authority of Congress and Section 5 of the Fourteenth Amendment,<sup>119</sup> can legislate affirmative action programs more freely than state or local governments.<sup>120</sup> After the Tenth Circuit's affirmation of the District Court's ruling, Adarand petitioned the Supreme Court for certiorari.<sup>121</sup>

The Supreme Court granted Adarand's petition in order to resolve the issue of which is the appropriate standard for review for federal race-based action: intermediate scrutiny or strict scrutiny.<sup>122</sup> The respondents in *Adarand III* argued that "[t]he Subcontracting Compensation Clause program is . . . a program based on *disadvantage*, not on race," and thus is subject only to "the most relaxed judicial scrutiny."<sup>123</sup> However, the respondents conceded that "the race-based rebuttable presumption" used in determining certification as a SDB was subject to a heightened level of scrutiny.<sup>124</sup> The Court, in an effort to correctly identify the scope of its decision, clarified that the race-based statute at issue in *Adarand III* was unlike others it had reviewed, which had been either

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<sup>115</sup> *Id.* at 210.

<sup>116</sup> *Adarand Constructors, Inc. v. Skinner (Adarand I)*, 790 F. Supp. 240, 245 (D. Colo. 1992), *vacated*, *Adarand III*, 515 U.S. 200.

<sup>117</sup> *Adarand Constructors, Inc. v. Pena (Adarand II)*, 16 F.3d 1537, 1539 (10th Cir. 1994), *vacated*, *Adarand III*, 515 U.S. 200.

<sup>118</sup> *See id.* at 1544. *See also* *Fullilove v. Klutznick*, 448 U.S. 448 (1980), *abrogated in part by Adarand III*, 515 U.S. 200; discussion *supra* Part III.C.

<sup>119</sup> U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

<sup>120</sup> *Adarand II*, 16 F.3d at 1545.

<sup>121</sup> *See Adarand III*, 515 U.S. 200 (1995).

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 212–13 (citing Brief for the Respondents at 26, *Adarand III*, 515 U.S. 200 (No. 93-1841), 1994 WL 694992 at 26).

<sup>124</sup> *See id.* at 213.

facially race-neutral but resulted in a racially disproportionate impact<sup>125</sup> or had been motivated by a racially discriminatory purpose.<sup>126</sup>

The Court began by determining the proper basis for *Adarand*'s claims, specifically taking note that the Fifth Amendment protects citizens from "arbitrary treatment by the Federal Government, [which] is not as explicit a guarantee of equal treatment as the Fourteenth Amendment."<sup>127</sup> The Court discussed at length the jurisprudential history which led to its conclusion that "[t]his Court's approach to Fifth Amendment equal protection claims [is] precisely the same as to equal protection claims under the Fourteenth Amendment."<sup>128</sup>

The Court bluntly set forth its holding after its long discussion reconciling previous Fifth Amendment<sup>129</sup> and Fourteenth Amendment<sup>130</sup> jurisprudence, which culminated in finding that the equal protection components of each are indistinguishable.<sup>131</sup> In overruling any residual authority that *Fullilove* might have had on federal race-based classifications, the Court announced that strict scrutiny was the proper standard under which such laws should be reviewed by holding "[f]ederal racial classifications, like those of the State, must serve a compelling governmental interest, and must be narrowly tailored to further that interest."<sup>132</sup> In announcing its decision, the majority agreed with Justice Stevens's dissent in *Fullilove* that "[b]ecause racial characteristics so seldom provide a relevant basis for disparate treatment, and because classifications based on race are potentially so harmful to the entire body politic, it is especially important that the reasons for any such classification be clearly identified and unquestionably legitimate," and that "[r]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification."<sup>133</sup>

Unfortunately, the Court did not take the opportunity before it to make a ruling on the merits; it merely announced the new standard of review. After announcing its decision, the Court remanded the case to the lower courts

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<sup>125</sup> See *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977).

<sup>126</sup> See *Washington v. Davis*, 426 U.S. 229 (1976).

<sup>127</sup> *Adarand III*, 515 U.S. at 213.

<sup>128</sup> *Id.* at 217 (citing *Weinberger v. Wisenfeld*, 420 U.S. 636, 638 n.2 (1975)).

<sup>129</sup> U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law.").

<sup>130</sup> U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

<sup>131</sup> *Adarand III*, 515 U.S. at 213–17.

<sup>132</sup> *Id.* at 235. Along with abrogating *Fullilove* in part, this decision also overruled *Metro Broad., Inc. v. FCC*, 497 U.S. 547 (1990), which held that intermediate scrutiny was the appropriate standard of review for federal legislation with benign racial classifications. *Id.*

<sup>133</sup> *Id.* at 236 (citing *Fullilove v. Klutznick*, 448 U.S. 448, 533–35 (1980) (Stevens, J., dissenting), *abrogated in part by Adarand III*, 515 U.S. 200).

because the lower courts had reviewed the statute at issue under intermediate scrutiny, and although the governmental interest was previously found “significant,” it now needed to be determined if the governmental interest was “compelling.”<sup>134</sup> Furthermore, the lower courts also had failed to address whether the statute was narrowly tailored with respect to the newly announced strict scrutiny standard.<sup>135</sup> Finally, the Court noted a discrepancy between the requirements of the definition of “economically disadvantaged” in the Programs.<sup>136</sup>

