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Judicial Strict Scrutiny and Administrative Compliance: The Case of Public Contracting Preferences

George R. La Noue
Matthew Speake, University of Maryland Baltimore County

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Judicial Strict Scrutiny and Administrative Compliance:
The Case of Public Contracting Preferences

by

George R. La Noue
Professor of Political Science
Professor of Public Policy

and

Matthew Speake
University of Maryland Baltimore County

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Synopsis

What circumstances determine compliance with or resistance to federal judicial rulings in the United States? Compliance may depend on court unanimity, executive branch concurrence, legislative enactment, and stakeholders’ support.

Judicial interpretations of the 14th Amendment Equal Protection Clause and various civil rights statutes made discrimination against minority groups and women illegal. However, they have also functioned as a check against political coalitions that seek to use racial and gender preferences in distributing university admissions, public employment, and public contracting benefits in favor of those groups. In its City of Richmond v. Croson (1989) decision, the U.S. Supreme Court held that the standard for review of race-based procurement programs was the strict scrutiny test, requiring a government to have a compelling interest and to use the most narrowly tailored means to achieve its goals. Gender based classifications must pass the “exceedingly persuasive justification” test.

When Croson was decided there were more than 230 state and local public preferential contracting programs scattered across the country. Since 1989, lower courts made decisions requiring changes in many federal, state and local preferential contracting programs. But what happened after the courts acted? Were the preferential programs permanently suspended or were they continued with only minor changes or were the court decisions simply defied?

Using historical, legal, and political science tools, this paper examines the aftermath of judicial rulings for fifteen local, state and federal contracting programs and the factors determining individual outcomes. This analysis will be used to re-examine theories about judicial compliance in the area of public contracting.

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I. Introduction

Confronting the task of establishing an effective and durable government after the rebellion against the British monarchy, Americans designed an intricate constitutional system. The new government had the authority to “establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty.”¹ Fearing tyranny, however, this authority was constrained by a system of separation of powers, checks and balances, federalism which divided responsibilities between the central government and the states, and by an explicit definition of individual rights the federal government could not transgress. Later constitutional amendments protected these rights against state and local actions. Implementing this complex arrangement was an innovation in governmental design, an independent judiciary providing for the “judicial Power of the United States…vested in one Supreme Court, and in such inferior courts as Congress may from time to time ordain and establish.”²

As Alexander Hamilton noted, however, in The Federalist Papers (1788) in exercising the “judicial Power” that “The Judiciary have neither force nor will, neither sword nor purse, they have only society’s striving for the rule of principle, its readiness to receive principle from the courts and its strong habit formed inclination to accept, to accord and harmonize, to obey.”³ In twenty-first century multicultural America, are Hamilton’s conditions for compliance with judicial rulings enough where issues of race, power and money are at stake? Modern political scientists have been skeptical: “Judicial decisions are not self-implementing; … the actors upon which courts must rely to translate law into action are usually political actors and are subject to

¹ United States Constitution, Preface
² United States Constitution, Article III.
political pressures as they allocate resources to implement a judicial decision."

In the United States political system, all federal officials take an oath to uphold the constitution, though federal courts have emerged as the arbiters of the meaning of constitutional language. That role has emerged over time and is not often challenged abstractly. When civil rights are involved, however, courts are dependent to enforce their constitutional and statutory interpretations on agencies in the executive branch such as the U.S. Department of Justice, the Office of Civil Rights in the U.S. Department of Education, the U.S. Equal Employment Opportunity Commission, among others, and numerous state and local officials. Enforcement sometimes happens with relative promptness and completeness. Other times, compliance with judicial rulings is slow and erratic.

Political scientists have been greatly interested in the circumstances when and where compliance takes place and or whether a pattern of resistance or passiveness emerges. This paper will examine the hypothesis that judicial unanimity, executive branch concurrence, legislative enactments, and stakeholders’ behavior will determine compliance with judicial rulings on the use of racial classifications in the area of public contracting.

Among the most important of the constitutional provisions that federal courts have defined is the 14th Amendment’s Equal Protection Clause which declares that no State shall “deny to any person within its jurisdiction equal protection of the law.” Since the 5th Amendment has been held to apply the same equal protection standards to the federal government, American citizens are


This paper focuses on contracting issues in the United States. For an international perspective, see George R. La Noue, “Policies to Ensure Group Equality in Public Contracting in Four Countries,” International Journal of Diversity in Organisations, Communities and Nations, Vol. 8, 2008

protected against certain forms of discrimination by any government agency.

The ability to apply the Equal Protection Clause to specific public policies is one of the most important powers of federal courts. In education, for example, the Supreme Court in *Brown v. Board of Education* (1954) interpreted the equal protection clause to end school segregation in 21 states and the District of Columbia, while in *San Antonio v. Rodriguez* (1973), the Court decided that equal protection did not require a single standard of local or state financing of public schools. To distinguish between laws that might have collateral impacts on racial and other groups and laws that use overt racial classifications, federal courts use the rational basis test for the former and the strict scrutiny test for the latter. The rational basis test usually results in court deferring to legislative or administrative policies, but the strict scrutiny test calls for judges to review a policy based explicitly on race de novo to see if it has a compelling interest and is narrowly tailored. In that situation, judicial review functions as a counter balance to policies, such as race preferential contracting, which may have majority political support. This paper explores what happens when courts try to exercise that function.

The Equal Protection Clause has been used to eliminate public discrimination against minority groups and women in many areas of American life, but it has also functioned as a check against political coalitions using racial preferences to redistribute state university admissions, public employment, and public contracting awards. It was in the public procurement area that the Court first made strong statements limiting the use of race in redistributive or affirmative action programs in *City of Richmond v. Croson* (1989).\(^7\)

\(^7\) 488 U.S.469 (1989).
II. Existing Literature

An enormous amount has been written generally about the role of courts as makers and rejecters of policy in the American constitutional system. Further, the subject of the use of race in what is often called affirmative action has received substantial attention in the media and from scholars. The literature for both of those two subjects is too extensive to be reviewed here, though where specific scholarship has informed this analysis, it will be cited.

Despite the substantial amount of controversy and money involved in the awarding of public contracts, comparatively little has been published about the use of race and gender classifications in this process.\(^8\) There are several dozen court cases on preferential contracting, many of which will be cited here. The General Accountability Office,\(^9\) the US Commission on Civil Rights,\(^10\) and the Inspector’s General Office of the USDOT\(^11\) have issued largely critical reports about federal preferential contracting programs. There are a number of consultants’ reports in the form of disparity studies, but only a few university-connected scholars have chosen to examine the administration of MWBE and DBE programs. George La Noue has written about


their histories, their goal setting procedures and their outcomes for various group beneficiaries. In his book, *Merely Judgment: Ignoring, Evading and Trumping the Supreme Court*, Martin J. Sweet has focused on the issue most relevant to the research reported here: the aftermath of court decisions restricting the use of preferential contracting. His book contains case studies from Portland (OR.), Philadelphia, and Miami. This paper updates his finding about the latter two jurisdictions as well covering thirteen additional governments.

