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CHAPTER 1: LEGAL ANALYSIS

I. INTRODUCTION

Two United States Supreme Court decisions, *City of Richmond v. J.A. Croson Co. (Croson)*[1] and *Adarand v. Pena (Adarand)*[2], raised the standard by which federal courts shall review both local and federal government minority business enterprise and disadvantaged business enterprise contracting programs.

This chapter presents the state of the federal law applicable to public contracting affirmative action programs. It also includes a discussion of the United States Department of Transportation (USDOT) Disadvantaged Business Enterprise (DBE) regulations and relevant case law. The application of the *Croson* standard to the DBE program in the Ninth Circuit, pursuant to the *Western States Paving Co. v. State of Washington Dept. of Transportation,*[3] is also explicated.

Croson, decided in 1989, dealt with non-federally funded programs and established an evidentiary standard of review for race-based programs. The Court announced that programs employing racial classification would be subject to "strict scrutiny," the highest legal standard. Broad notions of equity or general allegations of historical and societal discrimination against minorities fail to meet the requirements of strict scrutiny. Local governments, as set forth in *Croson*, may adopt race-conscious programs only as a remedy for identified statistical findings of discrimination, and the remedy must impose a minimal burden upon unprotected classes.

Adarand, which the United States Supreme Court decided in 1995, directly challenged the USDOT's Disadvantaged Business Enterprise Program as set forth in statute and regulations. The Court found a compelling interest for the DBE Program but ruled, after applying the *Croson* required "strict scrutiny" standard to this federal program, that the DBE Program was not narrowly tailored. In response the USDOT amended its regulations in 1999 to include goals which can be met by race-neutral and race-specific means.

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1 *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

2 *Adarand Constructors, Inc. v. Federico Pena*, 115 S.Ct. 2097 (1995).

3 Wes*tern States Paving Co. v. United States & Washington State Department of Transportation*, 407 F. 3d 983 (9th Cir. 2005).

Following *Adarand*, there were several circuit court cases that challenged the constitutionality of the DBE regulations.[4] Until the 2005 Ninth Circuit Court of Appeals decision in *Western States Paving Co. v. State of Washington Dept. of Transportation (Western States)*[5], the challenges had been unsuccessful. However, *Western States* found that Washington State's DBE Program was facially constitutional but determined the State's application of the regulations was invalid.

In 1996 Proposition 209 was passed by referendum in California. After legal challenges were settled the proposition was codified in Article I, Section 31 of the California Constitution. Section 31 prohibits the State, local governments, districts, public universities, colleges, schools, and other governmental instrumentalities from discriminating against or giving preferential treatment on the basis of race, sex, color, ethnicity, or national origin to any individual or group in public employment, public education, or public contracting. Section 31 contains an exception to its prohibition against race-based remedies. The exception provides that such race-based remedies are permissible to establish or maintain eligibility for a federal program when failure to implement such remedies would result in a loss of federal funds to the agency.

II. STANDARD OF REVIEW

The standard of review represents the measure by which a court evaluates whether a particular legal claim meets a certain statute, rule, or precedent. The standard of review that the Supreme Court set in *Croson* for race-specific programs is applicable to meet constitutional muster.

A. Race-Conscious Programs

In *Croson* the United States Supreme Court affirmed that pursuant to the 14th Amendment, the proper standard of review for state and local MBE programs, which are necessarily race-based, is strict scrutiny.[6] Specifically, the government must show that the classification is narrowly tailored to achieve a compelling state interest.[7] The Court recognized that a state or local entity may take action, in the form of an MBE program, to rectify the effects of *identified, systemic racial discrimination* within its jurisdiction.[8] Justice O'Connor, speaking for the majority, articulated various methods of

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4 *Sherbrooke Turf Inc. v. Minnesota Department of Transportation*, 345 F3d 964, 969-73 (8th Cir 2003); *Gross Seed Co. v. Nebraska Department of Roads*, 345 F.3d 964 (8th Cir. 2003); *Western States Paving Co. v. State of Washington Dept. of Transportation*, 407 F. 3d 983 (9th Cir. 2005); *Northern Contracting Inc. v. Illinois Department of Transportation*, 473 F.3d 715 (2007).

5 *Western States*, 407 F. 3d 983 (9th Cir. 2005)

6 *Croson*, 488 U.S. at 493-95.

7 *Id.* at 493.

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

demonstrating discrimination and set forth guidelines for crafting MBE programs so that they are "narrowly tailored" to address systemic racial discrimination.[9]

III. BURDEN OF PROOF

The procedural protocol established by *Croson* imposes an initial burden of proof upon the government to demonstrate that the challenged MBE program is supported by a strong factual predicate, i.e., documented evidence of past discrimination. Notwithstanding this requirement, the plaintiff bears the ultimate burden of proof to persuade the court that the MBE program is unconstitutional. The plaintiff may challenge a government's factual predicate on any of the following grounds:[10]

- Disparity exists due to race-neutral reasons.
- Methodology is flawed.
- Data is statistically insignificant.
- Conflicting data exists.

Thus, a disparity study must be analytically rigorous, at least to the extent that the data permits, if it is to withstand legal challenge.[11]

A. Strong Basis in Evidence

Croson requires defendant jurisdictions to produce a "strong basis in evidence" that the objective of the challenged MBE program is to rectify the effects of discrimination.[12] The issue of whether or not the government has produced a strong basis in evidence is a question of law.[13] Because the sufficiency of the factual predicate supporting the MBE program is at issue, factual determinations relating to the accuracy and validity of the proffered evidence underlie the initial legal conclusion to be drawn.[14]

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[9] *Id.* at 501-02. Cases involving education and employment frequently refer to the principal concepts applicable to the use of race in government contracting: compelling interest and narrowly tailored remedies. The Supreme Court in *Croson* and subsequent cases provides fairly detailed guidance on how those concepts are to be treated in contracting. In education and employment, the concepts are not explicated to nearly the same extent. Therefore, references in those cases to "compelling governmental interest" and "narrow tailoring" for purposes of contracting are essentially generic and of little value in determining the appropriate methodology for disparity studies.

[10] These were the issues on which the district court in Philadelphia reviewed the disparity study before it.

[11] *Croson*, 488 U.S. 469.

[12] *Concrete Works of Colorado v. City and County of Denver*, 36 F.3d 1513 at 1522 (10th Cir. 1994), (citing *Wygant v. Jackson Board of Education*, 476 U.S. 267, 292 (1986); *see Croson* 488 U.S. at 509 (1989)).

[13] *Id.* (citing *Associated General Contractors v. New Haven*, 791 F.Supp. 941, 944 (D.Conn 1992)).

[14] *Concrete Works I*, 36 F.3d at 1522.

The adequacy of the government's evidence is "evaluated in the context of the breadth of the remedial program advanced by the [jurisdiction]."[15] The onus is upon the jurisdiction to provide a factual predicate that is sufficient in scope and precision to demonstrate that contemporaneous discrimination necessitated the adoption of the MBE program.

B. Ultimate Burden of Proof

The party challenging an MBE program will bear the ultimate burden of proof throughout the course of the litigation—despite the government's obligation to produce a strong factual predicate to support its program.[16] The plaintiff must persuade the court that the program is constitutionally flawed by challenging the government's factual predicate for the program or by demonstrating that the program is overly broad.

Justice O'Connor explained the nature of the plaintiff's burden of proof in her concurring opinion in *Wygant v. Jackson Board of Education (Wygant).*[17] She stated that following the production of the factual predicate supporting the program:

> [I]t is incumbent upon the non-minority [plaintiffs] to prove their case; they continue to bear the ultimate burden of persuading the court that the [government's] evidence did not support an inference of prior discrimination and thus a remedial purpose, or that the plan instituted on the basis of this evidence was not sufficiently "narrowly tailored." [18]

In *Philadelphia*, the Third Circuit Court of Appeals clarified this allocation of the burden of proof and the constitutional issue of whether facts constitute a "strong basis" in evidence.[19] That court wrote that the allocation of the burden of persuasion depends on the theory of constitutional invalidity that is being considered.[20] If the plaintiff's theory is that an agency has adopted race-based preferences with a purpose other than remedying past discrimination, the plaintiff has the burden of convincing the court that the identified remedial motivation is a pretext and that the real motivation was something else.[21]
The situation differs if the plaintiff's theory is that an agency's conclusions as to the existence of discrimination and the necessity of the remedy chosen have no strong basis in evidence. In such a situation once the agency comes forward with evidence of facts

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[15] *Id.* (citing *Croson* 488 U.S. at 498).

[16] *Id.* (citing *Wygant*, 476 U.S. at 277-278).

[17] *Wygant v. Jackson Board of Education*, 476 U.S. 267, 293 (1986).

[18] *Id.* at 293

[19] *Contractors Association of Eastern Pennsylvania v. City of Philadelphia*, 6 F.3d 990 (3rd Cir. 1993), *on remand*, 893 F.Supp. 419 (E.D. Penn. 1995), *aff'd*, 91 F.3d 586 (3rd Cir. 1996).

[20] *Id.* at 597

[21] *Id.* at 597

alleged to justify its conclusions, the plaintiff has the burden of persuading the court that those facts are not accurate. However, the ultimate issue of whether a strong basis in evidence exists is an issue of law, and the burden of persuasion in the traditional sense plays no role in the court's resolution of that ultimate issue.[22]

Concrete Works II made clear that as the plaintiff's burden is an evidentiary one, it cannot be discharged simply by argument. The court cited its opinion in *Adarand Constructors Inc. v. Slater*, 228 F.3d 1147 (2000): "[g]eneral criticism of disparity studies, as opposed to particular evidence undermining the reliability of the particular disparity study, is of little persuasive value."[23]

The Supreme Court's disposition of the plaintiff's petition for *certiorari* strongly supports the conclusion that plaintiff has the burden of proof. Supreme Court review of appellate decisions is discretionary in that four justices have to agree, so normally little can be inferred from its denial. However, *Concrete Works* is not the typical instance. Justice Scalia concurred in *Croson* that strict scrutiny was required of race-conscious contracting programs. However, his antagonism there and over the years to the use of race is clear. Justice Scalia's view is that governmental remedies should be limited to provable individual victims. That view is at the base of his written dissent, on which only Chief Justice Rehnquist joined, to the Court's November 17, 2003 decision not to grant *certiorari* in *Concrete Works.*[24]

Justice Scalia would place the burden of proof squarely on the defendant jurisdiction when a plaintiff pleads unequal treatment. For him the Tenth Circuit was simply wrong, because the defendant should have to *prove* that there was discrimination. He takes this position despite the case law in equal employment cases, from which *Croson* was derived, that the defendant has the burden of *production*. Once the defendant satisfies that, the burden of *proof* shifts to the plaintiff.