## 2. On Remand: Different Standard, Different Result

Much like the Supreme Court, the Tenth Circuit also passed on the opportunity to decide the merits of the case and sent the case back to the District Court.<sup>137</sup> The District Court, in an opinion issued by Senior District Judge John Kane, granted Adarand’s motion for summary judgment and issued an injunction enjoining the defendants from “soliciting bids for, or allocating any funds under the [challenged] program.”<sup>138</sup> To clarify his ruling, Judge Kane added that this decision “precludes the implementation of the statutes or regulations that grant *presumptive eligibility for government preference in contracting on the basis of race*, i.e., the use of presumptions of social and economic disadvantage in Section 8(d) of the Small Business Act.”<sup>139</sup> Judge Kane believed that although the laws at issue served a compelling governmental interest, they were not narrowly tailored.<sup>140</sup>

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<sup>134</sup> See *id.* at 237.

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

<sup>136</sup> *Id.* at 238. Previous regulations for Section 8(a) participants required a showing that such person’s ability to compete has been impaired “as compared to others in the same or similar line of business who are not socially disadvantaged,” while Section 8(d) regulations require a showing merely “as compared to others in the same or similar line of business.” *Id.*

<sup>137</sup> *Adarand Constructors, Inc. v. Pena (Adarand IV)*, 965 F. Supp. 1556, 1558 (D. Colo. 1997), *rev’d sub nom.*, *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000). The District Court candidly expressed its displeasure with both the Supreme Court and the Tenth Circuit prior to its statement of jurisdiction:

[C]oncerns of judicial efficiency and the desire to resolve disputes quickly would have favored the resolution of the remaining legal issues by the higher courts. Following the remand, the Tenth Circuit Court of Appeals entered an order stating that, its own judgment having been vacated and, upon consideration of the Supreme Court’s judgment, the cause was remanded to this court for further proceedings. Again, in light of the lack of a genuine issue as to any material fact, the rationale for the circuit court’s remand to this trial court eludes me.

*Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* (emphasis added).

<sup>140</sup> See *id.* at 1570.

Regarding the existence of a “compelling governmental interest,” Judge Kane believed that the only interest that justifies racial classifications were those which sought to remedy past wrongs.<sup>141</sup> Regarding federal contract awards, Adarand argued that there was no evidence of any racial discrimination in Colorado, and there were only two isolated incidents nationwide prior to Congress’s adoption of the Programs.<sup>142</sup> To the contrary, the defendants argued that the scope of the Programs was within Congress’s legislative powers under Section 5 of the Fourteenth Amendment.<sup>143</sup>

Judge Kane went on to distinguish the challenged legislation in *Adarand III* with the legislation that was at issue in *Oregon v. Mitchell*.<sup>144</sup> In *Mitchell*, the challenged legislation was a literacy test that was essentially being used to deny African-Americans the right to vote.<sup>145</sup> Judge Kane believed this was significantly different than the alleged harm in *Adarand III* because “[e]nforcing the right to vote of a member of a minority group does not require, *ipso facto*, the denial of that right to anyone else.”<sup>146</sup> Unlike equal access to voting, the corollary of awarding a contract to one firm is that that contract is necessarily denied to a different firm. Judge Kane ultimately found that under both *Adarand III* and *Croson*, Congress was not prohibited from remedying the effects of past discrimination if it could be shown that the federal government was a “passive participant [by providing funding] in a system of racial exclusion,” and that no individualized showing of racial discrimination was necessary.<sup>147</sup>

#### IV. CONSTITUTIONAL REVIEW UNDER STRICT SCRUTINY

This Part will show, through the use of Supreme Court precedent and the text of the United States Constitution, that the Programs permit both the deprivation of equal protection of the laws to some citizens and also fail strict scrutiny, and that the Programs are therefore unconstitutional. The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, which has been applied to the federal government through the Fifth Amendment’s Due Process Clause, provides that “no [government] shall . . . deny to any person within its jurisdiction the equal protection of the

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<sup>141</sup> *Id.* (relying on *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion)).

<sup>142</sup> *See id.*

<sup>143</sup> *See id.* at 1571.

<sup>144</sup> 400 U.S. 112 (1970).

<sup>145</sup> *Id.* at 112.

<sup>146</sup> *Adarand IV*, 965 F. Supp. at 1573.

<sup>147</sup> *Id.*

laws.”<sup>148</sup> With the 1978 amendments to the Act, the Constitution was derailed from its mandate of equality and was permutated into something that now allows constructive discrimination based solely on race.<sup>149</sup>

In *Fullilove*, the Supreme Court said “[i]t is not a constitutional defect in this program that it may disappoint the expectations of some [non-SDB] firms.”<sup>150</sup> However, “failed expectations” is not the constitutional defect in the Programs; rather, the constitutional defect is that those firms denied access to federal contracts have been subjected to an unequal application of the law as a direct result of the race of the firm’s principal. This failure to treat citizens equally merely on the basis of race is repugnant to the core purpose of the Fourteenth Amendment.