Preferential contracting programs had become widespread in the United States encompassing more that 230 state and local governments. Further, the federal government had authorized the use of racial preferences by a number of federal agencies including the Department of Defense, Department of Transportation, and the Small Business Administration. Such programs have a number of motivations:

- To remedy instances of current discrimination against specific minority businesses.
- To overcome the present effects of past discrimination against minority businesses in general.
- To compensate for current societal discrimination.
- To provide reparations for past societal discrimination.
- To create new economic strength in the minority communities generally.
- To create more business competition in general.
- To respond to the political demands of particular individuals or groups to reallocate public contracts.


• To create new political coalitions to overturn the existing commercial and political establishment.\textsuperscript{16}

In \textit{City of Richmond v. Croson} (1989),\textsuperscript{17} the Supreme Court set a new constitutional standard of review for any legislative use of racial classifications. Such programs were to be subject to the strict scrutiny test requiring governments to have a compelling interest for the use of race and to employ that classification only in a narrowly tailored manner.\textsuperscript{18} Speaking for the Court’s plurality, Justice O’Connor held:

• State and local governments may act to remedy direct as well as indirect contract discrimination for which they are responsible.
• But evidence of general societal discrimination or of past discrimination in an entire industry is not enough to justify racial classifications.
• Finding discrimination in one market does not permit an assumption that discrimination exists in all markets.
• Finding discrimination against one minority group does not permit an assumption that discrimination exists against all such groups.
• If racial conscious tools are necessary in extreme cases, they should be narrowly tailored.
• If discrimination exists, racial neutral remedies\textsuperscript{19} must be used first.\textsuperscript{20}

The \textit{Croson} case involved a Richmond city program establishing a 30% dollar goal as a share for minority-owned business enterprises in public contracting. Justice O’Connor did not find minority and women-owned business enterprises (MWBE) programs unconstitutional per se. “Strict scrutiny,” as she noted in \textit{Adarand}, was not “strict in theory, but fatal in fact.”\textsuperscript{21}

Nevertheless, the constitutional bar for the use of racial classifications in public contracting was

\textsuperscript{17} 488 U.S. 469 (1989).
\textsuperscript{18} \textit{Croson}, 488 at 493. As applied to federal programs, see \textit{Adarand}, 515 at 227.
\textsuperscript{19} Race neutral remedies are tools that seek to reduce barriers to participation in public contracting such as improving information about contracting opportunities, reducing bonding or other requirement, aiding all small businesses or enforcing anti-discrimination rules, without using overt race conscious or preferential tools such as quotas or goals. See \textit{Croson} at 507.
\textsuperscript{20} \textit{Local Officials Guide to Minority Business Programs and Disparity Studies}, op.cit. p.6
\textsuperscript{21} \textit{Adarand v. Pena}, 515 U.S. 200, 237.
set very high. Justice O'Connor said it would be only in the “the extreme case,” where “some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion.” Then, she provided a statistical test that a jurisdiction should use as a beginning point to determine whether patterns of discriminatory exclusion existed:

Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion could arise.  

This test invited the development of studies to determine whether disparities, if any, in the use of MWBEs in public contracting was caused by discrimination. A cottage industry emerged to produce them.  

Other federal courts have followed Croson’s interpretation of equal protection principles as applied to contracting. Federal preferential contracting programs have been found unconstitutional on their face or as administered in Western States Paving v. Washington State Department of Transportation (2005), Rothe v. Department of Defense (2008), and Dynalantic v. Department of Defense (2012). State preferential procurement programs have been struck down in whole or in part in Michigan, (Michigan Roadbuilders v Millikin, 1987), California, (Monterey Mechanical v. Wilson, 1997), Ohio, (AGC v Drabik, 2000), Oklahoma, (Kornhaas v. State of Oklahoma, 2001) and North Carolina (Rowe v. North Carolina, 2010). Local MWBE contracting programs enacted by more than twenty governments have also been found unconstitutional.

Despite these judicial actions, preferential contracting programs have been supported by strong political coalitions (women and minority voters form electoral majorities everywhere) and

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22 Croson, 488 at 509.
23 Ibid.
24 George R. La Noue, “Who Counts?:Determining the Availability of Minority Businesses for Public Contracting
sometimes by powerful feelings of remedying social injustice. Billions of dollars of public contracts are at stake. So it is worthwhile to examine compliance with the judicial rulings regarding preferential contracting programs, not only because procurement is substantively important, but because of what it may add to the literature about how the U.S. constitutional system really works.

III. Implementation of Federal Court Decisions

A. Local MWBE programs

The first impact of the Supreme Court’s *Croson* ruling was on MWBE city or county programs. The National League of Cities declared: “The decision cast a pall of uncertainty over state and local programs which use a numerical quota or any other form of racial preference.”

Either on the advice of city attorneys or because the programs were based on fragile political coalitions, some local governments voluntarily discontinued their MWBE programs. Other local governments held on waiting until they were sued.

One of the first such cases was *Contractors Association of Eastern Pennsylvania, Inc v. City of Philadelphia* decided in 1995. The City had commissioned a disparity study by the noted economist Andrew Brimmer. Based on a head count of MWBE and non-MWBE firms, he discovered a disparity in their utilization, but the federal trial judge found the City program unconstitutional declaring:

> “Qualified,” “willing” and “able” are the three pillars of the of the *Croson* test; *a fortiori*, a municipality may not enact race-based remedial measures unless it determines that qualified, willing and able minority contractors have been excluded from participating in public contracting.”

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Headcount comparisons were not enough. When the Third Circuit Court of Appeals affirmed, the City abandoned its preferential program for several years.

After a 1998 disparity study by D.J. Miller and Associates based on firm headcounts, regardless of their qualifications or capacities, however, the City Council found that an MWBE program was “still necessary to overcome the effects of past discrimination and to prevent ongoing discrimination in the city’s contracting process.”

Currently, Philadelphia has a MWBE program established by executive order which also includes firms owned by disabled person (DSBE). A City study indicated that the headcount of M/W/DSBE firms in the Metropolitan Statistical Area of Philadelphia was 19.1%. From FY 2006 to FY 2011, the City achieved an average of 21.4% MWBE utilization and has announced its intention to increase its goal to 25% by 2014. Since the 1991 case, no new plaintiff has come forward to challenge the City program.

In 1996, the Associated General Contractors of America, Ohio Chapter, sued the City of Columbus which was relying for its MWBE program on a disparity study prepared by Brown, Bortz and Coddington, (BBC), a national consulting firm. The study used a City produced bidders list to measure availability, but the federal district court found that, while the city actively recruited minority-owned firms to join that list, it did not similarly recruit majority-owned firms, and, therefore, declared the City program unconstitutional. Judge James Graham wrote a vigorous 150 page decision condemning the Columbus program and enjoined the City from

28 945 F.2d 1260, (3rd Cir. 1991).
30 All goals figures refer to the percentage of dollars received by MWBE or DBE firms as compared to the total contract dollars awarded by a government.
“discriminating on the basis of percentage preferences for minorities and females in construction work.”