Contrary to Scalia, the Tenth Circuit in *Concrete Works II* held that the defendant must show "a strong basis" for concluding that MBEs are being discriminated against. Additionally, the plaintiff has to put in evidence that negates its validity.

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[22] At first glance, the position of the Third Circuit does not square with what the Eleventh Circuit announced as its standard in reviewing whether a jurisdiction has established the "compelling interest" required by strict scrutiny. The Eleventh Circuit said the inquiry was factual, and would be reversed only if it was "clearly erroneous." However, the difference in formulation may have had to do with the angle from which the question was approached: If one starts with the disparity study—whether a compelling interest has been shown—factual issues are critical. If the focus is the remedy, because the constitutional issue of equal protection in the context of race comes into play, the review is necessarily a legal one.

[23] *Concrete Works II*, 321 F.3d at 979.

[24] *Concrete Works of Colorado, Inc. v. City and County of Denver, Colorado*, 321 F.3d 950 (10th Cir. 2003), *petition for cert. denied*, (U.S. Nov. 17, 2003) (No. 02-1673) ("*Concrete Works II*").

IV. CROSON EVIDENTIARY FRAMEWORK

Government entities must construct a strong evidentiary framework to stave off legal challenges and to ensure that the adopted MBE program complies with the requirements of the Equal Protection clause of the U.S. Constitution. The framework must comply with the stringent requirements of the strict scrutiny standard. Accordingly, there must be a strong basis in evidence, and the race-conscious remedy must be "narrowly tailored," as set forth in *Croson*. A summary of the appropriate types of evidence to satisfy the first element of the *Croson* standard follows.

A. Active or Passive Participation

Croson requires that the local entity seeking to adopt an MBE program must have perpetuated the discrimination to be remedied by the program. However, the local entity need not be an active perpetrator of such discrimination. Passive participation will satisfy this part of the Court's strict scrutiny review.[25]

An entity will be considered an "active" participant if the evidence shows that it has created barriers that actively exclude MBEs from its contracting opportunities. In addition to examining the government's contracting record and process, MBEs who have contracted or attempted to contract with that entity can be interviewed to relay their experiences in pursuing that entity's contracting opportunities.[26]

An entity will be considered to be a "passive" participant in private sector discriminatory practices if it has infused tax dollars into that discriminatory industry.[27] The *Croson* Court emphasized a government's ability to passively participate in private sector discrimination with monetary involvement, stating:

> [I]t is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from tax contributions of all citizens, do not serve to finance the evil of private prejudice.[28]

Until *Concrete Works I*, the inquiry regarding passive discrimination was limited to the subcontracting practices of government prime contractors. In *Concrete Works I* the Tenth Circuit considered a purely private sector definition of passive discrimination. Since no government funds were involved in the contracts analyzed in the case, the court questioned whether purely private sector discrimination was likely to be a fruitful line of

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[25] *Croson*, 488 U.S. at 509.

[26] *Wygant v. Jackson Board of Education*, 476 U.S. 267 at 275 (1985).

[27] *Croson*, 488 U.S. at 492; *Coral Construction*, 941 F.2d at 916.

[28] *Croson*, 488 U.S. at 492.

inquiry.[29] On remand the district court rejected the three disparity studies offered to support the continuation of Denver's M/WBE program, because each focused on purely private sector discrimination. Indeed, Denver's focus on purely private sector discrimination may account for what seemed to be a shift by the court away from the standard *Croson* queries of: (1) whether there was a firm basis in the entity's contracting process to conclude that discrimination existed; (2) whether race-neutral remedies would resolve what was found; and (3) whether any race-conscious remedies had to be narrowly tailored. The court noted that in the City of Denver's disparity studies, the chosen methodologies failed to address the following six questions:

- Was there pervasive discrimination throughout the Denver Metropolitan Statistical Area (MSA)?
- Were all designated groups equally affected?
- Was discrimination intentional?
- Would Denver's use of such firms constitute "passive participation"?
- Would the proposed remedy change industry practices?
- Was the burden of compliance—which was on white male prime contractors in an intensely competitive, low profit margin business—a fair one?

The court concluded that the City of Denver had not documented a firm basis of identified discrimination derived from the statistics submitted.[30]

However, the Tenth Circuit on appeal of that decision completely rejected the district court's analysis. The district court's queries required Denver to prove the existence of discrimination. Moreover, the Tenth Circuit explicitly held that "passive" participation included private sector discrimination in the marketplace. The court, relying on *Shaw v. Hunt*,[31] a post-*Croson* Supreme Court decision, wrote as follows:

> The *Shaw* Court did not adopt any requirement that only discrimination by the governmental entity, either directly or by utilizing firms engaged in discrimination on projects funded by the entity, was remediable. The

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[29] *Concrete Works I*, 36 F.3d at 1529. "What the Denver MSA data does not indicate, however, is whether there is any linkage between Denver's award of public contracts and the Denver MSA evidence of industry-wide discrimination. That is, we cannot tell whether Denver indirectly contributed to private discrimination by awarding public contracts to firms that in turn discriminated against MBE and/or WBE subcontractors in other private portions of their business or whether the private discrimination was practiced by firms who did not receive any public contracts. Neither *Croson* nor its progeny clearly state whether private discrimination that is in no way funded with public tax dollars can, by itself, provide the requisite strong basis in evidence necessary to justify a municipality's affirmative action program. A plurality in *Croson* simply suggested that remedial measures could be justified upon a municipality's showing that 'it had essentially become a "a passive participant" in a system of racial exclusion practiced by elements of the local construction industry' [citing *Croson*]. Although we do not read *Croson* as requiring the municipality to identify an exact linkage between its award of public contracts and private discrimination, such evidence would at least enhance the municipality's factual predicate for a race- and gender-conscious program. The record before us does not explain the Denver government's role in contributing to the underutilization of MBEs and WBEs in the private construction market in the Denver MSA, and this may well be a fruitful issue to explore at trial."

[30] *Id.* at 61.

[31] 517 U.S. at 519.

> Court, however, did set out two conditions which must be met for the governmental entity to show a compelling interest. "First, the discrimination must be identified discrimination." *Id.* at 910. The City can satisfy this condition by identifying the discrimination "public or private, with some specificity." *Id.* (quoting *Croson*, 488 U.S. at 504 (emphasis added)). The governmental entity must also have a "strong basis in evidence to conclude that remedial action was necessary." *Id.*[32]

The Tenth Circuit therefore held that the City was correct in its attempt to show that it "indirectly contributed to private discrimination by awarding public contracts to firms that in turn discriminated against M/WBE subcontractors in other private portions of their business."[33] The court emphasized that its reading of *Croson*[34] and its own precedents supported that conclusion. Also, the court pointed out that the plaintiff, which had the burden of proof, failed to introduce conflicting evidence and merely *argued* that the private sector was out of bounds and that Denver's data was flawed.[35]

The courts found that the disparities in MBE private sector participation, demonstrated with the rate of business formation and lack of access to credit which affected MBEs' ability to expand in order to perform larger contracts, gave Denver a firm basis to conclude that there was actionable private sector discrimination. For technical legal reasons,[36] however, the court did not examine whether the consequent public sector remedy—i.e., one involving a goal requirement on the City of Denver's contracts—was "narrowly tailored." The court took this position despite the plaintiff's contention that the remedy was inseparable from the findings and that the court should have addressed the issue of whether the program was narrowly tailored.

Ten months later, in *Builders Association of Greater Chicago v. City of Chicago*,[37] the question of whether a public sector remedy is "narrowly tailored" when it is based on purely private sector discrimination was at issue. The district court reviewed the remedies derived from private sector practices with a more stringent scrutiny. It found that there was discrimination against minorities in the Chicago construction industry. However, it did not find the City of Chicago's MBE subcontracting goal an appropriate remedy, because it was not "narrowly tailored" to address the lack of access to credit for MBEs which was the documented private discrimination. The court also criticized the remedy

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[32] *Concrete Works II*, 321 F.3d at 975-76.

[33] Slip opinion, pg. 20.

[34] See also *Shaw v. Hunt*, 517 U.S. 899 (1996), which it cited.

[35] Whether Denver had the requisite strong basis to conclude that there was discrimination was a question of law; it was for the Tenth Circuit to decide. The standard by which the factual record before it was reviewed was "clearly erroneous."

[36] Plaintiff had not preserved the issue on appeal; therefore, it was no longer part of the case.

[37] 298 F.Supp2d 725 (N.D.Ill. 2003).

because it was a "rigid numerical quota," and there was no individualized review of MBE beneficiaries, citing Justice O'Connor's opinion in *Gratz v. Bollinger*.[38]

The question of whether evidence of private sector practices met the Court standard also arose in *Builders Ass'n of Greater Chicago v. County of Cook*.[39] In this case the Seventh Circuit cited *Associated General Contractors of Ohio v. Drabik*[40] in throwing out a 1988 County ordinance under which at least 30 percent of the value of prime contracts was to go to minority subcontractors and at least ten percent to woman-owned businesses. Appellants argued that evidence of purely private sector discrimination justified a public sector program. The Court found that the County, in order to justify the public sector remedy, had to demonstrate that it had been at least a passive participant in the private discrimination by showing that it had infused tax dollars into the discriminatory private industry.

B. Systemic Discriminatory Exclusion

Croson clearly established that an entity enacting a business affirmative action program must demonstrate identified, systemic discriminatory exclusion on the basis of race or any other illegitimate criteria (arguably gender).[41] Thus, it is essential to demonstrate a pattern and practice of such discriminatory exclusion in the relevant market area.[42] Using

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[38] 123 S.Ct, 2411, 2431 (2003). *Croson* requires a showing that there was a strong basis for concluding that there was *discrimination* before a race-conscious remedy can be used in government contracting. In the University of Michigan cases that considered race-conscious admissions programs, a key element in the decisions is the Court acceptance of *diversity* as a constitutionally sufficient ground; it did not require a showing of past *discrimination* against minority applicants. If it had, the basis for a program would have disappeared. Discrimination is the historic concern of the 14th Amendment, while promoting diversity is of recent origin. The Court may have been disposed therefore to apply a more rigorous review of legislation based on diversity. The 14th Amendment's prohibitions are directed against "state action." The private sector behavior of businesses that contract with state and local governments is a conceptual step away from what it does in its public sector transactions. That distinction may lead courts to apply the *Gratz* approach of more searching scrutiny to remedial plans based on private sector contracting.