#### A. *Compelling Interest*

Under strict scrutiny, a compelling governmental interest is the threshold over which a race-based law must pass to be constitutionally valid; without a compelling interest, analysis of whether the law is narrowly tailored is moot. The Court requires a compelling interest “because racial characteristics so seldom provide a relevant basis for disparate treatment, and because classifications based on race are potentially so harmful to the entire body politic.”<sup>151</sup> When remedial legislation—such as the Programs—is challenged, the party defending the legislation “bears the initial burden of production to show the program is supported by a strong basis in evidence.”<sup>152</sup> In addition to the defending party’s showing, courts must conduct a “searching judicial inquiry into the justification for such race-based measures.”<sup>153</sup>

In *Adarand IV*, Judge Kane began his compelling-interest analysis by first recognizing that “[t]here appears to be only one compelling interest recognized by the Supreme Court to justify racial classifications, namely remedying past wrongs.”<sup>154</sup> Because the underlying purpose of Section 8(d)

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<sup>148</sup> U.S. CONST. amend. XIV, § 1. This has been read to apply to the federal government through the Due Process Clause of the Fifth Amendment.

<sup>149</sup> According to the U.S. Census Bureau, in 2000, white non-Hispanic males (the primary group of citizens categorically denied eligibility for Section 8(a) and Section 8(d)) comprised roughly 34.8% of the total population. *Resident Population Estimates of the United States by Sex, Race, and Hispanic Origin: April 1, 1990 to July 1, 1999, with Short-Term Projection to November 1, 2000*, U.S. CENSUS BUREAU (Jan. 2, 2001), <http://www.census.gov/population/estimates/nation/intfile3-1.txt>.

<sup>150</sup> *Fullilove v. Klutznick*, 448 U.S. 448, 484 (1980), *abrogated in part by Adarand III*, 515 U.S. 200 (1995).

<sup>151</sup> *See id.* at 533–35.

<sup>152</sup> *Adarand IV*, 965 F. Supp. at 1577 (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986)).

<sup>153</sup> *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989).

<sup>154</sup> *Adarand IV*, 965 F. Supp. at 1570 (citing *Croson*, 488 U.S. at 493).

was to remedy past wrongs, Judge Kane then conducted a searching judicial inquiry into the program's justifications, after which he concluded that "Congress has a strong basis in evidence for enacting the challenged statutes, which thus serve a 'compelling governmental interest.'"<sup>155</sup> The "strong basis in evidence" was the record of congressional hearings, the relevant legislative history of the SBA, and the recorded statements by members of Congress; the court found that these bases were sufficient to support a finding that racial barriers in federal contract awards existed.<sup>156</sup>

Although determining what constitutes a "compelling" interest is subjective, the Supreme Court has nonetheless recognized that remedying the effects of past discrimination is such a compelling interest. Therefore, any viable challenge to the Programs hinges on the argument that they do not survive the second prong of strict scrutiny because they are not narrowly tailored.

### B. *Narrowly Tailored*

Under the strict scrutiny test, any law that makes a race-based classification must be "narrowly tailored" to serve a governmental interest recognized as "compelling." The Supreme Court has named five factors that are useful in a court's determination of whether a race-based law is narrowly tailored: "(i) the efficacy of alternative remedies; (ii) the planned duration of the remedy; (iii) the relationship between the percentage of minority group members in the relevant population or workforce; (iv) the availability of waiver provisions if the hiring plan could not be met; and (v) the effect of the remedy upon innocent third parties."<sup>157</sup> This section will review each factor in turn.

#### 1. Efficacy of Alternative Remedies

In *Adarand III*, the Supreme Court alluded to a consideration to be made upon remand: "whether there was 'any consideration of the use of race-neutral means to increase minority business participation' in government contracting."<sup>158</sup> On remand, the district court agreed with Congress' findings, namely that the race-neutral programs in effect from the promulgation of the Act in 1953 up to the 1978 amendments that created the Programs were ineffective at achieving the goal of increasing participation by SDBs.<sup>159</sup>

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<sup>155</sup> *Id.* at 1577.

<sup>156</sup> *Id.* at 1574–75.

<sup>157</sup> *United States v. Paradise*, 480 U.S. 149, 187 (1987).

<sup>158</sup> *Adarand III*, 515 U.S. 200, 237–38 (1995) (quoting *Croson*, 488 U.S. at 507).

<sup>159</sup> *Adarand IV*, 965 F. Supp. at 1584.

## 2. Planned Duration of the Remedy

Along with consideration of race-neutral alternatives, the Supreme Court in *Adarand III* alluded to the consideration of “whether the [SBA’s] program was appropriately limited such that it ‘will not last longer than the discriminatory effect it is designed to eliminate.’”<sup>160</sup> The defendants asserted that the duration of the challenged legislation is limited because it is “regularly reviewed to determine whether [it is] still needed.”<sup>161</sup> They further asserted that Congress reviews evidence “to determine whether the goals are achieving the desired result of remedying discrimination and the lingering effects of past discrimination nationwide and has determined there is a need to continue the [SDB] requirements of § 644(g).”<sup>162</sup>

## 3. Relationship Between Included Minorities and the Target Workforce

The Programs fail this factor because they are both overinclusive and underinclusive. The Programs are overinclusive because they create a presumption of social disadvantage for individuals that quite possibly have never suffered from discrimination in the award of federal contracts. The Programs are also underinclusive because they exclude “certain minority groups whose members are economically and socially disadvantaged due to past discrimination.”<sup>163</sup>

### a. Overinclusive

The Programs’ standard of presumptive eligibility is far too likely to include citizens that have themselves never suffered any discrimination in the realm of federal contracting. Before Congress can include a particular racial group in a race-based classification, it must “inquir[e] into whether or not the particular [group] seeking a racial preference has suffered from the effects of past discrimination.”<sup>164</sup> However, the current language of Section 8(a) would permit a racial preference to be afforded to many groups that have not in fact suffered from the effects of past discrimination.