He also decided to maintain jurisdiction requiring the City to ask the court to modify his order should the City choose to enact a new law imposing minority or female percentage preferences. Retaining jurisdiction is not uncommon in civil rights cases, particularly in the desegregation of public schools. Columbus, however, argued on appeal that since federal court jurisdiction was limited to “cases and controversies,” that continuing jurisdiction was improper. If the city enacted new preferential legislation based on new evidence and a new plaintiff emerged, new litigation would be necessary to resolve the matter. The Sixth Circuit agreed with the City, but Judge Graham has remained on the bench, though now on senior status. The City has moved to a new program to promote the inclusiveness of minority and women owned businesses using race and gender neutral tools. In 2010, the MWBE utilization rate achieved race neutrally was 22.48% in professional services, 6.52% construction and 6.39% in goods and services.

In that same year, a coalition of construction organizations, the Engineering Contractors Association of South Florida, Associated General Contractors of America, South Florida Chapter, Inc., Gold Coast Associated Builders and Contractors, Inc., Construction Association of Florida, Inc., Underground Contractors Association of South Florida, Inc, and the Air Conditioning and Refrigeration Association, Inc. sued Metro Dade County. Again a federal court found a disparity study deficient. The Court ruled that:

… simple disparity indices do not account for the myriad factors that can legitimately

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34 The Associated General Contractors of America v. City of Columbus, 1999 U.S. App. LEXIS 5319.


36 http://www.docstoc.com/docs/131647107/Annual-Report-Columbus-City-Council-City-of-Columbus p36
result in disparities, such as the availability of MWBEs that are actually qualified to perform the contract requirements, the size of the firm, which will impact the dollar value of contracts which can be successfully bid for, the capacity of a firm to handle multiple County contracts at the same time, etc. Only when these and other factors which affect the qualifications, ability and willingness of a firm to compete for County construction work are taken into account through appropriate data and performing regression analysis can the County accurately determine where there are actual disparities in the number of MWBEs and the amount of work they are performing in the local construction industry.\textsuperscript{37}

Following the \textit{Engineering Contractors} case, the County enacted a new MWBE program which was challenged by architect Hershell Gill. This lawsuit not only attacked the evidentiary predicate of the new County program, but sought to hold County Commissioners personally liable for violating the civil rights of non-minority businesses. The Court agreed that the current County program was illegal and that in theory public office holders could be held personally liable for their actions, but, after firing that shot across the County Commission’s bow, declined to invoke actual sanctions.\textsuperscript{38} After that case, the Miami city manager contacted the city attorney’s office for guidance in implementing a still politically popular MWBE “set-aside program.” Citing \textit{Croson}, \textit{Adarand} and \textit{Gill}, the city attorney advised against such a program and the County agreed to replace it with a local and small business race neutral program.\textsuperscript{39} That outcome may not be stable. The County has recently announced that it is retaining Mason Tillman Associates to conduct a new $450,000 disparity study.

The Builders Association of Greater Chicago won two difficult cases against Cook County, Illinois in 2000,\textsuperscript{40} and the City of Chicago in 2003.\textsuperscript{41}

\textsuperscript{37} 943 F. Supp. 1546, 1583, (S. D. Fla. 1996) affirmed 122 F.3d 895 (11th Cir.1997).


\textsuperscript{39} Memo from Jorge L. Fernandez, City Attorney to Joe Arriola, City Manager, “Request for a Legal Opinion Regarding Set-Asides to Enhance the Participation of Minority-and –Women-Owned Businesses in Fulfilling the City’s Procurement Needs (MIA-0500001), March 30, 2003.

\textsuperscript{40} \textit{BAGC v. Cook County}, 123 F. Supp. 1087 (N.D. Ill 2000), affirmed 256 F.3rd 642 (7th Cir. 2001)

\textsuperscript{41} \textit{BAGC v. City of Chicago}, 298 F.Supp. 2d 725, (N.D. Ill, 2003)
Cook County had a 1988 ordinance requiring that 30% of the dollar value of any County construction contract go to MBEs and 10% to WBEs. After a six week bench trial, the Cook program was found to be unconstitutional because it was not based on any valid compelling interest. The County did not even attempt to justify that its program was narrowly tailored.

Currently, Cook County maintains a program to assist Minority and Female owned businesses, collectively known as PCEs or Protected Class Enterprises. While the statute specifies several race neutral steps that can be taken to increase participation among PCEs, Cook County has declared that:

Race and gender neutral measures or affirmative action programs without numerical goals have not and are not likely to eliminate to competitive disadvantage of minority and women’s businesses in participating in contracts due to discrimination in the local economy.  

This conclusion was based on anecdotal evidence rather than any statistical disparity study. Nevertheless, the current Cook County goals on public works contracts are 24% for MBEs and 10% for WBEs.

Three years after the Cook County program was found unconstitutional, a federal district court invalidated the Chicago MWBE program. Nevertheless, although the City no longer sets aside contracts for minority firms, Chicago has a current construction goal of 24% MBE and 4% WBE.

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42 Cook County Code of Ordinances Sec. 34-263.  
43 Ibid., Sec 34-261(j).  
46 Chicago Municipal code, sections 2-92-420 through 2-92-780.
The National Economic Research Association (NERA) conducted a standard disparity study for Chicago in 2004, but the City’s new MWBE program relies instead on a more group specific analysis. According to the City’s legislative history:

When creating the current MBWE Program in 2004 and renewing it again in 2009, the City wanted to ensure that it provided sufficient econometric studies to firmly establish a compelling governmental interest. Dr. David Blanchflower’s report included written interview summaries prepared by social science experts who each examined a specific subset of the MWBE Program and discrimination therein: Dr. Ana Aparacio, of Northwestern University (Hispanic and women-owned firms), Dr. Cedric Herring, of University of Illinois-Chicago (African American-owned firms), and Dr. Yvonne Lau, of DePaul University (Asian American-owned firms). Together, these reports demonstrated significant and ongoing discrimination in the Chicago construction industry.47

A number of other local programs were struck down by federal courts, though a few survived litigation.48 As the above discussion illustrates, however, even after clear-cut losses in the courts, local MWBE programs often have rebounded, though in different formats, after new disparity studies or the adoption of a “so sue me” posture by the governments involved which calculated they could better withstand a new lawsuit than could plaintiffs.