[39] 256 F.3d 642 (7th Cir. 2001).

[40] 214 F.3d 730 (6th Cir. 2000).

[41] *Croson*, 488 U.S. 469. See also *Monterey Mechanical v. Pete Wilson*, 125 F.3d 702 (9th Cir. 1997). The Fifth Circuit Court in *W.H. Scott Construction Co. v. City of Jackson, Mississippi*, 199 F.3d 206 (1999) found that the City's MBE program was unconstitutional for construction contracts because minority participation goals were arbitrarily set and not based on any objective data. Moreover, the Court noted that had the City implemented the recommendations from the disparity study it commissioned, the MBE program may have withstood judicial scrutiny (the City was not satisfied with the study and chose not to adopt its conclusions). "Had the City adopted particularized findings of discrimination within its various agencies and set participation goals for each accordingly, our outcome today might be different. Absent such evidence in the City's construction industry, however, the City lacks the factual predicates required under the Equal Protection Clause to support the Department's 15% DBE-participation goal."

In 1996, Houston Metro had adopted a study done for the City of Houston whose statistics were limited to aggregate figures that showed *income* disparity between groups, without making any connection between those statistics and the City's contracting policies. The disadvantages cited that M/WBEs faced in contracting with the City also applied to small businesses. Under *Croson*, that would have pointed to race-neutral remedies. The additional data on which Houston Metro relied was even less availing. Its own expert contended that the ratio of lawsuits involving private discrimination to total lawsuits and ratio of unskilled black wages to unskilled white wages established that the correlation between low rates of black self-employment was due to discrimination. Even assuming that nexus, there is nothing in *Croson* that accepts a low number of MBE business *formation* as a basis for a race-conscious remedy.

[42] *Id*. at 509.

appropriate evidence of the entity's active or passive participation in the discrimination, as discussed above, the showing of discriminatory exclusion must cover each racial group to whom a remedy would apply.[43] Mere statistics and broad assertions of purely societal discrimination will not suffice to support a race or gender-conscious program.

Croson enumerates several ways an entity may establish the requisite factual predicate. First, 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 an entity or by the entity's prime contractors may support an inference of discriminatory exclusion.[44] In other words when the relevant statistical pool is used, a showing of gross statistical disparity alone "may constitute *prima facie* proof of a pattern or practice of discrimination."[45]

The *Croson* Court made clear that both prime contract and subcontracting data was relevant. The Court observed that "[w]ithout any information on minority participation in subcontracting, it is quite simply impossible to evaluate overall minority representation in the city's construction expenditures."[46] Subcontracting data is also an important means by which to assess suggested future remedial actions. Since the decision makers are different for the awarding of prime contracts and subcontracts, the remedies for discrimination identified at a prime contractor versus subcontractor level might also be different.

Second, "evidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government's determination that broader remedial relief is justified."[47] Thus, if an entity has statistical evidence that non-minority contractors are systematically excluding minority businesses from subcontracting opportunities, it may act to end the discriminatory exclusion.[48] Once an inference of discriminatory exclusion arises, the entity may act to dismantle the closed business system.

In *Coral Construction* the Ninth Circuit Court of Appeals further elaborated upon the type of evidence needed to establish the factual predicate that justifies a race-conscious remedy. The court held that both statistical and anecdotal evidence should be relied upon in establishing systemic discriminatory exclusion in the relevant marketplace as the

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[43] *Id.* at 506. As the Court said in *Croson*, "[t]he random inclusion of racial groups that, as a practical matter, may never have suffered from discrimination in the construction industry in Richmond suggests that perhaps the city's purpose was not in fact to remedy past discrimination." *See North Shore Concrete and Assoc. v. City of New York*, 1998 U.S. Dist. LEXIS 6785 (EDNY 1998), which rejected the inclusion of Native Americans and Alaskan Natives in the City's program, citing *Croson*.

[44] *Id.* at 509.

[45] *Id.* at 501 (citing *Hazelwood School District v. United States*, 433 U.S. 299, 307-08 (1977)).

[46] *Croson*, 488 U.S. at 502-03.

[47] *Id.* at 509.

[48] *Id.*

factual predicate for an MBE program.[49] The court explained that statistical evidence, standing alone, often does not account for the complex factors and motivations guiding contracting decisions, many of which may be entirely race-neutral.[50]

Likewise, anecdotal evidence, standing alone, is unlikely to establish a systemic pattern of discrimination.[51] Nonetheless, anecdotal evidence is important because the individuals who testify about their personal experiences bring "the cold numbers convincingly to life."[52]

- **Geographic Market**

Croson did not speak directly to how the geographic market is to be determined. In *Coral Construction* the Court of Appeals held that "an MBE program must limit its geographical scope to the boundaries of the enacting jurisdiction."[53] Conversely, in *Concrete Works I* the Tenth Circuit Court of Appeals specifically approved the Denver MSA as the appropriate market area since 80 percent of the construction contracts were let there.[54]

Read together, these cases support a definition of market area that is reasonable rather than dictated by a specific formula. *Croson* and its progeny did not provide a bright line rule for local market area, which determination should be fact-based. An entity may limit consideration of evidence of discrimination within its own jurisdiction.[55] Extra-jurisdictional evidence may be permitted when it is reasonably related to where the jurisdiction contracts.[56]

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[49] *Coral Construction*, 941 F.2d at 919.

[50] *Id.*

[51] *Id.*

[52] *Id.* (quoting *International Brotherhood of Teamsters v. United States* (*Teamsters*), 431 U.S. 324, 339 (1977)).

[53] *Coral Construction*, 941 F.2d at 925.

[54] *Concrete Works of Colorado v. City and County of Denver*, 823 F.Supp. 821, 835-836 (D.Colo. 1993); rev'd on other grounds, 36 F.3d 1513 (10th Cir. 1994).

[55] *Cone Corporation V. Hillsborough County*, 908 F.2d 908 (11th Cir. 1990); *Associated General Contractors v. Coalition for Economic Equity*, 950 F.2d 1401 (9th Cir. 1991).

[56] There is a related question of which firms can participate in a remedial program. In *Coral Construction*, the Court held that the definition of "minority business" used in King County's MBE program was over-inclusive. The Court reasoned that the definition was overbroad because it included businesses other than those who were discriminated against in the King County business community. The program would have allowed, for instance, participation by MBEs who had no prior contact with the County. Hence, location within the geographic area is not enough. An MBE had to have shown that it previously sought business, or is currently doing business, in the market area.

- **Current Versus Historical Evidence**

In assessing the existence of identified discrimination through demonstration of a disparity between MBE utilization and availability it may be important to examine disparity data both prior to and after the entity's current MBE program was enacted. This will be referred to as "pre-program" versus "post-program" data.

On the one hand *Croson* requires that an MBE program be "narrowly tailored" to remedy current evidence of discrimination.[57] Thus, goals must be set according to the evidence of disparity found. For example if there is a current disparity between the percentage of an entity's utilization of Hispanic construction contractors and the availability of Hispanic construction contractors in that entity's marketplace, then that entity can set a goal to bridge that disparity.

It is not mandatory to examine a long history of an entity's utilization to assess current evidence of discrimination. In fact *Croson* indicates that it may be legally fatal to justify an MBE program based upon outdated evidence.[58] Therefore, the most recent two or three years of an entity's utilization data would suffice to determine whether a statistical disparity exists between current M/WBE utilization and availability.[59]

Pre-program data regarding an entity's utilization of MBEs prior to enacting the MBE program may be relevant to assess the need for the agency to keep such a program intact. A 1992 unpublished opinion by Judge Henderson of the U.S. District Court for the Northern District of California, *RGW Construction v. San Francisco Bay Area Rapid Transit District (BART),*[60] set forth the possible significance of statistical data during an entity's "pre-program" years. Judge Henderson opined that statistics that provides data for a period when no M/WBE goals were operative is often the most relevant data in evaluating the need for remedial action by an entity. Indeed, "to the extent that the most recent data reflect the impact of operative DBE goals, then such data are not necessarily a reliable basis for concluding that remedial action is no longer warranted."[61] Judge Henderson noted that this is particularly so given the fact that M/WBEs report that they are seldom or never used by a majority prime contractor without M/WBE goals. That this situation may be the case suggests a possibly fruitful line of inquiry: an examination of whether different programmatic approaches in the same market area led to different outcomes in M/WBE participation. The Tenth Circuit came to the same conclusion in

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[57] See *Croson,* 488 U.S. at 509-10.

[58] *Id.* at 499 (stating that "[i]t is sheer speculation how many minority firms there would be in Richmond absent past societal discrimination").

[59] *See Associated General Contractors of California v. Coalition for Economic Equity and City and County of San Francisco, 950 F.2d 1401 (9th Cir. 1991).* (consultant study looked at City's MBE utilization over a one year period).

[60] See November 25, 1992, Order by Judge Thelton Henderson (on file with Mason Tillman Associates).

[61] *Id.*

Concrete Works II. It is permissible for a study to examine programs where there were no goals.

Similarly, the Eleventh Circuit in *Dade County* cautions that using post-enactment evidence (post-program data) may mask discrimination that might otherwise be occurring in the relevant market. Still, the court agreed with the district court that it was not enough to speculate on what MBE utilization would have been in the absence of the program.[62]

Thus, an entity should look both at pre-program and post-program data in assessing whether discrimination exists currently and analyze whether it would exist in the absence of an M/WBE program.

- **Statistical Evidence**

To determine whether statistical evidence is adequate to give rise to an inference of discrimination, courts have looked to the "disparity index," which consists of the percentage of minority or women contractor participation in local contracts divided by the percentage of minority or women contractor availability or composition in the population of available firms in the local market area.[63] Disparity indexes have been found highly probative evidence of discrimination where they ensure that the "relevant statistical pool" of minority or women contractors is being considered.