For an illustration of the Programs’ failings, let’s imagine that Firm X is bidding on a federal contract. Firm X is owned by a recently naturalized United States citizen from Mongolia. Assuming the firm’s principal can show

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<sup>160</sup> *Adarand III*, 515 U.S. at 237–38 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 513 (1980), *abrogated in part by Adarand III*, 515 U.S. 200 (1995)).

<sup>161</sup> *Adarand IV*, 965 F. Supp. at 1583.

<sup>162</sup> *Id.* at 1584.

<sup>163</sup> *Id.* at 1580.

<sup>164</sup> *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 508 (1989).

economic disadvantage, the current language of Section 8(a) would allow the Mongolian presumptive eligibility even though there is little likelihood that the federal government has discriminated against Mongolian firms in the past. To remedy this overinclusiveness, eligibility for the Programs should be altered from a presumption of disadvantage to a need-based assessment.<sup>165</sup>

b. Underinclusive

It is important to recognize that, in the history of our nation, although racial discrimination is perhaps the most perceptible form of discrimination to the average citizen, it is certainly not the only discrimination that has economically and socially disadvantaged a particular group. Additionally, within the broad strokes of any racial classification there are innumerable ethnic, religious and other subcategories within the “majority” that have also suffered from discrimination.<sup>166</sup>

For an illustration, one need not leave the bounds of the twentieth century or the Supreme Court’s membership: Justice Hugo Black was notoriously anti-Catholic.<sup>167</sup> In a speech made while running for the United States Senate and in response to an enormous surge in Italian immigration in the early 1920s, Black decried the Catholic influx and proclaimed that “[o]nly desirable immigrants should ever again be admitted.”<sup>168</sup> Black’s statement was made regarding the Immigration Act of 1924,<sup>169</sup> one aim of which was to virtually eliminate Italian immigration.

Non-racial discrimination is hardly limited to anti-Catholicism. Among the ethnic but non-racial minorities that have suffered severe and, in some instances, continuing discrimination are Jews,<sup>170</sup> Italians,<sup>171</sup> and Irish.<sup>172</sup> By

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<sup>165</sup> See discussion *infra* Part V.

<sup>166</sup> See *infra* notes 170–172 and accompanying text.

<sup>167</sup> Although he would later say he regretted his membership, Justice Black went so far as to become a member of Ku Klux Klan, joining in 1923. *Ku Klux Klan—Hugo L. Black and the KKK*, L. LIBR.—AM. L. & LEGAL INFO., <http://law.jrank.org/pages/8014/Ku-Klux-Klan-Hugo-L-Black-KKK.html> (last visited Nov. 6, 2012).

<sup>168</sup> ROGER K. NEWMAN, *HUGO BLACK: A BIOGRAPHY* 108 (2d ed. 1997). See also Letter from Hugo Black to Mary C. Pittman, January 18, 1926, in which Black stated that “I am accused by the opposition as being a candidate of the Ku Klux Klan. This will further show that I am not amenable to Catholic influences.”

<sup>169</sup> Pub. L. No. 68-139, 43 Stat. 153 (1924) (revised by the Immigration and Nationality Act of 1952 (codified as amended at 8 U.S.C. §§ 1101-1537 (2006 & Supp. V 2011))).

<sup>170</sup> See *ADL Survey: Anti-Semitism Declines Slightly in America; 14 Percent of Americans Hold ‘Strong’ Anti-Semitic Beliefs*, ADL (Apr. 4, 2005), [http://www.adl.org/PresRele/ASUS\\_12/4680\\_12.htm](http://www.adl.org/PresRele/ASUS_12/4680_12.htm).

<sup>171</sup> See ALAN G. GAUTHREAU, *AN EXTREME PREJUDICE: ANTI-ITALIAN SENTIMENT AND VIOLENCE IN LOUISIANA, 1855–1924* (History4All 2011).

aggregating all Caucasian ethnicities into the overbroad racial classification of “white,” the “preferential treatment for non-whites amount[s] to invidious discrimination against other ‘minorities’—that is, the discrete national origin groups into which whites [have] been disaggregated.”<sup>173</sup>

Furthermore, the Programs provide no assistance for other various non-racial and non-ethnic groups that have suffered discrimination, such as homosexuals, the elderly, or the mentally or physically handicapped.<sup>174</sup> These groups are limited to retrospective relief under other legislation, such as the Age Discrimination in Employment Act,<sup>175</sup> the Americans with Disabilities Act,<sup>176</sup> and Civil Service Reform Act of 1978.<sup>177</sup>

It is likely that most Americans have some history of past discrimination in their ancestry. Any determination of whether that past discrimination is sufficient to justify statutory inclusion is arbitrary and wholly subjective. Similar to my proposal to remedy the Programs’ overinclusiveness,<sup>178</sup> to remedy the defect of underinclusiveness I would again advocate an individualized need-based assessment.