B. State MWBE programs


Scott v. City of Jackson, 199 F.3d 206 (5th Cir.1999)
Phillips and Jordan v. Watts, 13 F. Supp. 2d 1308 (N. D. Fla. 1999)
Webster v. Fulton County, 51 F. Supp. 2d 1359 (N.D. Ga. 2000), affirmed 218 F.3d 1276 (11th Cir. 2000)
West Tennessee Assn. of Builders and Contractors v. Memphis City Schools, 64 F. Supp. 2d 714 (W. D. Tenn. 1999)
BAGC v. Cook County, 123 F. Supp. 1087 (N.D. Ill 2000), affirmed 256 F.3rd 642 (7th Cir. 2001)

Concrete Works v. City and County of Denver, 86 F. Supp. 2d 1042 (D. Colo. 2000), but reversed 312 F.3d 950 (10th Cir. 2003)
In 2000, the Associated General Contractors challenged the state of Ohio’s 1980 Minority Business Enterprise Act which required that 5% of the dollar value of all state construction contracts be set-aside for bidding exclusively by certified MBEs.\(^{50}\) The state lost when the Sixth Circuit faulted the statistical comparisons Ohio relied on because it counted only the utilization of certified firms and did not take into account whether they were “qualified willing and able to perform state construction contracts” or the “relative size of firms, either in terms of their ability to do the work or the number of tasks they have the resources to complete.”\(^{51}\)

In 2001 Ohio contracted for a disparity study by Mason Tillman, Consulting and created two new programs for MWBEs. The MBE program, excluding white women, has a 15% goal for all state goods and services contracts which turns into a set-aside if not met\(^ {52}\) The EDGE (Ensuring Diversity Growth and Equity) program is a quasi race-neutral program for providing contracts to small businesses in any commercial field. While race and gender can be a factor in the certification determining eligibility, so can physical/mental disability, areas with high unemployment, or “long-term residency in an environment isolated from mainstream Ohio.” Therefore, businesses owned by white males can participate. Further, the EDGE program requires that owners have a net worth not exceeding $250,000 at certification and both owners and businesses cannot remain in the program for more than ten years, so it has some narrow-tailoring features.\(^ {53}\) The EDGE firm goal was 5% which was exceeded with 6.8% of state expenditures in FY 2012.

Thus, Ohio has responded to the Sixth Circuit ruling with two programs (MBE and EDGE) which are less racially rigid than the invalidated set-aside Drabik program, but still do not

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\(^{50}\) AGC v. Drabik, 214 F. 3d 730, 732 (6th Cir. 2000)

\(^{51}\) Ibid., 736.

\(^{52}\) Ohio Administrative Code 123:2-15 and Ohio Revised Code 122.71, 125.081.
meet the standards announced on the State’s own website declaring that Ohio is “committed to making all state contracts, services, and opportunities available without discriminating on the basis of race, color, religion, sex, national origin, disability, age or ancestry.”

In 1998, North Carolina commissioned a disparity study by MGT of America. In 1999 it established a Historically Underutilized Business Program through an Executive Order to increase the utilization of minority and women-owned business by creating “a verifiable” ten percent goal participation in all state building projects.

In 2003, H.B. Rowe, a general contracting company, with the financial support of the Carolinas AGC chapter, challenged the MWBE goals as applied to the North Carolina highway construction program. After seven years of litigation, the 4th Circuit decided the Rowe case in 2010 by affirming in part and overruling in part a district court decision. The Circuit court upheld the program with regard to African-Americans and Native Americans, but excluded firms owned by white women, Hispanics and Asian-Americans from preferences. After that decision, North Carolina changed its highway program to conform to the 4th Circuit ruling, but did not change the groups eligible to participate in its HUB program.

C. Federal Preferential Contracting Programs

There have been a wide variety of federal preferential contracting programs, including, the Department of Defense (DOD) price preference program, the Small Business Administration’s 8(a) program, and the Department of Transportation DBE program. Naturally federal courts have

53 Ohio Administrative Code 123:2-16 and Ohio Revised Code 123.152
54 Rowe v. North Carolina Department of Transportation, 615 F.3d 233, 259 (4th Cir. 2010).
55 Interview with Dennis English, Director of the North Carolina HUB program, by Matthew Speake, June 28, 2013.
56 The most recent comprehensive list of federal preferential business programs shows such programs exist in almost every federal agency. Charles V. Dale and Cassandra Foley, “Survey of Federal Laws and Regulations Mandating Affirmative Action Goals, Set-asides, or Other Preferences Based on Race, Gender or Ethnicity.” Congressional Research Service, 2004.
been more reluctant to overturn laws passed by Congress than by some city, county or even a state. Nevertheless in *Rothe Development Corporation v. U.S. Department of Defense and Department of the Air Force*, the Federal Circuit Court of Appeals after ten years of litigation found that the DOD program, although based on a number of disparity studies, was invalid because the studies did not properly measure firm capacity.\(^{57}\) The Circuit found that it was not enough to establish a threshold of being able to bid on one contract to determine availability because that measure fails to account for “the relative capacity of businesses to bid on more than one contract at a time.” (emphasis in original).\(^{58}\)

In 2012, a federal district court in *Dynalantic v Department of Defense* found that using 8(a) race based set-asides in the computer simulation industry was not warranted because the federal government had no evidence regarding contracting discrimination in that specific industry.\(^{59}\) The Defense Department has continued to use 8(a) set asides in other industries, even though there is no specific proof of contracting discrimination in those industries either.

The largest federal preferential contracting program is the Department of Transportation’s Disadvantaged Business Enterprise (DBE) program which requires the utilization of DBEs by every 1,425 state and local governments receiving federal transportation funds. All women and minorities are considered presumptively “socially disadvantaged,” so firms owned by them receive contracting preferences. Prior to *Adarand*, legislation required that DBEs receive at least 10% of all federal dollars, but after that decision, in an effort to “narrow tailor” the DBE program, each recipient is expected to set a goal based on local market conditions and the previous history.

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\(^{58}\) *Id.*, at 1044.

\(^{59}\) 885 F. Supp. 2d 237, (D.DC2012)
of its DBE utilization. Challenging DBE programs has been a more difficult target. Courts have uniformly held that the variety of hearings, studies, and reports claiming the existence of discrimination in the construction industry submitted to Congress was sufficient to create a compelling interest.\footnote{Milwaukee County Pavers Association v. Fiedler 922 F.2d 419 (7th Circuit 1991); Tennessee Asphalt Co. v. Farris 942 F.2d, 969 (6th Cir.1991); the Adarand Cases culminating in Adarand VII, 228 F.3rd 1147 (10th Cir.2000); Gross Seeds v. Nebraska Department of Roads, 345 F.3d 964 (8th Cir.2003), Sherbrooke Turf, Inc. 345 F.3d 964 (8th Cir.2003). Northern Contracting, Inc. v. Illinois Department of Transportation, 473 F.3d715 (7th Cir. (2007)).} There have been more judicial doubts about whether the programs were narrowly tailored.