The Third Circuit Court of Appeals, in *Philadelphia*, ruled that the "relevant statistical pool" includes those businesses that not only exist in the marketplace but that is qualified and interested in performing the public agency's work. In that case the Third Circuit rejected a statistical disparity finding where the pool of minority businesses used in comparing utilization to availability were those that were merely licensed to operate in the City of Philadelphia. Merely being licensed to do business with the City does not indicate either a willingness or capability to do work for the City. As such, the Court concluded this particular statistical disparity did not satisfy *Croson*.[64]

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62 *Dade County*, 122 F.3d at 912.

63 Although the disparity index is a common category of statistical evidence considered, other types of statistical evidence have been taken into account. In addition to looking at Dade County's contracting and subcontracting statistics, the district court also considered marketplace data statistics (which looked at the relationship between the race, ethnicity, and gender of surveyed firm owners and the reported sales and receipts of those firms), the County's Wainwright study (which compared construction business ownership rates of M/WBEs to those of non-M/WBEs and analyzed disparities in personal income between M/WBE and non-M/WBE business owners), and the County's Brimmer Study (which focused only on Black-owned construction firms and looked at whether disparities existed when the sales and receipts of Black-owned construction firms in Dade County were compared with the sales and receipts of all Dade County construction firms).

The court affirmed the judgment that declared appellant's affirmative action plan for awarding county construction contracts unconstitutional and enjoined the plan's operation because there was no statistical evidence of past discrimination and appellant failed to consider race and ethic-neutral alternatives to the plan.

64 *Philadelphia*, 91 F.3d at 586. The courts have not spoken to the non-M/WBE component of the disparity index. However, if only as a matter of logic, the "availability" of non-M/WBEs requires that their willingness to be government contractors be established. The same measures used to establish the interest of M/WBEs should be applied to non-M/WBEs.

Statistical evidence demonstrating a disparity between the utilization and availability of M/WBEs can be shown in more than one way. First, the number of M/WBEs utilized by an entity can be compared to the number of available M/WBEs. This is a strict *Croson* "disparity" formula. A significant statistical disparity between the number of MBEs that an entity utilizes in a given product/service category and the number of available MBEs in the relevant market area specializing in the specified product/service category would give rise to an inference of discriminatory exclusion.

Second, M/WBE dollar participation can be compared to M/WBE availability. This comparison could show a disparity between the award of contracts by an entity in the relevant locality/market area to available majority contractors and the award of contracts to M/WBEs. Thus, in *AGCC II* an independent consultant's study compared the number of available MBE prime contractors in the construction industry in San Francisco with the amount of contract dollars awarded to San Francisco-based MBEs over a one-year period. The study found that available MBEs received far fewer construction contract dollars in proportion to their numbers than their available non-minority counterparts.[65]

Whether a disparity index supports an inference that there is discrimination in the market turns not only on what is being compared, but also on whether any disparity is statistically significant. In *Croson* Justice O'Connor opined, "[w]here the gross statistical disparities can be shown, they alone, in a proper case, may constitute a *prima facie* proof of a pattern or practice of discrimination."[66] However, the Court has not assessed nor attempted to cast bright lines for determining if a disparity index is sufficient to support an inference of discrimination. Rather, the analysis of the disparity index and the finding of its significance are judged on a case-by-case basis.[67]

Following the dictates of *Croson*, courts may carefully examine whether there is data that shows that MBEs are ready, willing, and able to perform.[68] *Concrete Works I* made the same point: capacity—i.e., whether the firm is "able to perform"—is a ripe issue when a disparity study is examined on the merits:

> [Plaintiff] has identified a legitimate factual dispute about the accuracy of Denver's data and questioned whether Denver's reliance on the percentage of MBEs and WBEs available in the marketplace overstates "the ability of MBEs or WBEs to conduct business relative to the industry as a whole because M/WBEs tend to be smaller and less experienced than non-

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[65] *AGCC II*, 950 F.2d 1401 at 1414. Specifically, the study found that MBE availability was 49.5 percent for prime construction, but MBE dollar participation was only 11.1 percent; that MBE availability was 36 percent prime equipment and supplies, but MBE dollar participation was 17 percent; and that MBE availability for prime general services was 49 percent, but dollar participation was 6.2 percent.

[66] *Croson*, 488 U.S. at 501 (quoting *Hazelwood School District v. United States*, 433 U.S. 299, 307-308 (1977)).

[67] *Concrete Works*, 36 F.3d at 1522.

[68] The *Philadelphia* study was vulnerable on this issue.

> minority owned firms." In other words, a disparity index calculated on the basis of the absolute number of MBEs in the local market may show greater underutilization than does data that takes into consideration the size of MBEs and WBEs.[69]

Notwithstanding that appellate concern, the disparity studies before the district court on remand did not examine the issue of M/WBE capacity to perform Denver's public sector contracts. As mentioned above, they were focused on the private sector, using census-based data and Dun & Bradstreet statistical extrapolations.

The Sixth Circuit Court of Appeals in *Drabik* concluded that for statistical evidence to meet the legal standard of *Croson*, it must consider the issue of capacity.[70] The State's factual predicate study based its statistical evidence on the percentage of M/WBE businesses in the population. The statistical evidence did not take into account the number of minority businesses that were construction firms, let alone how many were qualified, willing, and able to perform state contracts.[71] The court reasoned as follows:

> Even statistical comparisons that might be apparently more pertinent, such as with the percentage of all firms qualified in some minimal sense, to perform the work in question, would also fail to satisfy the Court's criteria. If MBEs comprise 10% of the total number of contracting firms in the State, but only get 3% of the dollar value of certain contracts that does not alone show discrimination, or even disparity. It does not account for the relative size of the firms, either in terms of their ability to do particular work or in terms of the number of tasks they have resources to complete.[72]

Further, *Drabik* also pointed out that the State not only relied upon the wrong type of statistical data but that the data was more than twenty years old.

The appellate opinions in *Philadelphia*[73] and *Dade County*[74] regarding disparity studies involving public sector contracting are particularly instructive in defining availability. First, in *Philadelphia*, the earlier of the two decisions, contractors' associations challenged a city ordinance that created set-asides for minority subcontractors on city public works contracts. Summary judgment was granted for the contractors.[75] The Third

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[69] *Concrete Works*, 36 F.3d at 1528.

[70] See Contractors of *Ohio* v. *Drabik, 214 F.3d 730* (6th Cir. 2000). The Court reviewed Ohio's 1980, pre-*Croson*, program, which the Sixth Circuit found constitutional in *Ohio Contractors Ass'n v. Keip*, 1983 U.S. App. LEXIS 24185 (6th Cir. 1983), finding the program unconstitutional under *Croson*.

[71] *Id.*

[72] *Id.* at 736.

[73] *Philadelphia*, 6 F.3d 990 (3rd Cir. 1993), on remand, 893 F.Supp. 419 (E.D. Penn. 1995), aff'd, 91 F.3d 586 (3rd Cir. 1996).

[74] *Dade County*, 943 F.Supp. 1546 (11th Circuit, 1997)..

[75] *Philadelphia*, 91 F.3d 586.

Circuit upheld the third appeal, affirming that there was no firm basis in evidence for finding that race-based discrimination existed to justify a race-based program and that the program was not narrowly tailored to address past discrimination by the City.[76]

The Third Circuit reviewed the evidence of discrimination in prime contracting and stated that whether it is strong enough to infer discrimination is a "close call" which the court "chose not to make."[77] It was unnecessary to make this determination because the court found that even if there was a strong basis in evidence for the program, a subcontracting program was not narrowly tailored to remedy prime contracting discrimination.

When the court looked at subcontracting, it found that a firm basis in evidence did not exist. The only subcontracting evidence presented was a review of a random 25 to 30 percent of project engineer logs on projects more than $30,000. The consultant determined that no MBEs were used during the study period based upon recollections regarding whether the owners of the utilized firms were MBEs. The court found this evidence insufficient as a basis for finding that prime contractors in the market were discriminating against subcontractors.[78]

The Third Circuit has recognized that consideration of qualifications can be approached at different levels of specificity, and the practicality of the approach also should be weighed. The Court of Appeals found that "[i]t would be highly impractical to review the hundreds of contracts awarded each year and compare them to each and every MBE" and that it was a "reasonable choice" under the circumstances to use a list of certified contractors as a source for available firms.[79] Although theoretically it may have been possible to adopt a more refined approach, the court found that using the list of certified contractors was a rational approach to identifying qualified firms.

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[76] *Id*. at 586

[77] *Id.* at 605.

[78] Another problem with the program was that the 15 percent goal was not based on data indicating that minority businesses in the market area were available to perform 15 percent of the City's contracts. The court noted, however, that "we do not suggest that the percentage of the preferred group in the universe of qualified contractors is necessarily the ceiling for all set-asides." The court also found the program flawed because it did not provide sufficient waivers and exemptions, as well as consideration of race-neutral alternatives.

[79] *Philadelphia*, 91 F.3d at 603.

Furthermore, the court discussed whether bidding was required in prime construction contracts as the measure of "willingness" and stated, "[p]ast discrimination in a marketplace may provide reason to believe the minorities who would otherwise be willing are discouraged from trying to secure work."[80]

In addition the court found that a program certifying MBEs for federal construction projects was a satisfactory measure of capability of MBE firms.[81] In order to qualify for certification the federal certification program required firms to detail their bonding capacity, size of prior contracts, number of employees, financial integrity, and equipment owned. According to the court, "the process by which the firms were certified [suggests that] those firms were both qualified and willing to participate in public work projects."[82] The court found certification to be an adequate process of identifying capable firms, recognizing that the process may even understate the availability of MBE firms.[83] Therefore, the court was somewhat flexible in evaluating the appropriate method of determining the availability of MBE firms in the statistical analysis of a disparity.

In *Dade County* the district court held that the County had not shown the compelling interest required to institute a race-conscious program, because the statistically significant disparities upon which the County relied disappeared when the size of the M/WBEs was taken into account.[84] The *Dade County* district court accepted the disparity study's limiting of "available" prime construction contractors to those that had bid at least once in the study period. However, it must be noted that relying solely on bidders to identify available firms may have limitations. If the solicitation of bidders is biased, then the results of the bidding process will be biased.[85] In addition a comprehensive count of bidders is dependent on the adequacy of the agency's record keeping.[86]

The appellate court in *Dade County* did not determine whether the County presented sufficient evidence to justify the M/WBE program. It merely ascertained that the lower court was not clearly erroneous in concluding that the County lacked a strong basis in evidence to justify race-conscious affirmative action. The appellate court did not prescribe the district court's analysis or any other specific analysis for future cases.