#### 4. Availability of Waiver Provisions

Because the SBA allows for the possibility of a waiver from participation, this factor outwardly supports a finding that the Programs are narrowly tailored. However, upon closer review, a waiver seems exceedingly difficult to obtain:

Grantees are given the opportunity to demonstrate that their best efforts will not succeed or have not succeeded in achieving the statutory 10% target for minority firm participation within the limitations of the program’s remedial

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<sup>172</sup> See RYAN HACKNEY & AMY HACKNEY BLACKWELL, 101 THINGS YOU DIDN’T KNOW ABOUT IRISH HISTORY, THE PEOPLE, PLACES, CULTURE, AND TRADITIONS OF THE EMERALD ISLE 153–61 (2007).

<sup>173</sup> Ian F. Haney Lopez, “A Nation of Minorities”: Race, Ethnicity, and Reactionary Colorblindness, 59 STAN. L. REV. 985, 990 (2007).

<sup>174</sup> The SBA does have a program for service-disabled veterans. See Veterans Benefit Act of 2003, Pub. L. No. 180-183, 117 Stat. 2651 (codified as amended in scattered sections of 15 U.S.C. and 38 U.S.C.).

<sup>175</sup> Pub. L. No. 90-202, 81 Stat. 602 (1967) (codified as amended at 29 U.S.C. §§ 621–34 (2006)). Under the Age Discrimination in Employment Act, if a citizen believes they were discriminated against because of their age, they are limited to declaratory and injunctive relief. See also *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000).

<sup>176</sup> Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended in scattered sections of 42 U.S.C.).

<sup>177</sup> Pub. L. No. 95-454, 92 Stat. 1111 (codified as amended in scattered sections of 5 U.S.C.).

<sup>178</sup> See *supra* Part III.B.

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objectives. In these circumstances a waiver or partial waiver is available once compliance has been demonstrated. A waiver may be sought and granted at any time during the contracting process, or even prior to letting contracts if the facts warrant.<sup>179</sup>

Essentially, to have the SBA's SDB-participation goal waived, the prime contractor must show a complete and good-faith effort to seek out and contract with SDBs. The corollary of this is that only if the price is unreasonable and is not the result of the present effects of past discrimination, or if there is a total absence of certified SDBs, is a waiver appropriate.

The difficulty in satisfying the "reasonableness of the price" element lies with highly subjective nature of a determination of the effect the past discrimination has on the bid submitted by the subcontractor. How can this be realistically quantified and reduced to a reliable monetary amount? What is left is essentially the absence of a true waiver.

#### 5. Effect upon Innocent Third Parties

The Supreme Court has said that "[w]hen effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such a 'sharing the burden' by innocent third parties is not impermissible."<sup>180</sup> This factor has been chronically and severely mischaracterized by reviewing courts. While it is true that non-SDBs theoretically "share" the burden, the proper focus is on the individual firms affected when an SDB is hired under the auspices of the Programs. "The actual 'burden' shouldered by [non-SDBs] is relatively light in this connection when we consider the scope of [total contract awards]."<sup>181</sup>

However, it is crucial to recognize that in order for the burden to be shouldered by non-SDBs affected by race-based classifications, the classifications generally must first be found to survive the other elements of strict scrutiny. In other words, if the law serves a compelling interest but is not narrowly tailored, then the burden imposed on the non-SDB is impermissible and unconstitutional.

#### C. *The Use of "Goals": Federally Mandated Racial Balancing After Gratz*

In addition to the constitutional defects discussed above, the Programs are also violative of the Supreme Court's prohibition on racial balancing through the use of a quota system. In *Croson*, the Supreme Court struck down a

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<sup>179</sup> Fullilove v. Klutznick, 448 U.S. 448, 488 (1980), *abrogated in part by Adarand III*, 515 U.S. 200 (1995).

<sup>180</sup> *Id.* at 484.

<sup>181</sup> *Id.*

law that required that at least thirty percent of the city's construction contracts be awarded to MBEs.<sup>182</sup> The majority held that "the 30% quota cannot be said to be tailored to any goal, except perhaps outright racial balancing. It rests upon the 'completely unrealistic' assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population."<sup>183</sup> Although *Croson* produced only fractured pluralities, that Court's rejection of an outright quota system was solidified in the Court's 2003 decision in *Gratz v. Bollinger*.<sup>184</sup> In *Gratz*, the Court held—similarly to its earlier decision in *Regents of the University of California v. Bakke*<sup>185</sup>—that racial quotas are unconstitutional. The race-based numerical requirements rejected by the Court in *Bakke* and *Gratz* are analogous to the numerical quota prescribed by the Act.