In 2005, the Ninth Circuit decided \textit{Western States Paving Co., Inc. v. Washington State Department of Transportation} applying the strict scrutiny test.\footnote{Western States Paving Co., Inc. v. Washington State Department of Transportation 407 F.3d 983, 990. (9th Cir. 2005).} While agreeing that a national compelling interest existed for the DBE program, the Court found that each state program had to be narrowly tailored, since states decided on the size of the overall DBE goal, the balance between race conscious and race neutral tools and which groups were included to meet the race conscious goals. The Circuit Court declared:

\begin{quote}
Whether Washington’s DBE program is narrowly tailored to further Congress’s remedial objective depends upon the presence or absence of discrimination in the State’s transportation industry. If no such discrimination is present in Washington, then the State’s DBE program does not serve a remedial purpose; it instead provides an unconstitutional windfall to minority contractors based solely on race.\footnote{Ibid., 997-998.}
\end{quote}

The Court also found that Washington availability calculations were flawed because:

\begin{quote}
This oversimplified statistical evidence is entitled to little weight, however, because it does not account for factors that may affect the relative capacity of DBEs to undertake contracting work.... DBE firms may be smaller and less experienced than non-DBE firms (especially if they are new businesses started by recent immigrants) or they may be concentrated in certain geographical areas of the State, rendering them unavailable for a disproportionate amount of work.\footnote{Ibid. at 1000-1001.}
\end{quote}
The Western States ruling, the U.S. Department of Transportation worked to circumscribe its impact by arguing that it did not apply to any state out-side of the Ninth Circuit, while warning the states inside those boundaries that they would have to do disparity studies to justify their continuing use of race conscious goals. Thus the nine states in the Ninth Circuit provide valuable case studies in administrative compliance or noncompliance to a specific judicial ruling.

Alaska

Prior to Western States, the Alaska Department of Transportation (AKDOT) set a DBE goal of 7.5% of which 4% was race conscious and 3.5% was race neutral. After the decision AKDOT commissioned a $600,000 disparity study conducted by the D. Wilson firm. Completed in 2008 the study recommended a total goal of 13% (7.3% race conscious and 5.7% race neutral). This disparity study was criticized by the Alaska Association of General Contractors and the Pacific Legal Foundation, so AKDOT turned the 13% goal into a race neutral program from 2008-2010. By 2011, Alaska returned again to its 13% goal (7.3% race conscious and 5.7% race neutral), but this time excluding white women as a preferred group because there was no evidence in the disparity study finding discrimination against them. For the FY2012-FFY2014 period, AKDOT reduced its the overall DBE target to 10.38% (5.59% race conscious and 4.79% race neutral), while still excluding white women-owned firms in its central district from participation in preferences. In Alaska, therefore, the net effect of Western States was that after a


66 http://www.dot.state.ak.us/cvlrts/DBE-program.pdf
brief race neutral period, AKDOT nearly doubled its DBE goal, but has now begun to reduce it, even though some women-owned firms are excluded from meeting those goals.

**Arizona**

Before *Western States*, Arizona set a 10.5% DBE goal (7% race conscious and 3.5% race neutral). After that decision, the Arizona Department of Transportation (ADOT) decided its whole DBE goal had to be achieved race neutrally. A 2009 disparity study by MGT of America, Inc. recommended that Arizona implement an overall DBE goal of 8.0% (3.1% race conscious and 4.9% through race neutral means), but that firms owned by non-minority women and Native American businesses should be excluded in meeting the race and gender conscious targets because there was no statistical evidence of discrimination against those groups. In 2011, ADOT proposed a 6.03% goal (3.67% race conscious and 2.36% race neutral), but after negotiations with the Federal Highway Administration, the state highway goals were raised to 7.76% (5.08% race conscious and 2.68% race neutral). Non-Minority women and Native American-owned firms were reinstated as eligible for preferences. On the other hand, Arizona has proposed that its 3.82% DBE goal for Federal Transit Administration and Federal Aviation Administration assisted projects be entirely race neutral.

In Arizona, the *Western States* decision and the U.S. DOT instructions initially caused a substantial reduction in the size of the overall DBE goal and the elimination of the use of race conscious goals, probably caused by the fact that data did not support the continuation of white women and Native Americans in the program. That would have made the state dependent on the use of Hispanic firms and on a very small numbers of existing African-American and Asian-American-owned construction firms to meet race conscious goals. Gradually the state has

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67 Interview with Charlene Neish, DBE Supportive Services Program Manager, by Matthew Speake, July 1, 2013.
reintroduced race conscious goals, but the overall highway goal has been reduced from pre-
Western States totals, while the FTA and FAA goals are wholly race neutral.

California

The impact of Western States in California has been more turbulent than in other states, partly because the size of the transportation pie is so large and a partly because of the fierce opposition of some groups to racial preferences.\(^69\) Prior to Western States, the California Department of Transportation (Caltrans) set a 12% DBE goal, all to be met race consciously. After the 9\(^{th}\) Circuit ruling, the Caltrans goal became entirely race neutral. In 2007, Browne, Bortz and Coddington (BBC) completed a $1.5 million disparity study and Caltrans raised its DBE goal to 13% percent, evenly divided between race conscious and race neutral means, but excluding Hispanic and subcontinent Asian-American owned firms. In 2012, BBC updated its study and Caltrans slightly lowered its DBE goal to 12.5%, again split evenly between race conscious and race neutral means and again excluding subcontinent Asian-American owned firms, but now including the far more numerous Hispanic businesses as eligible for race conscious awards.\(^70\)

In 2009 the AGC San Diego Chapter, represented by the Pacific Legal Foundation, challenged the race conscious goals on a number of grounds. Four years later, the Ninth Circuit found that the plaintiffs did not show specific injuries and dismissed the case for lack of standing. In its dicta, however, the panel appeared to have no problems with the Caltrans program and seemed to imply that if a transportation agency were just following federal regulations, plaintiffs were unlikely to be successful on the merits.\(^71\) It is too soon to determine what the fall-out of this


\(^{69}\) California, Michigan, Nebraska, Oklahoma, and Washington State have passed state constitutional amendments barring any preferential use of race in public university admissions, public employment or public contracting. These amendments can not overturn federal requirements of the use of race conscious goals in state administration of federal programs, however.


\(^{71}\) \textit{Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation},
new Ninth Circuit opinion will be in California or elsewhere.

**Hawaii**

Prior to *Western States*, the Hawaii Department of Transportation (HDOT) set a DBE goal of 11%, all race conscious. After the Ninth Circuit decision, HDOT moved to a 6.8% goal, all race neutral. That policy continued until 2012 when HDOT received a disparity study from NERA which called for a 35.73% goal (28.2% race conscious and 7.6% race neutral). Hawaii is a “majority-minority” state and this goal is the highest ever set by any state DOT. Its proposed goal for FY 2014-2016, is even more aggressive at 53.43%, of which 45.83% would be race conscious and 7.6% would be race neutral. During all these years, firms owned by Asian Pacific males were excluded from meeting race conscious goals because the study showed no disparity for them.  