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[80] *Id*. at 603

[81] *Id.* at 603

[82] *Id.* at 603

[83] *Id.* at 603

[84] *Engineering Contractors Association of South Florida, Inc. et al. v. Metropolitan Dade County*, 943 F. Supp. 1546 (S.D. Florida 1996).

[85] Cf. *League of United Latin American Citizens v. Santa Ana*, 410 F.Supp. 873, 897 (C.D. Cal. 1976); *Reynolds v. Sheet Metal Workers, Local 102*, 498 F.Supp 952, 964 n. 12 (D. D.C. 1980), aff'd, 702 F.2d 221 (D.C. Cir. 1981). (Involving the analysis of available applicants in the employment context).

[86] Cf. *EEOC v. American Nat'l Bank*, 652 F.2d 1176, 1196-1197 (4th Cir.), *cert. denied*, 459 U.S. 923 (1981). (In the employment context, actual applicant flow data may be rejected where race coding is speculative or nonexistent).

C. Anecdotal Evidence

In *Croson* Justice O'Connor opined that "evidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government's determination that broader remedial relief is justified."[87] Anecdotal evidence should be gathered to determine if minority contractors are systematically being excluded from contracting opportunities in the relevant market area. Remedial measures fall along a sliding scale determined by their intrusiveness on non-targeted groups. At one end of the spectrum are race-neutral measures and policies, such as outreach to the M/WBE community, which are accessible to all segments of the business community regardless of race. They are not intrusive and in fact require no evidence of discrimination before implementation. Conversely, race-conscious measures, such as set-asides, fall at the other end of the spectrum and require a larger amount of evidence.[88]

As will be discussed below, anecdotal evidence will not suffice standing alone to establish the requisite predicate for a race-conscious program. Its great value lies in pointing to remedies that are "narrowly tailored," the second prong of a *Croson* study.

The following types of anecdotal evidence have been presented and relied upon by the Ninth Circuit, in both *Coral Construction* and *AGCC II*, to justify the existence of an M/WBE program:

- M/WBEs denied contracts despite being the low bidders—*Philadelphia*[89]
- Prime contractors showing MBE bids to non-minority subcontractors to find a non-minority firm to underbid the MBEs—*Cone Corporation v. Hillsborough County*[90]
- M/WBEs' inability to obtain contracts for private sector work—*Coral Construction*[91]

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87 *Croson*, 488 U.S. at 509. The Court specifically cited to *Teamsters*, 431 U.S. at 338.

88 Cf. *AGCC II*, 950 F.2D at 1417-18 (in finding that an ordinance providing for bid preferences was narrowly tailored, the Ninth Circuit stated that the program encompassed the required flexibility and stated that "the burdens of the bid preferences on those not entitled to them appear relatively light and well distributed. . . . In addition, in contrast to remedial measures struck down in other cases, those bidding have no settled expectation of receiving a contract. [Citations omitted.]").

89 *Philadelphia*, 6 F.3d at 1002.

90 *Cone Corporation v. Hillsborough County*, 908 F.2d at 916 (11th Cir.1990).

91 For instance, where a small percentage of an MBE or WBE's business comes from private contracts and most of its business comes from race or gender-based set-asides, this would demonstrate exclusion in the private industry. *Coral Construction*, 941 F.2d 910 at 933 (WBE's affidavit indicated that less than seven percent of the firm's business came from private contracts and that most of its business resulted from gender-based set-asides).

- M/WBEs told that they were not qualified, although they were later found to be qualified when evaluated by outside parties—*AGCC* [92]

- Attempts to circumvent M/WBE project goals—*Concrete Works I*[93]

- Harassment of M/WBEs by an entity's personnel to discourage them from bidding on an entity's contracts—*AGCC*[94]

Courts must assess the extent to which relief measures disrupt settled "rights and expectations" when determining the appropriate corrective measures.[95] Presumably, courts would look more favorably upon anecdotal evidence, which supports a less intrusive program than a more intrusive one. For example if anecdotal accounts related experiences of discrimination in obtaining bonds, they may be sufficient evidence to support a bonding program that assists M/WBEs. However, these accounts would not be evidence of a statistical availability that would justify a racially limited program such as a set-aside.

As noted above, in *Croson*, the Supreme Court found that the City of Richmond's MBE program was unconstitutional, because the City lacked proof that race-conscious remedies were justified. However, the Court opined that "evidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government's determination that broader remedial relief is justified."[96]

In part it was the absence of such evidence that proved lethal to the program. The Supreme Court stated that "[t]here was no direct evidence of race discrimination on the part of the city in letting contracts or any evidence that the city's prime contractors had discriminated against minority-owned subcontractors."[97]

This was not the situation confronting the Ninth Circuit in *Coral Construction*. There, the 700-plus page appellate records contained the affidavits of "at least 57 minorities or women contractors, each of whom complain in varying degrees of specificity about discrimination within the local construction industry. These affidavits certainly suggest that ongoing discrimination may be occurring in much of the King County business community."[98]

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[92] *AGCC II*, 950 F.2d at 1415.

[93] *Concrete Works*, 36 F.3d at 1530.

[94] *AGCC II*, 950 F.2d at 1415.

[95] *Wygant*, 476 U.S. at 283.

[96] *Croson*, 488 U.S. at 509, citing *Teamsters*, 431 U.S. at 338.

[97] *Id.* at 480.

[98] *Coral Construction*, 941 F.2d at 917-18.

Nonetheless, this anecdotal evidence standing alone was insufficient to justify King County's MBE program since "[n]otably absent from the record, however, is *any* statistical data in support of the County's MBE program."[99] After noting the Supreme Court's reliance on statistical data in Title VII employment discrimination cases and cautioning that statistical data must be carefully used, the Court elaborated on its mistrust of pure anecdotal evidence:

> Unlike the cases resting exclusively upon statistical deviations to prove an equal protection violation, the record here contains a plethora of anecdotal evidence. However, anecdotal evidence, standing alone, suffers the same flaws as statistical evidence. Indeed, anecdotal evidence may even be less probative than statistical evidence in the context of proving discriminatory patterns or practices.[100]

The Court concluded its discourse on the potency of anecdotal evidence in the absence of a statistical showing of disparity by observing that "rarely, if ever, can such evidence show a systemic pattern of discrimination necessary for the adoption of an affirmative action plan."[101]

Two other circuit courts also suggested that anecdotal evidence might be dispositive, while rejecting it in the specific case before them. For example, in *Contractors Ass'n* the Third Circuit Court of Appeals noted that the Philadelphia City Council had "received testimony from at least fourteen minority contractors who recounted personal experiences with racial discrimination," which the district court had "discounted" because it deemed this evidence to be "impermissible" for consideration under *Croson*.[102] The circuit court disapproved of the district court's actions because in its view the court's rejection of this evidence betrayed the court's role in disposing of a motion for summary judgment.[103] "Yet," the circuit court stated:

> [g]iven *Croson's* emphasis on statistical evidence, even had the district court credited the City's anecdotal evidence, we do not believe this amount of anecdotal evidence is sufficient to satisfy strict scrutiny [quoting *Coral*, *supra*]. Although anecdotal evidence alone may, in an exceptional case, be so dominant or pervasive that it passes muster under *Croson*, it is insufficient here.[104]

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[99] *Id.* at 918 (emphasis added) (additional statistical evidence gathered after the program had been implemented was also considered by the court and the case was remanded to the lower court for an examination of the factual predicate).

[100] *Id.* at 919.

[101] *Id.*

[102] *Philadelphia*, 6 F.3d at 1002.

[103] *Id.* at 1003.

[104] *Id.*

The District of Columbia Circuit Court echoed the Ninth Circuit's acknowledgment of the rare case in which anecdotal evidence is singularly potent in *O'Donnell Construction v. District of Columbia*.[105] The court found that in the face of conflicting statistical evidence, the anecdotal evidence there was not sufficient:

> It is true that in addition to statistical information, the Committee received testimony from several witnesses attesting to problems they faced as minority contractors. Much of the testimony related to bonding requirements and other structural impediments any firm would have to overcome, no matter what the race of its owners. The more specific testimony about discrimination by white firms could not in itself support an industry-wide remedy [quoting *Coral*]. Anecdotal evidence is most useful as a supplement to strong statistical evidence—which the Council did not produce in this case.[106]

The Eleventh Circuit is also in accord. In applying the "clearly erroneous" standard to its review of the district court's decision in *Dade County*, it commented that "[t]he picture painted by the anecdotal evidence is not a good one."[107] However, it held that this was not the "exceptional case" where, unreinforced by statistics, the anecdotal evidence was enough.[108]

In *Concrete Works I* the Tenth Circuit Court of Appeals described the type of anecdotal evidence that is most compelling: evidence within a statistical context. In approving of the anecdotal evidence marshaled by the City of Denver in the proceedings below, the court recognized that

> [w]hile a fact finder should accord less weight to personal accounts of discrimination that reflect isolated incidents, anecdotal evidence of a municipality's institutional practices carries more weight due to the systemic impact that such institutional practices have on market conditions.[109]

The court noted that the City had provided such systemic evidence.

The Ninth Circuit Court of Appeals has articulated what it deems to be permissible

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[105] 963 F.2d at 427 (D.C. Cir.1992).

[106] *Id.*

[107] *Engineering Contractors Ass'n of South Florida v. Metropolitan Dade County*, 943 F.Supp 1546 (S.D. Fla. 1996), aff'd, 122 F.3d 895 (11th Cir. 1997).

[108] *Id.* at 926.

[109] *Concrete Works I*, 36 F.3d at 1530.

anecdotal evidence in *AGCC II*.[110] There, the court approved a "vast number of individual accounts of discrimination" which included numerous reports of MBEs denied contracts despite being the low bidder; MBEs told they were not qualified although they were later found qualified when evaluated by outside parties; MBEs refused work even after they were awarded the contracts as low bidder; and MBEs being harassed by city personnel to discourage them from bidding on city contracts. On appeal the City points to numerous individual accounts of discrimination to substantiate its findings that discrimination exists in the City's procurement processes; an "old boy's network" still exists; and racial discrimination is still prevalent within the San Francisco construction industry.[111] Based on *AGCC II*, it would appear that the Ninth Circuit's standard for acceptable anecdotal evidence is more lenient than other Circuits that have considered the issue.