Under the Act, the President is required annually to establish the federal goals for participation by MBEs procurement contracts, with total awards being not higher than twenty-three percent and not lower than five percent.<sup>186</sup> With this in mind, it is difficult, if not impossible, to imagine how one could view the SBA's regulations as anything short of a race-based quota system, the sort of which has clearly been rejected by the Supreme Court as unconstitutional.<sup>187</sup> This view was shared by Judge Kane in *Adarand IV*.<sup>188</sup> In addition to his prohibition on the implementation of programs that allow race to show a presumption of social disadvantage, Judge Kane also prohibited "the use of percentage goals found in and promulgated pursuant to § 644(g) of the SBA."<sup>189</sup>

## V. PROPOSED ALTERATIONS TO THE PROGRAMS

The *presumption* of social disadvantage based solely on race is unconstitutional and should be amended.<sup>190</sup> This section will provide two suggestions that would bring the Programs into congruence with the Constitution: basing social disadvantage on an individualized need-based assessment and removal of the subcontractor compensation clause that operates

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<sup>182</sup> *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507 (1989).

<sup>183</sup> *Id.*

<sup>184</sup> 539 U.S. 244 (2003).

<sup>185</sup> 438 U.S. 265 (1978) (plurality opinion). In *Bakke*, the University of California had reserved sixteen percent of its admission slots for minority students. *See id.* at 265–67.

<sup>186</sup> 15 U.S.C. § 644(g) (2006).

<sup>187</sup> *See generally Gratz*, 539 U.S. 244.

<sup>188</sup> *Adarand IV*, 965 F. Supp. 1556, 1558 (D. Colo. 1997), *rev'd*, *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000).

<sup>189</sup> *Id.* at 1558.

<sup>190</sup> At this point, I wish to make it clear that I am not opposed to the SBA's goal of assisting SDBs participate in federal contract acquisition. However, as discussed *supra* Part III, I believe that some of the current requirements for participation in the Programs are unconstitutional.

as a bonus to firms that hire SDBs. Finally, if the Programs were stricken, the possibility of suit under 42 U.S.C. § 1981 or 42 U.S.C. § 1983 provides a sufficient disincentive for federal agencies and federal prime contractors to eliminate discriminatory action while awarding contracts.

A. *Abandoning Presumptions for an Individualized Showing of Need*

Strict scrutiny requires that a race-based preferencing program be narrowly tailored to serve a compelling governmental interest. The SBAs regulations that presume social disadvantage on the basis of race could easily be more narrowly tailored by striking subsection (b) of 13 C.F.R. Section 124.103<sup>191</sup> and instead using the test set forth in subsection (c) of that section as the sole means for determining Program eligibility. Subsection (c)<sup>192</sup> allows for individuals who are not members of one of the groups designated as presumptively disadvantaged by subsection (b) to still qualify for the program's benefits if they establish social disadvantage by a preponderance of the evidence.<sup>193</sup>

To sufficiently show social disadvantage under 13 C.F.R. Section 124(c), three elements must be satisfied. First, the individual must show “[a]t least one objective distinguishing feature that has contributed to social disadvantage, such as race, ethnic origin, gender, physical handicap, long-term residence in an environment isolated from the mainstream of American society, or other similar causes.”<sup>194</sup> Second, the individual must also show “[p]ersonal experiences of substantial and chronic social disadvantage in American society.”<sup>195</sup> Finally, the individual must show that their disadvantage has had a “[n]egative impact on entry into or advancement in the business world because of the disadvantage.”<sup>196</sup>

In determining the final element, the “SBA will consider any relevant evidence . . . . In every case, however, [the] SBA will consider education, employment and business history, where applicable, to see if the totality of circumstances shows disadvantage in entering into or advancing in the business world.”<sup>197</sup> These considerations are codified as:

(A) *Education*. SBA considers such factors as denial of equal access to institutions of higher education, exclusion from social and professional association with students or teachers, denial

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<sup>191</sup> 13 C.F.R. § 124.103 (2012).

<sup>192</sup> *Id.* § 124.103(c).

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

<sup>194</sup> *Id.* § 124.103(c)(2)(i).

<sup>195</sup> *Id.* § 124.103(c)(2)(ii).

<sup>196</sup> *Id.* § 124.103(c)(2)(iii).

<sup>197</sup> *Id.*

of educational honors rightfully earned, and social patterns or pressures which discouraged the individual from pursuing a professional or business education.<sup>198</sup>

(B) *Employment.* SBA considers such factors as unequal treatment in hiring, promotions and other aspects of professional advancement, pay and fringe benefits, and other terms and conditions of employment; retaliatory or discriminatory behavior by an employer; and social patterns or pressures which have channelled [sic] the individual into nonprofessional or non-business fields.<sup>199</sup>

(C) *Business history.* SBA considers such factors as unequal access to credit or capital, acquisition of credit or capital under commercially unfavorable circumstances, unequal treatment in opportunities for government contracts or other work, unequal treatment by potential customers and business associates, and exclusion from business or professional organizations.<sup>200</sup>

These considerations are the appropriate standard to determine true disadvantage that will in turn lead to an appropriate allocation of the SBA's resources. This level of individualized showing of need will remedy the constitutional defects of overinclusiveness and underinclusiveness by assuring that those undeserving of assistance are excluded and that only those deserving of assistance are included.