**Idaho**

Prior to *Western States*, the Idaho Department of Transportation (IDOT) set an overall DBE goal of 11% with almost all of it (10.39%) being race conscious. After the Ninth Circuit decision and based on a disparity study by BBC, IDOT reversed course and set its goal at 10.5% but all race neutral. In 2013, IDOT retained its race neutral policy, but reduced its highway DBE goal to 6%.  

**Montana**

Montana struggled to develop a satisfactory DBE goal after the *Western States* case. Before that decision the Montana Department of Transportation (MDOT) set a DBE goal of 6.77% (1.69% race conscious and 5.08% race neutral) though there was no disparity study to support those goals. After *Western States*, lacking a study, MDOT had to go race neutral, but it

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713 F.3d1187, (9th Cir, 2013).

72 (http://hawaii.gov/dot/administration/ocr/dbe/FHWA%20Waiver%20Request.pdf)

73 http://www.itd.idaho.gov/civil/dbegoal.htm
nearly doubled its goal to 12%. When D. Wilson completed a disparity study in 2009, it found
that every DBE group was overutilized as construc
tion subcontractors and recommended a race neutral program. In 2011, however,
MDOT set an overall goal of 5.83%, with a split of 3.27% race conscious and 2.56% race neutral,
with all groups eligible for preferences. In 2013, a small traffic control firm Mountain West
Holding brought suit against MDOT, challenging its race conscious goals on a number of fronts.\textsuperscript{74}

\textbf{Nevada}

Prior to the \textit{Western States}, Nevada set a 6% DBE goal divided equally between race
conscious and race neutral. After that decision, the Nevada Department of Transportation (NDOT)
used only race neutral means until a new disparity study by BBC could be completed in
2007. That study led NDOT to make a slight decrease in the overall DBE goal to 5.7%, still race neutral. But by 2010, NDOT was not achieving its goal, so some race conscious measures were again instituted\textsuperscript{75} and a new disparity study commissioned that would hopefully provide “the backup statistical information than can support these DBE goals.”\textsuperscript{76} The race conscious goals first put forward may not be consistent with \textit{Western States}, but no plaintiffs have arisen.

\textbf{Oregon}

Prior to \textit{Western States}, the Oregon Department of Transportation (ODOT) set a 13.36 %
DBE goal of which 8.48 % was race conscious and 4.88% was race neutral. Following that
decision, ODOT suspended all “hard goals” or race conscious goals for DBEs pending the
completion of the required disparity study. That study was finished in 2007 by MGT of America,
Inc. and it found that only two groups, African-American and Asian-Americans showed enough

\begin{thebibliography}{99}
\bibitem{74} Mountain West Holding Co. Inc. v. The State of Montana et.al (2013)
\end{thebibliography}
disparity to warrant targeted utilization goals for construction contracting.\textsuperscript{77} In 2011, Oregon completed another disparity study which led the state to divide Asian-Americans into two groups and eliminate Asian-Pacific owners from the preferred category, while preserving preferences for Sub-Continent Asians and African-Americans.\textsuperscript{78} Currently Oregon has maintained an 11.5% DBE goal, but because there are so few firms eligible for preferences only 1% of that goal is to be achieved race consciously.\textsuperscript{79}

**Washington**

At the time *Western States* was decided on May 9, 2005, the Washington State Department of Transportation (WSDOT) had no completed disparity study, though one was in process. When NERA finished its study on October 2005, it showed that DBEs were 18.77% of the headcount of available firms for highway construction. Consequently in 2008, WSDOT adopted that figure as a race conscious goal, based on NERA finding of overall availability, even though that study made no adjustment for firm capacity. WSDOT’s race conscious goal, however, has proved uncomfortably difficult to reach and so has been constantly lowered. The proposed target for FY 2012-2014 is an overall goal of 14.06% (10.33% race conscious and 3.73% race neutral).\textsuperscript{80}

Looking back at *Western States* after eight years, it is clear that the decision has had a powerful, but mixed effect.\textsuperscript{81} First, USDOT decided not to appeal the decision either *en banc* or to the Supreme Court, perhaps fearing that an appeal would lead to giving the decision more

\textsuperscript{76} https://leg.state.nv.us/Session/77th2013/Minutes/Assembly/TRANS/Final/118.pdfp.10.
\textsuperscript{77} http://www.oregon.gov/ODOT/CS/CIVILRIGHTS/sbe/dbe/docs/2011_waiver_amendment_request.pdf
\textsuperscript{78} http://www.oregon.gov/ODOT/CS/CIVILRIGHTS/sbe/dbe/docs/DisparityUpdate2011_Overview.pdf
\textsuperscript{80} (http://www.wsdot.wa.gov/NR/rdonlyres/9B8206BF-50A4-419C-B4F4-66F75D73B90F/0/FFY2012FHWAProposedOverallDBEGoalMethodology.pdf)
precedential power. Instead, USDOT instructed state DOTs that the decision applied only to Ninth Circuit states which would have to complete disparity studies which, however, would be paid for by the federal agency.  

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Figure A displays some of the post-Western States results.

Impact of Western States Paving v. Washington State Department of Transportation on DBE goals in 9th Circuit States

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The outcome of the Ninth Circuit’s *Western States* ruling is mixed. Each of the relevant state have has to reconfigure and justify their individual DBE programs. All of these states operated race neutral DBE programs for a number of years before their disparity studies were completed. Afterward, Idaho remained race neutral, although it had a 10.4% race conscious goal pre-*Western States*. Some states’ (Arizona, Idaho, Montana, Nevada, Oregon, and Washington) current DBE goals have been reduced from their pre-*Western States*’ goals. On the other hand,
Alaska marginally increased its race conscious goals, while Hawaii quadrupled its race conscious goal from 11% to 44%. A number of states also excluded some groups from fulfilling race conscious goals for a time. While no one can be sure about what might have happened without the Ninth Circuit decision, it does appear some narrow tailoring has occurred.

The disparity studies were completed by various firms using different methodologies, but only in California and Montana have plaintiffs arisen to challenge the new disparity study backed goals. So *Western States* has made a difference, but it did not lead to national standards about when and how vigorously DBE race conscious goals can be used on federally assisted transportation projects. Except for individual private litigants, there was no public agency that seemed willing to tackle that problem.

**IV. Conclusions**

According to Alexander Hamilton’s *Federalist Papers*’ prediction and the concurrence of modern political scientists, it should not be that surprising that the Supreme Court’s *Croson* standard of strict scrutiny has not been uniformly enforced. After all, it took almost a century before Equal Protection Clause enforcement began to dismantle patterns of segregation and discrimination in the South and elsewhere. Still, since public contracting program using race or gender now must have a compelling interest and be narrowly tailored, why have so many DBE and MWBE programs survived?