Taken together, these statements constitute a taxonomy of appropriate anecdotal evidence. The cases suggest that to be optimally persuasive, anecdotal evidence must satisfy six particular requirements.[112] These requirements are that the accounts:

- Are gathered from minority contractors, preferably those that are "qualified."[113]
- Concern specific, verifiable instances of discrimination.[114]
- Involve the actions of governmental officials.[115]
- Involve events within the relevant jurisdiction's market area.[116]
- Discuss the harm that the improper conduct has inflicted on the businesses in question.[117]
- Collectively reveal that discriminatory exclusion and impaired contracting opportunities are systemic rather than isolated or sporadic.[118]

Given that neither *Croson* nor its progeny identifies the circumstances under which anecdotal evidence alone will carry the day, it is not surprising that none of these cases explicate bright line rules specifying the quantity of anecdotal evidence needed to support a race-conscious remedy. However, the foregoing cases and others provide some guidance by implication.

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[110] *AGCC II*, 950 F.2d 1401.

[111] *Id.* at 1415.

[112] *Philadelphia*, 6 F.3d at 1003. The anecdotal evidence must be "dominant or pervasive."

[113] *Philadelphia*, 91 F.3d at 603.

[114] *Coral Construction*, 941 F.2d at 917-18. But see *Concrete Works II*, 321 F.3d at 989. "There is no merit to [plaintiff's] argument that the witnesses' accounts must be verified to provide support for Denver's burden."

[115] *Croson*, 488 U.S. at 509.

[116] *Coral Construction*, 941 F.2d at 925.

[117] *O'Donnell*, 963 F.2d at 427.

[118] *Coral Construction*, 941 F.2d at 919.

Philadelphia makes clear that 14 anecdotal accounts will not suffice.[119] While the matter is not free of countervailing considerations, 57 accounts, many of which appeared to be of the type referenced above, were insufficient to justify the program in *Coral Construction*. The number of anecdotal accounts relied upon by the district court in approving Denver's M/WBE program in *Concrete Works I* is unclear, but by one count the number might have exceeded 139.[120] It is, of course, a matter of speculation as to how many of these accounts were indispensable to the court's approval of the Denver M/WBE program.

In addition as noted above, the quantum of anecdotal evidence that a court would likely find acceptable may depend on the remedy in question. The remedies that are least burdensome to non-targeted groups would likely require a lesser degree of evidence. Those remedies that are more burdensome on the non-targeted groups would require a stronger factual basis likely extending to verification.

D. Remedial Statutory Scheme

In 2010 *H.B. Rowe Company (Rowe) v. Tippett* challenged the constitutionality of the North Carolina General Assembly's Statute 136-28.4 (Statute), promulgated in 1983.[121] The Statute set forth a general policy to promote the use of small, minority, physically handicapped, and women contractors in non-federally funded State construction projects. The 1983 Statute directed North Carolina Department of Transportation (NCDOT) to encourage and promote the policy. Seven years later in 1990, the Statute was amended to include specific participation goals on state-funded transportation construction contracts for minority and women-owned businesses.

As a result of the amendment, NCDOT created a Minority Business Enterprise and Women Business Enterprise Program for non-federally funded highway and bridge construction contracts. The program, for all intents and purposes, mirrored the federal DBE Program pursuant to 49 CFR Part 26. In 1991 the Statute was challenged in District court regarding its constitutionality. The District court ruled in favor of the plaintiff, stating that in order to implement race-conscious measures to remedy discrimination, the governmental entity must identify with "some specificity" the racial discrimination it seeks to remedy. As a result of the District court decision, NCDOT suspended its

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[119] *Philadelphia*, 6 F.3d. at 1002-03.

[120] The Denver City Council enacted its M/WBE ordinance in 1990. The program was based on the results of public hearings held in 1983 and 1988 at which numerous people testified (approximately 21 people and at least 49 people, respectively), and on a disparity study performed in 1990. See *Concrete Works of Colorado v. Denver*, 823 F.Supp. 821, 833-34. The disparity study consultant examined all of this preexisting data, presumably including the anecdotal accounts from the 1983 and 1988 public hearings, as well as the results of its own 69 interviews, in preparing its recommendations. *Id.* at 833-34. Thus, short of analyzing the record in the case, it is not possible to determine a minimum number of accounts because it is not possible to ascertain the number of consultant interviews and anecdotal accounts that are recycled statements or statements from the same people. Assuming no overlap in accounts, however, and also assuming that the disparity study relied on prior interviews in addition to its own, the number of M/WBEs interviewed in this case could be as high as 139, and, depending on the number of new people heard by the Denver Department of Public Works in March 1988 (*see id.* at 833), the number might have been even greater.

[121] *H.B. Rowe Company v. Tippett*, 615 F.3d 233, (4th Cir. 2010).

M/WBE Program in 1991.

In 1993 NCDOT commissioned a disparity study on state-funded transportation construction contracts. The study determined that minority and women subcontractors were underutilized at a statistically significant level, and the M/WBE Program was re-implemented. In 1998 the North Carolina General Assembly commissioned an update to the 1993 study. The 1998 update study concluded that minority and women-owned businesses continued to be underutilized in State-funded road construction contracts.

In 2002 H.B. Rowe Company was denied a NCDOT contract because the company's bid included 6.6 percent women subcontractor participation and no minority subcontractor participation. NCDOT claimed that Rowe failed to meet the good faith effort requirements. A third study was commissioned in 2004 to again study minority and women contractor participation on the State's highway construction industry. In 2006, relying on the 2004 study, the North Carolina General Assembly amended Statute 136-28.4. The principle modifications were:

- Remedial action should only be taken when there is a strong basis in evidence of ongoing effects of past or present discrimination that prevents or limits disadvantaged minority and women-owned businesses from participating as subcontractors in State-funded projects.

- The minority/women classification was limited to those groups that suffered discrimination.

- A disparity study should be performed every five years to respond to changing conditions.

- A sunset provision should be included.

First, the court considered whether the statutory scheme as it relates to minorities survives the "strict scrutiny" standard. The circuit court reviewed the statistical evidence detailed in the 2004 disparity study to determine if the statutory scheme was based on strong statistical evidence to implement race-conscious subcontractor goals. The statistical evidence was also examined to determine if the statute's definition of minorities was over-inclusive by including minority groups that did not suffer discrimination pursuant to the statistical standards set forth in the 2004 disparity study.

The court did not consider whether the statistical methodology employed in the 2004 disparity study was sufficient to support a compelling state interest. The court noted and accepted that the statistical measure to determine whether the underutilization of minorities on the State's subcontracts was statistically significant was the disparity index. The 2004 disparity study calculated a disparity at .05 confidence level. A statistical calculation is significant at the .05 confidence level because the probability of that result

occurring by chance is five percent or less.[122] The .05 confidence level is used in social sciences as a marker of when a result is a product of some external influence, rather than ordinary variation or sampling error.[123]

The circuit court admonished that 'the study itself sets out the standard by which one could confidently conclude that discrimination was at work," but the standard was not followed in the State's statutory scheme. The statistical evidence in the 2004 disparity study demonstrated that African American and Native American subcontractors were underutilized at a disparity index of .05. Hispanic American and Asian American subcontractors were also underutilized but not at a .05 confidence level. The 2004 Study determined that underutilization was not statistically significant.

Therefore, the statutory scheme was ruled "narrowly tailored" to achieve the State's compelling interest as it relates to African American and Native American subcontractors but not Hispanic American and Asian American subcontractors. Thus, the State provided a strong basis in evidence for minority subcontractor participation goals pertaining to African American and Native American subcontractors.

Second, the court considered whether the statutory scheme as it relates to women survives the intermediate scrutiny standard. The evidence demonstrated that the State's prime contractors "substantially over-utilized" women-owned businesses on public road construction projects. The 2004 disparity study calculated the overutilization of women subcontractors as statistically significant at a 96 percent confidence level. The circuit court further noted that the private sector evidence was insufficient to overcome the strong evidence of overutilization. Consequently, the circuit court determined that the evidence in the 2004 disparity study did not provide "exceedingly persuasive justification" to include women-owned businesses in gender-based remedies.

In light of the *Rowe* decision, caution should be exercised when determining which minority or gender group is appropriate for race-conscious or gender-conscious remedies. For an M/WBE program to be narrowly tailored, there must be a statistical finding of underutilization of minority subcontractors. Where the underutilization of a minority group is not found to be statistically significant, the minority group should not be included in race-conscious remedies.

The intermediate scrutiny standard for gender classifications can be met with statistical evidence of underutilization that is not statistically significant. However, this does not apply when there is demonstrated overutilization. Women-owned businesses should be considered for gender-based remedies when the statistical evidence demonstrates that the overutilization is not statistically significant.

[122] Fourth Circuit Court citing, *Research Methods and Statistics: A Critical Thinking Approach*, Sherri L. Jackson, (3ed. 2009).

[123] Fourth Circuit Court citing, *The Practice of Social Research*, Earl Babbie, (12th ed. 2010).

V. CONSIDERATION OF RACE-NEUTRAL OPTIONS

A remedial program must address the source of the disadvantage faced by minority businesses. If it is found that race discrimination places MBEs at a competitive disadvantage, an MBE program may seek to counteract the situation by providing MBEs with a counterbalancing advantage.[124]

On the other hand an MBE program cannot stand if the sole barrier to minority or woman-owned business participation is a barrier that is faced by all new businesses, regardless of ownership.[125] If the evidence demonstrates that the sole barrier to M/WBE participation is that M/WBEs disproportionately lack capital or cannot meet bonding requirements, then only a race-neutral program of financing for all small firms would be justified.[126] In other words if the barriers to minority participation are race-neutral, then the program must be race-neutral or contain race-neutral aspects.