*B. Abandoning the Subcontractor Compensation Clause*

The subcontractor compensation clause, which must be included in the subcontracting plan of every non-Section 8(a) prime contractor, creates "incentives" for those prime contractors to accept bids from and hire certified SDBs instead of their non-SDB counterparts. Reasonable minds may differ on whether this constitutes "compensation" or is more appropriately termed as a "bonus." Those who would favor the former characterization would argue that the contractual language merely compensates prime contractors for additional expenses that are the result of their decision to hire an SDB. Those who would favor the latter characterization would argue that the payment is nothing but an inducement for prime contractors to discriminate against non-SDBs. That difference in interpretation has been a source of contention, most notably in *Adarand Constructors, Inc. v. Peña*.<sup>201</sup>

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<sup>198</sup> *Id.* § 124.103(c)(2)(iii)(A).

<sup>199</sup> *Id.* § 124.103(c)(2)(iii)(B).

<sup>200</sup> *Id.* § 124.103(c)(2)(iii)(C).

<sup>201</sup> 515 U.S. 200 (1995).

The weight of evidence militates in support of characterization as a “bonus.” The basis for this conclusion is that the term “compensation” implies a reimbursement for a sustained loss, whereas a “bonus” implies an additional payment for an action and does not imply that a loss must be sustained. Because the subcontractor compensation clause seemingly awards additional payment to the prime contractor merely for hiring a SDB and does not mandate any particularized showing that the prime contractor actually incurred any extra expense as a result of hiring the SDB, characterization as a “bonus” is the more appropriate of the two terms.

Once the subcontractor compensation clause is recognized as a bonus, the logical inference is that the clause is further evidence that the Programs are not narrowly tailored. Regarding the extent to which a subcontractor compensation clause payment acts as a bonus, “it cannot be said to be narrowly tailored to the government’s interest of eliminating discriminatory barriers. Rather, this aspect . . . results in the spending of public funds in a way ‘which encourages, entrenches, subsidizes, or results in racial discrimination.’”<sup>202</sup>

### C. *Civil Rights Actions as a Check on Discriminatory Hiring Practices*

Effectively preventing future discrimination is not only a goal of the SBA but is also a constitutional command. Because the Programs can be viewed as government-sponsored discrimination against non-SDB certified businesses, a more appropriate and narrowly tailored remedy is for firms that have suffered discrimination to file an action for deprivation of contract rights under the Civil Rights Act of 1866<sup>203</sup> or violation of civil rights under the Civil Rights Act of 1871.<sup>204</sup> In modern jurisprudence, the relevant provisions of these two Acts are respectively known as Section 1981 and Section 1983.

As originally enacted, Section 1981 gave “[a]ll persons born in the United States . . . the same right . . . to make and enforce contracts.”<sup>205</sup> Congress added two new provisions to Section 1981 with the Civil Rights Act of 1991.<sup>206</sup> First, Congress defined and expanded the right to make and enforce contracts to include “making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.”<sup>207</sup> More importantly, Congress clarified that the right to make and enforce contracts is “protected against impairment by

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<sup>202</sup> *Adarand IV*, 965 F. Supp. 1556, 1579–80 (D. Colo. 1997) (citing *Lau v. Nichols*, 414 U.S. 563, 569 (1974)), *rev’d*, *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000).

<sup>203</sup> 14 Stat. 27 (codified as amended at 42 U.S.C. § 1981 (2006)).

<sup>204</sup> 17 Stat. 13 (codified as amended at 42 U.S.C. § 1983).

<sup>205</sup> 14 Stat. 27, § 1.

<sup>206</sup> Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended at 42 U.S.C. §§ 1981–2000h-6).

<sup>207</sup> *Id.* § 101 (codified at 42 U.S.C. § 1981(b)).

nongovernmental discrimination and impairment under color of State law.”<sup>208</sup> These two additions served to clarify that protection from discriminatory action extends to all aspects of contractual relationships, both public and private.

A complaint under 42 U.S.C. § 1981 must allege specific acts of discrimination based on race.<sup>209</sup> This requires that a plaintiff allege the deprivation “of a right” that “under similar circumstances[] would have been accorded to a person of a different race.”<sup>210</sup> “Even under federal notice pleading standards, a plaintiff must set forth facts, rather than conclusory allegations, which give rise to a claim based on racial discrimination.”<sup>211</sup>

Section 1983 “applies to all identifiable classes and groups in the labor market”<sup>212</sup> and included in the enforceable rights are violations of federal statutes, such as the prohibition on employment discrimination by the federal government.<sup>213</sup> Section 1983 makes equitable relief available to those who have had their civil rights violated by the government or by an actor acting under governmental authority.<sup>214</sup> There are essentially “four major elements to a § 1983 claim: (a) conduct by a ‘person’; (b) who acted under ‘color of law’; (c) [whose conduct proximately caused]; (d) a deprivation of federally protected rights.”<sup>215</sup>

Whether viewed separately or in conjunction, the plain language of Section 1981 and Section 1983 provides redress for firms that have suffered from racial discrimination by a federal prime contractor while seeking a subcontract either because of the nature of the relationship, i.e., one of contract formation, or because of the nature of the discrimination. The issue then becomes whether a prime contractor that has suffered from discriminatory action while seeking a contract directly from the federal government has any redress due to the limitations on suits imposed by the doctrine of sovereign immunity.<sup>216</sup> However, by utilizing provisions of the Tucker Act,<sup>217</sup> firms

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<sup>208</sup> *Id.* (codified at 42 U.S.C. § 1981(c)).