There are several specific explanations regarding contracting programs that also bear on the more general issue of compliance with judicial authority. As suggested earlier, there are four components that increase compliance with court decisions: judicial unanimity, executive agency implementation, Congressional legislation, and stakeholder group monitoring and support. Ending the use or even the dramatic overreach in the use of public contracting racial and gender
preferences has benefitted from none of those components.

A. Judicial Unanimity

While there have been very strong statements by the Supreme Court and many Circuit Courts affirming strict scrutiny to restrict the use of racial and gender classifications in procurement, judges have not been nearly unanimous. In most affirmative action issues, judicial conservatives oppose, liberals support, and court moderates (Powell, O’Connor, and Kennedy) control the final opinion in an otherwise closely divided bench. Moreover, the Supreme Court has heard only one preferential contracting case, *Adarand* in 1995, since *Croson*. Only the Ninth Circuit has had more than two post-*Croson* preferential contracting cases. When Circuit Courts have written powerful opinions (*Western States* and *Rothe*) restricting preferential contracting in federal programs, the U.S. Department of Justice has chosen not to appeal them to avoid a Supreme Court concurrence.

B. Executive agency implementation,

For a court decision to be implemented there needs to be support from executive agencies which can invoke sanctions for non-compliance. In the extreme case, President Eisenhower had to dispatch 101st Airborne paratroopers to enforce school desegregation in Little Rock Arkansas in 1957. To the contrary after *Croson* and *Adarand*, the Executive branch under successive administrations protected preferential contracting programs, since the federal government had a number of its own such programs. There are offices in most federal agencies dedicated specifically to increasing the number of minority and women owned businesses and their share of contracting dollars. Similar bureaucracies exist in state and local governments, so there was no governmental pressure to end state or local preferential programs, even those that had no compelling interest study predicates or that overutilized DBEs or MWBEs. Indeed the
bureaucracies managing those programs were dedicated to preserving them and their own jobs.

C. Congressional legislation

Even when exercised, executive authority may not be enough to enforce controversial court decisions. Actual implementation often depends on whether legislative branches have passed supportive legislation. A decade after the Supreme Court decided *Brown* requiring the end of school segregation only about 2% of southern black children were in Southern desegregated schools. Only after the passage of Title VI of the Civil Rights Act of 1964 which provided for the cut-off of federal funds to segregated districts, did that practice substantially diminish. It was not necessary for funding cut-offs to actually occur, the mere threat was sufficient to change local resistance.

Enforcement legislation has three impacts. First, it adds to the moral legitimacy of the new civil rights policy. Second, it usually creates agencies in the Executive Branch dedicated to enforcing those laws and finally it provides penalties for violations. Thus, the passage of Title VI and Title IX of the Civil Rights Act of 1964 greatly increased the size and authority of enforcement bureaucracies in the Office of Civil Rights. Similarly, the Equal Employment Opportunity Commission expanded to implement the employment provisions in Title VII and the US Department of Justice created a subdivision of attorneys to enforce the Voting Rights Act of 1965. Ending the discrimination that might occur because of MWBE and DBEs program overreach has had none of that legislative support. No Congressional legislation was enacted to achieve that goal and no part of the bureaucracy ever saw it as an appropriate mission. To the contrary preferential contracting programs have been frequently re-enacted usually with little debate.

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D. Stakeholder group monitoring and support.

Because of government agency and legislative enforcement inaction, the only means businesses had to enforce Croson’s restrictions on MWBE programs was to bring their own litigation against the preferential programs that disadvantaged them. As the previous sections show, such litigation was brought and often won, but there were formidable obstacles to following this path. Challenging a MWBE or DBE program requires that a business or an association be willing to sue its actual or potential customers. This is not an attractive proposition for most firms. It also means opposing the ingrained narrative in American politics that discrimination only occurs against women and minorities which can alienate other customers and politicians.

Litigation is a difficult tool to manage. Few small firms have the resources to engage in it and large firms have to consider the long-term political impacts of such an adversarial action. Some firms have decided that forming a “front” business by bringing in a women or minority putatively as the owner and decision maker or listing DBEs in their bids, but doing the work themselves, is the safer decision than challenging programs in court. Both actions are illegal and can lead to tragic consequences.

General business associations usually have some members who benefit from preferences and consequently have become reluctant to offend these members. Further, while general associations have diffuse goals, business organizations specifically representing women and different minority groups have emerged at various levels of government with focused agendas

1984.

86 It is not surprising that many of the lawsuits challenging the federal preferential programs have been brought by small white-owned firms working in specific niches (Adarand, guardrails, Gross Seeds and Sherbrooke, landscaping, Dynalantic, computer simulations, and Mountain West, traffic control) who thought their survival was threatened because of their inability to compete if rivals had preferences based on race or gender.
87 John Marzulli and Brian Kates, “Construction exec commits suicide two days before sentencing for $19M federal
aimed at gaining shares of public contracts for their members. In a political contest between a large diffuse associations and smaller focused organizations, size may not matter.

While the Center for Equal Opportunity and the Pacific Legal Foundation have had some success in convincing government agencies voluntarily not to adopt preferential contracting programs, the only organization in the country which could have managed and financed a national campaign against preferential contracting is the Associated General Contractors (AGC), the largest organization of construction owners in the country. In the early days after Croson, AGC chapters fought and won litigation against MWBE programs and the national organization supported anti-preference amicus curiae briefs in important appellate cases. Over the years, however, association memberships changed, as they should have, to include more women and minority owned businesses. Further, as public infrastructure dollars became scarcer, AGC adopted an informal motto, “It is better to build bridges than to burn them.” and is not eager to be visible in opposing contracting preferences.

Litigation financed by organizational dues payers against agencies financed by taxpayers rarely results in equivalence of resources. Consequently, despite the Croson admonition that race preferences should be used only in the “extreme case” and even when preferential program have no disparity studies to create the semblance of a compelling interest; plaintiffs have arisen rarely to challenge them.

The disparity study industry has continued to grow and often has a vested interest in making findings that support new preferential programs or maintain existing ones. Not many governments are willing to hire consultants that would disrupt existing MWBEs programs or plans for new ones. By 2012, there were at least 350 such completed studies at a cost to the

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taxpayers of at least $140 million, although few of them attempt to control for which firms are really “qualified, willing and able” as Croson and lower courts have required. Nor do any attempt to verify the anecdotes of discrimination on which they rely.  

So almost a quarter of a century after the Supreme Court attempted to restrain preferential contracting programs, many are still operative and have even expanded. Since the implementation of Croson’s strict scrutiny test in public contracting has been only partial, the hypothesis about the consequences of the lack of judicial unanimity, executive agency implementation, legislative enactment, and stakeholder support can be only partially confirmed. Litigation to enforce strict scrutiny has not been without effect. The judicial ruling that a compelling interest is required for a using a racial classification has led a de facto requirement that a pre-enactment disparity study must conducted. If challenged, an MWBE program without a recent and valid disparity study is not likely to survive. There is a post-Croson judicial consensus that to be narrowly tailored a finding of discrimination must exist for each separate industry and each separate racial or ethnic group before contracting preferences can be employed for that industry or group. Disparity studies can lead to unexpected results that may require more narrow tailoring than the political consensus would wish. These are not small matters, but courts can only enforce them consistently, if enough litigation is brought that raises those issues.