The requirement that race-neutral measures be considered does not mean that they must be exhausted before race-conscious remedies can be employed. The district court recently wrote in *Hershell Gill Consulting Engineers, Inc. v. Miami-Dade County:*

> The Supreme Court has recently explained that although "narrow tailoring does not require exhaustion of every conceivable race-neutral alternative" it "does require serious, good faith consideration of workable race-neutral alternatives that will achieve… diversity[.]" *Grutter*, 123 S.Ct, at 2344, 2345. The County has failed to show the necessity for the relief it has chosen, and the efficacy of alternative remedies has not been sufficiently explored.[127]

If the barriers appear race-related but are not systemic, then the remedy should be aimed at the specific arena in which exclusion or disparate impact has been found. If the evidence shows that in addition to capital and bonding requirements, which are race-neutral, MBEs also face race discrimination in the awarding of contracts, then a race-conscious program will stand, so long as it also includes race-neutral measures to address the capital and bonding barriers.[128]

The Ninth Circuit Court of Appeals in *Coral Construction* ruled that there is no

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[124] *AGCC II*, 950 F.2d at 1404.

[125] *Croson*, 488 U.S. at 508.

[126] *Id.* at 507.

[127] *Hershell Gill*, 333 F.Supp. 2d 1305, 1330 (S.D.Fla. 2004).

[128] *Id.* (upholding MBE program where it operated in conjunction with race-neutral measures aimed at assisting all small businesses).

requirement that an entity exhaust every possible race-neutral alternative.[129] Instead, an entity must make a serious, good faith consideration of race-neutral measures in enacting an MBE program. Thus, in assessing MBE utilization it is imperative to examine barriers to MBE participation that go beyond "small business problems." The impact on the distribution of contracts programs that have been implemented to improve MBE utilization should also be measured.[130]

VI. UNITED STATES DEPARTMENT OF TRANSPORTATION DISADVANTAGED BUSINESS ENTERPRISE PROGRAM

In response to the United States Supreme Court's decision in *Adarand*, which applied the strict scrutiny standard to federal programs, the USDOT revised provisions of the DBE rules. Effective March 1999, the USDOT revised 49 CFR Part 26 of its DBE program rules. The goal of promulgating the rule was to modify the DBE program consistent with the "narrow tailoring" requirement of *Adarand*. The revised provisions applied only to USDOT airport, transit, and highway financial assistance programs. Effective February 28, 2011, the USDOT again amended the DBE regulations set forth in 49 CFR Part 26 as described in the Federal Register, Volume 76, No. 19. According to the 2011 amendment, recipients must incorporate a Small Business Enterprise component in their DBE Program by February 28, 2012.

There have been four challenges to the 1999 amended DBE regulations. Two circuit courts, the Seventh and Eighth, approved the DBE program. The Ninth, which Metro is bound to follow, did not. The Seventh and Eighth circuits were the first two circuits to apply *Croson* to the DBE regulations. The initial challenge was in the Eighth Circuit.

A. Analysis of the Eighth Circuit Challenges

Sherbrooke Turf Inc. v. Minnesota Department of Transportation and *Gross Seed Co. v. Nebraska Dep't of Roads* [131] is a 2003 joint decision. In both cases, the district courts found that the revised DBE Program, as amended in 1999, met the strict scrutiny standard prescribed in *Adarand.* On appeal the Circuit Court held that Congress had a "compelling interest" to enact the legislation because it "had a sufficient evidentiary basis on which to conclude that the persistent racism and discrimination in highway subcontracting

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[129] *Coral Construction Co. v. King County*, 941 F.2d 910 (9th Cir. 1991).

[130] *Dade County*, 122 F.3d at 927. At the same time, the Eleventh Circuit's caveat in *Dade County* should be kept in mind: "Supreme Court decisions teach that a race-conscious remedy is not merely one of many equally acceptable medications that a government may use to treat race-based problems. Instead, it is the strongest of medicines, with many potentially harmful side-effects, and must be reserved to those severe cases that are highly resistant to conventional treatment." For additional guidance, see *supra* the discussion of narrow tailoring in *Concrete Works, Adarand,, County of Cook, and City of Chicago.*

[131] 345 F.3d 964 (8th Cir. 2003).

warranted a race-conscious procurement program."

For the court's "narrow tailoring" examination it looked at the DBE regulations. The court held that four factors demonstrated that the program was narrowly tailored on its face. Those factors were: (1) the emphasis on the use of race-neutral measures to meet goals; (2) the substantial flexibility allowed; (3) goals were tied to the local market; and (4) participation was open to all small businesses who could show that they were socially and economically disadvantaged, and presumption that minority businesses qualified was limited to those with $750,000 or less in net worth.

The Circuit Court then examined whether the program was narrowly tailored *as applied* by Minnesota and Nebraska in its local labor markets. Each state retained a consultant to examine local conditions. In Minnesota the consultant followed the regulations' two-step goal setting process, reducing the availability it found by the precipitous drop in DBE participation when the program was suspended. In Nebraska the consultant determined the DBE availability in the four years before the program was amended in 1999 to make clear that the ten percent goal was not mandatory. After determining what decisions had been reached on a race-neutral basis the consultant predicted the amount of the availability that would require race and gender-conscious subcontracting. The Eighth Circuit rejected the plaintiffs' appeal based on the evidence presented by the consultant.[132]

B. Analysis of the Ninth Circuit Challenges

The first of the two Ninth Circuit cases challenging the constitutionality of the DBE program, *Western States Paving Co. v. Washington State Department of Transportation,*[133] was decided in the Ninth Circuit Court of Appeals in 2006. The most recent case, *Associated General Contractors of America, San Diego Chapter, Inc. (AGC) v. California Department of Transportation (Caltrans),* is under review in the appellate court.

1. *Western States*

Western States, decided in 2005, subjected the State of Washington's Department of Transportation DBE Program to a two-pronged analysis. One aspect of the analysis determined whether the USDOT DBE legislation was facially constitutional, and the other assessed whether the State of Washington's application of the DBE regulations was valid.

[132] The Seventh Circuit is in accord. *Northern Contracting Inc. v. Illinois Department of Transportation,* 473 F.3d 715 (2007). Consultant's methodology were consistent with the flexible nature of the DBE regulations: (1) use of its 'custom census' was acceptable method to determine Step 1 availability; (2) was not required to separate prime and subcontracting availability; and (3) reasonably determined amount of goal that would use race neutral means.

[133] *Western States Paving Co., v. Washington State Department of Transportation,* 407 F.3d 983 (9th Cir. 2005)

- **Facial Constitutional Challenge**

In *Western States* the plaintiff sought a declaratory judgment arguing that the 1998 Transportation Equity Act for the 21st Century's (TEA-21) preference program was in violation of the equal protection provision under the Fifth and Fourteenth Amendments of the U.S. Constitution. The TEA-21 DBE Program on its face and as applied by the State of Washington was claimed to be unconstitutional. In addressing *Western States'* facial challenge the Court interpreted the issue as to whether the United States met its burden of demonstrating that the federal statute and regulations satisfied the strict scrutiny's exacting requirements.

The federal government, according to *Croson*, has a compelling interest in ensuring that its funding is not distributed in a manner that perpetuates the effects of either public or private discrimination within the transportation contracting industry.[134] Thus, the Court evaluated the evidence that Congress considered in enacting the DBE statute to ensure it had a "strong basis in evidence for its conclusion that remedial action was necessary."[135] The Court concluded that a substantial body of statistical and anecdotal evidence was considered by Congress at the time the law was enacted. Therefore, the Court found that Congress had a strong basis in evidence for concluding that at least in some parts of the country there was discrimination within the transportation contracting industry which hindered minorities' ability to compete for federally funded contracts.[136]

Next, the Court considered whether the DBE regulation's racial classification was narrowly tailored as represented in the State of Washington's DBE goals. Citing *Croson*, *Western States* decided that a minority preference program must establish utilization goals that bear a close relationship to minority firms' availability in a particular market in order to be narrowly tailored.[137] The Court referenced *Sherbrook*e, noting that the Eighth Circuit in holding that the DBE programs of the Minnesota and Nebraska Departments of Transportation independently satisfied the strict scrutiny's narrow tailoring requirement by relying upon two disparity studies.

The Minnesota Department of Transportation (MnDOT) offered statistical evidence of the highway contracting market in Minnesota. Following the goal setting methodology set forth in 49 CFR Section 26.45(c), MnDOT formulated a factual predicate which illustrated the DBE availability in MnDOT's relevant market area. Findings from the statistical analysis of business formation statistics were used to adjust the base figure upward based on the rationale that the number of participating minority-owned businesses would be higher in a race-neutral market.

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134 *Croson*, 488 U.S. 469, 492 (1982).

135 *Id.* at 493.

136 *Western States Paving Co., v. Washington State Department of Transportation*, 407 F.3d at 983 (9th Cir. 2005).

137 *Id*. at 983.

MnDOT implemented good faith efforts to encourage prime contractors to meet the DBE goal. The availability of DBEs and the extent of subcontracting opportunities for each project were considered when setting the race-conscious portion of the overall DBE goal. The Eighth Circuit court agreed with the district court that MnDOT's revised DBE Program served a compelling government interest and was narrowly tailored on its face and as applied in Minnesota. Similarly, the Nebraska Department of Transportation (NDOT) also set an overall DBE goal pursuant to the DBE regulations for the Nebraska highway construction market. Like Minnesota, the Eighth Circuit found that NDOT's DBE Program was narrowly tailored. The Court notes that the DBE regulations did not establish a mandatory nationwide minority utilization goal in transportation contracting. The Court found that the ten percent DBE utilization goal in the regulation was only "aspirational" and that the regulation provides that each state must establish a DBE utilization goal based upon the proportion of ready, willing, and able DBEs in its transportation contracting industry.[138] Because the regulations require each state to set minority utilization goals that reflect the contractor availability in its own labor market, the Court found the DBE regulations to be narrowly tailored to remedy the effects of race and sex-based discrimination within the transportation contracting industry. The Court ultimately held that it was satisfied that TEA-21's DBE program was narrowly tailored to remedy the effects of race and sex-based discrimination within the transportation contracting industry, and thus *Western States'* facial challenge failed.

- **Application of the Narrowly Tailored Standard in Overall Goal Setting**

The second prong of the Court's analysis considered whether the utilization goals established by the State of Washington "as applied" were unconstitutional, because there is no evidence of discrimination within the State's transportation industry. The State contended that its implementation of the DBE Program was constitutional, because it comported with the federal statute and regulations. The State also proffered that since the proportion of DBEs in the state was 11.17 percent and the percentage of contracting funds awarded to them on race-neutral contracts was only nine percent, discrimination was demonstrated.[139]The Court disagreed with the rationale. It found that this oversimplified statistical evidence is entitled to little weight, because it does not account for factors that may affect the relative capacity of DBEs to undertake contracting work.