<sup>209</sup> *See* *Abiodun v. Martin Oil Service, Inc.*, 475 F.2d 142, 145 (7th Cir. 1973).

<sup>210</sup> *See* *Willis v. Chicago Extruded Metals Co.*, 358 F. Supp. 848, 851 (N.D. Ill. 1973).

<sup>211</sup> *Ahmed v. Quinn*, No. 95C6673 1996 WL 388418, at \*7 (N.D. Ill. July 9, 1996) (citations omitted); *see also* *McCormick v. City of Chicago*, No. 95C2028, 1996 WL 401936, at \*3 (N.D. Ill. July 16, 1996) (citation omitted).

<sup>212</sup> 21 AM. JUR. TRIALS 1, § 11.

<sup>213</sup> *See* 42 U.S.C. § 1983.

<sup>214</sup> *Id.*

<sup>215</sup> Martin A. Schwartz, *Fundamentals of Section 1983 Litigation*, in *PLI'S COURSE HANDBOOK (22ND ANNUAL SECTION 1983 CIVIL RIGHTS LITIGATION) 5* (2005), available at [http://www.pli.edu/emktg/toolbox/Fund\\_Sec198304.pdf](http://www.pli.edu/emktg/toolbox/Fund_Sec198304.pdf) (last accessed Nov. 6, 2012).

<sup>216</sup> For the limited discussion of sovereign immunity contained in this Note, it can be understood as “without an act of Congress no direct proceeding can be instituted against the government or its property.” *Carr v. United States*, 98 U.S. 433, 437 (1878). For a detailed discussion of federal sovereign immunity, see JOHN LOBATO & JEFFREY THEODORE, *HARVARD*

against whom the federal government has discriminated could circumvent the doctrine of sovereign immunity and appropriately bring a Section 1981 action against the federal government.

The Tucker Act is a jurisdictional statute that provides in relevant part that:

(a)(1) The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or *upon any express or implied contract with the United States*, or for liquidated or unliquidated damages in cases not sounding in tort.<sup>218</sup>

(b)(1) Both the United States Court of Federal Claims and the district courts of the United States shall have jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or *any alleged violation of statute or regulation in connection with a procurement* or a proposed procurement.<sup>219</sup>

The Tucker Act essentially gives jurisdiction to the United States Court of Federal Claims for all claims flowing from contracts to which the federal government is a party. However, an action under Section 1981 need not result from a consummated contractual relationship; as a result of the amendments included in the Civil Rights Act of 1991, the cause of action may flow from negotiations regarding the contract.<sup>220</sup> Therefore, if a firm can show that it would have been awarded a contract *but for* the federal government's discriminatory action, then the Court of Federal Claims could find that it has jurisdiction under either of two distinct theories. First, the court could find an implied-in-law contract for equitable purposes, thus satisfying the Tucker Act's requirement of a "contract" with the United States and allow suit under 28 U.S.C. § 1491(a)(1). The court could also find the discriminatory action that interfered with the contract's formation constitutes a violation of 42 U.S.C. § 1981 and allow suit under 28 U.S.C. § 1491(b)(1). Under either theory, the firm

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LAW SCH.: FED. BUDGET POLICY SEMINAR, BRIEF PAPER NO. 21: FEDERAL SOVEREIGN IMMUNITY (May 14, 2006), *available at* [http://www.law.harvard.edu/faculty/hjackson/FedSovereign\\_21.pdf](http://www.law.harvard.edu/faculty/hjackson/FedSovereign_21.pdf).

<sup>217</sup> 24 Stat. 505 (1887) (codified as amended at 28 U.S.C. § 1491 (2006)).

<sup>218</sup> 28 U.S.C. § 1491(a)(1) (emphasis added).

<sup>219</sup> *Id.* § 1491(b)(1) (emphasis added).

<sup>220</sup> Pub. L. No. 102-166, § 101 (1991) (codified at 42 U.S.C. § 1981(b) (2006)).

that suffered the discrimination should have an actionable claim against the federal government, despite the doctrine of sovereign immunity.<sup>221</sup>

## VI. CONCLUSION

Issues surrounding race and equality permeate the history of the United States, and federal contract procurement and acquisition regulations are certainly an area where such issues often take center stage. Although the drafters of the Programs were well-intentioned, they created a constitutional anomaly that is virtually unassailable. However, the Programs can be brought back into constitutional congruence through a few simple changes. First, abandoning the presumption of social disadvantage and instead implementing a need-based assessment will do much to alleviate constitutional concerns. The subcontracting clause, which creates a bonus for firms that hire SDBs, should be eliminated to level the field among all subcontractors. Finally, if these two suggestions are implemented, current statutory provisions provide adequate disincentives to ensure racial discrimination is eliminated.

Answers to the questions generated by the Programs are impossible to objectively answer. How much discrimination is enough? What races should be included? Excluded? Should ethnic minorities of the racial majority be included? What is race? Depending on who you ask, the answers will always be different, and because the spectrum of conceivable answers is infinite, we must reassess the continued viability of the Programs under the broad principle of equality embodied by the United States Constitution.

*William J. Bogard\**

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<sup>221</sup> The author bases this theory on a plain language reading of the relevant statutory text. Extensive research revealed no authority either supporting or contradicting this theory.

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