V. Implications for Compliance with Strict Scrutiny after Fisher v. University of Texas

The Supreme Court’s most recent affirmation of the strict scrutiny test (Fisher v. University of Texas at Austin) was in the complex area of using racial classifications in university admissions. A 7-1 majority affirmed that although the strict scrutiny test was not fatal

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to the use of race, it also should not be feeble in its application. Consequently we will have another set of case lessons regarding the implementation of strict scrutiny. As after Croson, there will need to be new studies, in this instance to confirm that preferential admissions policies that particular universities adopt have a compelling interest and are narrowly tailored. There will also be some likely commonalities in the post-Croson and post-Fisher eras in that plaintiffs will be hard to find and litigation will be costly and fact intensive. It is also improbable that there will be post-Fisher enforcement legislation or that existing civil rights agencies will see investigation about the use of racial classifications in admissions as part of their task. Nor are national organizations that would be willing to fund and organize litigation on admissions policies apparent. On the other hand, the higher education establishment filed numerous amicus brief supporting the University of Texas in Fisher. Finally, contracting goals and award outcomes are usually transparent to the participants, while university admission decisions are not. The history of erratic post-Croson strict scrutiny enforcement as described here suggests that post-Fisher strict scrutiny enforcement may also be erratic and lengthy, unless the Supreme Court provides more consistent review and clearer standards.

VI. Individual versus Group Rights

Overarching specific court decisions and bureaucratic actions is a larger issue in American society. As written the Equal Protection Clause and other civil rights laws protect individuals of whatever background. In Regents of the University of California v. Bakke, Justice Powell wrote: “It is settled beyond question that the rights created by the first section of the Fourteenth Amendment are by its terms, guaranteed to the individual. The rights established are personal rights.” 91 While Croson suggests that a disparity between the utilization of qualified, willing and

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91 438 U.S. 265, 289(1978)
able minority and non-minority firms might create an inference of discrimination, O'Connor's decision specifically rejects comparing shares of contract awards to shares of population. Nevertheless, in the political world such comparisons are commonly made. Moreover, some theorists define social justice in terms of the right of groups to achieve equal shares of public benefits to overcome disadvantages they have experienced historically. Disparate impact theory supports the idea that race neutral actions that affect minorities more adversely than non-minorities may violate civil rights.

American demography is changing dramatically. In many large cities and in its most populous state, California, with other states to follow, groups previously considered minorities are now majorities if they form coalitions. In every political jurisdiction, women and “minorities” have the potential to become the new majority. Born from decades of civil rights struggles, these groups have created formidable organizations to fight for their rights and, as overt discrimination has faded, to advocate for their shares of the economic pie.

The motto “To the victor belongs the spoils” was the Nineteenth Century justification for awarding public contracts as part of political patronage, but after the reform era, strict rules were enacted to eliminate that practice in public procurement, often requiring that contract awards be the basis of sealed low bids. Few, if any, American politicians would now admit to advocating that public contracts be distributed on the basis of the partisan identities of business owners, but there is no shortage of officials who support awarding contracts on the basis of the racial, ethnic and gender identities of owners. As the 11th Circuit’s concluded:

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92 Croson at 484-485, 499. See also Bakke, 438 U.S. at 307 and 315.
93 For an academic defense of this position, see David Ingram, Group Rights: Reconciling Equality and Difference. Lawrence, Kansas: University Press of Kansas, 2000.
94 See for example, Mt Holly Gardens Citizens in Action v. Mt Holly which examines the disparate impact theory in the Fair Housing Act which will be heard by the Supreme Court in its next term.
95 In Baltimore, for example, when a controversy arose over a proposed $107 million tax subsidy to a developer, the
It is clear as window glass that the [Dade] County gave not the slightest consideration to any alternative to a Hispanic affirmative action program. Awarding construction contracts based on ethnicity is what the County wanted to do, and all it considered doing as far as Hispanics were concerned.\textsuperscript{96}

Wheels turn. Years later in another part of the country, the Milwaukee City Council passed a contracting program favoring African-Americans and white women, a majority of the City population, while damaging Hispanics and Native Americans firms. After the settlement of a lawsuit by the Wisconsin Hispanic Chamber of Commerce, Milwaukee reverted back to a race neutral program.\textsuperscript{97}

Gradually, however, in many governments the definition of civil rights has shifted from the legal principal of protecting individuals of all backgrounds to a political posture supporting proportional representation or even reparations for previously disadvantaged groups. The mantra of diversity or inclusion is often used as the cover for these policies.\textsuperscript{98} In this atmosphere, requiring a fixed share of public contracts seems the fair approach, even if that results in awarding contacts to businesses that are not the most qualified or offer the lowest price. On the other side, there are no governmental or non-governmental organizations consistently and effectively insisting on the individual rights interpretation of civil rights.

Currently among the three branches of government, only in the federal courts is there a

\textsuperscript{96} Engineering Contractors Association of South Florida v. Metropolitan Dade County, 122 F. 3d 895, 928 (11th Cir. 1997).

\textsuperscript{97} Hispanic Chamber of Commerce of Wisconsin and American Indian Chamber of Commerce of Wisconsin, v. City of Milwaukee v. City of Milwaukee, Case No. 2:12-CV-00545-LA (2012). The disparity study firm, D.Wilson and/or its insurers, Gemini Insurance Co. agreed as part of the settlement to pay the plaintiffs $115,000 and the City $175,000 to pay their legal costs. Georgia Pabst, “Milwaukee agrees to repeal ordinance on contract preferences,” Milwaukee Journal Sentinel, June 11, 2103.

\textsuperscript{98} Meghan Holden, “Minneapolis sets diversity goals for city contracts,” Twin City Daily Planet, May 31, 2013. Bob
record of successful defense of the individual rights theory of Equal Protection. Such a defense, however, can only be invoked through litigation which is expensive, arduous, uncertain, and difficult to coordinate. As this research shows, even plaintiff success in lower courts can be short-lived if a government is determined to evade a judicial ruling through a new disparity study or repackaging a preferential contracting program. Lacking new and definitive Supreme Court decisions vigorously applying the individual rights theory of equal protection, the momentum appears to be in favor of a theory that proportional representation of racial, ethnic and gender groups in the distribution of various governmental benefits, including contracting, is “fair.” Proportional representation in the distribution of public benefits will require different policies where populations differ. Setting goals or quotas will depend ostensibly on the manipulation of statistics, but ultimately on political power. When populations are changing rapidly, proportional representation is rarely a formula for civic peace. Yet that very change illustrates the importance of a vigorous judicial system in protecting individual rights.

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