The Ninth Circuit opined that the only other circuit to consider an applied challenge to the federal DBE program was the Eight Circuit in *Sherbrook.* In discussing the Eighth Circuit's opinion in *Sherbrook* the Ninth Circuit reasoned that both Minnesota and Nebraska had hired outside consulting firms to conduct statistical analysis of the availability and capacity of DBEs in their local market. Accordingly, *Western States* concluded that the Eighth Circuit had relied upon the statistical evidence in the studies to hold that the State's DBE program was narrowly tailored and satisfied strict scrutiny.

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[138] *Id. at 983.*

[139] *Western States Paving Co., v. Washington State Department of Transportation,* 407 F.3d at 983 (9th Cir. 2005).

Citing *Croson*, the Court opined that recipients of federal funds could not use race-conscious methods to meet their DBE goals without a finding of discrimination. The Ninth Circuit also concluded that in order to satisfy the narrowly tailored requirement even when discrimination is present, the State may only implement a remedial race-conscious program including those minority groups that have actually suffered discrimination. The Ninth Circuit found insufficient evidence suggesting that minorities currently or previously suffered discrimination in the Washington transportation contracting industry. Further, the Court found that the State of Washington failed to provide evidence of discrimination within its own contracting market and thus failed to meet its burden of demonstrating that its DBE program was narrowly tailored to further Congress's compelling remedial interest.[140]

The Court concluded that the District Court erred when it upheld the State's DBE program simply because the State complied with the federal program's requirement. Washington's DBE program was categorized as an "unconstitutional windfall to minority contractors solely on the basis of their race or sex."

In sum *Western States* found that Washington's DBE program met the first prong of the test and was held facially constitutional, but it did not pass the second prong because the State's application of the DBE regulations was not narrowly tailored to a finding of statistically significant underutilization of the respective minority groups. Therefore, the State's application of the DBE regulations was deemed unconstitutional.

- **Evidentiary Requirements for Overall Goal Setting**

In response to *Western States* the USDOT issued a Memorandum in 2005 recommending a disparity study, which adheres to the evidentiary standards set forth in *Croson*, as the appropriate method for USDOT recipients in the Ninth Circuit to formulate narrowly tailored DBE goals.[141]

2. *Associated General Contractors*

Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation (AGC), filed 2011 in the District Court, cited civil rights violations in the application of California Department of Transportation's (Caltrans) 2009 DBE Program.[142] *AGC* charged that the Equal Protection Clause, federal DBE program regulations, and the U.S. Constitution generally require that Caltrans' DBE Program be

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[140] *Id. at 983.*

[141] We note that the USDOT regulations, as demanded in 1992 recommends the use of a disparity study among other availability sources for setting the DBE goals.

[142] California Department of Transportation (Caltrans) in the matter, *Associated General Contractors of California, San Diego Chapter v. Caltrans* (2:09-CV-01622-JAM-GGH) March 23, 2011.

predicated on evidence showing intentional discrimination. The remedial scheme regarding various groups based on Caltrans' statistical evidence, *AGC* argued, violates the nondiscrimination mandate of Title VI of the 1964 Civil Rights Act. Additionally, *AGC* argued that Caltrans, as a federal grantee, did not demonstrate that it would lose its federal funds if it did not implement the 2009 DBE program.

Specifically, *AGC* challenged the 2005 congressionally enacted "Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users" as applied by Caltrans. The Act requires that a minimum of ten percent of federal dollars be expended with disadvantaged business enterprises (DBEs).

AGC sought an injunction against Caltrans' DBE program, declaring the program unconstitutional. *AGC* asserted that Caltrans must identify intentional acts of discrimination and that failing to identify specific acts of intentional discrimination renders its program unconstitutional. The program was also attacked on the ground that some of the categories included in the DBE goal did not include sufficient specific statistical evidence pertaining to minority women. The statistical evidence in the disparity study found disparities for minorities, but the findings were not broken down by gender.

To rebut *AGC's* claim, Caltrans argued that its program met the requirements set forth in *Western States'* two-prong test for narrow tailoring. The presence or absence of discrimination in the State's transportation contracting industry and the narrowly tailored remedy limited to minority groups that actually had suffered discrimination were the two prongs.

The court compared the probative evidence presented in *Western States* and *AGC*. It was determined that in *Western States* there was insufficient evidence of discrimination within the department's own contracting market. Thus, Washington failed to meet its burden of demonstrating that its DBE program was narrowly tailored to further Congress's compelling remedial interest. In *Western States* to calculate a disparity, the proportion of DBE firms in the state was compared with the percentage of contracts awarded to DBEs on race-neutral contracts. This methodology was found to be oversimplified by the Appellate Court. In contrast the evidence Caltrans proffered was characterized by the District Court as extensive statistical and anecdotal evidence of discrimination in the California contracting industry. On March 23, 2011 in the *AGC* case, the District Court granted summary judgment in favor of Caltrans. The Court found that Caltrans met the standard set forth in *Croson* by identifying discrimination with "specificity," and showing a pattern of "deliberate exclusion.[143]" AGC has appealed the District Court's decision to the Ninth Circuit Court of Appeal where it is currently under review.

[143] *Croson*, 488 U.S. at 509.

C. Analysis of the Seventh Circuit Challenges

Northern Contracting, Inc. v. Illinois Department of Transportation (NCI), decided in 2007, challenged Illinois Department of Transportation's (IDOT) application of its DBE program. The District Court concluded that Northern Contracting, a company specializing in the highway construction of guardrails and fences, failed to prove a constitutional violation against IDOT. The Seventh Circuit Court of Appeals considered that IDOT had not violated the Supremacy Clause and the Fourteenth Amendment of the United States Constitution in administering its DBE program, because the program was designed to increase the participation of DBEs in Illinois highway construction subcontracts.[144]

NCI initially alleged that: (1) TEA-21 and USDOT's regulations were outside the scope of Congressional power; (2) federal provisions violated the Fifth Amendment's guarantee of equal protection; and (3) the Illinois statute implementing the federal DBE requirement violated 42 U.S.C. §§ 1981, 1983, 2000(d) and the Fourteenth Amendment's Equal Protection Clause. The district court summarily sided with IDOT, concluding that the federal government had demonstrated a compelling interest. At trial the district court ruled that IDOT's Fiscal Year 2005 DBE Program was narrowly tailored to the compelling interest identified by the federal government to remedy the effects of racial and gender discrimination in the Illinois highway construction market.

The appellate court agreed with the district court's ruling that IDOT's DBE program was narrowly tailored. Additionally, *NCI's* contention that IDOT must adjust its goal based on local market conditions was characterized as unfounded by the court. IDOT correctly argued that Section 26.45(d) did not require the agency to make any adjustments to the base figure after the initial calculation but simply provides recipients with authority to make such adjustments, if necessary. The court also dismissed *NCI's* argument that IDOT violated 49 CFR Section 26.51 by failing to meet the maximum feasible portion of its overall goal through race-neutral means. IDOT demonstrated that all of the methods described in Section 26.51(b) to maximize the portion of the goal that could be achieved through race-neutral means were utilized by the department.

[144] *Northern Contracting, Inc. v. Illinois Department of Transportation,* 473 F.3d 715 (7th Cir. 2007).)

VII. SECTION 31 OF THE CALIFORNIA CONSTITUTION

California Constitution Section 31 is a constitutional amendment that precludes the use of preferences in the award of public contracts. Although the amendment allows for the affirmative action requirements of a federal grant, the question of the appropriate application of an DBE program by a USDOT grantee in California has not been reviewed by the Ninth Circuit. However, the U.S. Constitution requires governmental agencies to treat all individuals and groups equally in the operation of public employment, public education, and public contracting. Section 31 does state that "if any parts are found to be in conflict with federal law or the U.S. Constitution, the section shall be implemented to the maximum extent that federal law and the U.S. Constitution permit."

The leading California cases concerning Section 31 are *Hi-Voltage v. City of San Jose*[145] and *Ward Connerly v. State Personnel Board*.[146] In *Hi-Voltage* the California Supreme Court held that Section 31 prohibited the City of San Jose from requiring construction contractors to document their efforts to solicit M/WBEs as subcontractors. The court noted two fatal flaws: (1) Contractors were required to request bids from at least four M/WBEs, which the court considered a preference in favor of M/WBEs; and (2) the program also failed because the extent to which M/WBEs were chosen would be measured against the City's statistical expectation. *Ward Connerly*, a subsequent appellate court opinion, determined that Section 31 applied to the five California statutory programs before that court.[147] However, neither *Hi-Voltage* nor *Ward Connerly* speak directly to what would happen should the findings of the local government's disparity study point to a race-conscious remedy.

Hi-Voltage refers to the impact of a remedy based on a disparity study. The California Supreme Court wrote:

> …if it were determined the City had violated federal constitutional or statutory law, the supremacy clause as well as the express terms of Proposition 209 would dictate federal law prevails…[148]

[145] 24 Cal. 4th 537 (Cal. 2000).

[146] 92 Cal. App. 4th 16 (Cal. 2001).

[147] State Lottery, Professional Bond Services, State Civil Service, Community Colleges, State Contracting (reporting requirements).

[148] *Hi-Voltage*, 24 Cal. 4th 537 at 569.

Crucially, it went on:

> The disparity study is not part of the record in this case. Without it, the court has no basis for measuring the fit between the Program and the goal of eliminating a disparity in the amount of contract dollars awarded MBEs in comparison to non-MBEs.[149]

Therefore, it is unclear whether the inclusion of a disparity study in this case may have permitted a race-conscious remedy despite Proposition 209.

Moreover, federal courts still have to decide whether Proposition 209 conflicts with the Equal Protection Clause of the Fourteenth Amendment.[150] *Croson* stated that such race-conscious contracting remedies are appropriate. In accordance with the Supreme Court's 1803 decision, *Marbury v. Madison*,[151] the federal courts are granted the power to determine whether a remedy growing out of a disparity study process sanctioned by the Court in *Croson* is narrowly tailored. This question is not intended to be answered by the State of California.

Title VI of the Civil Rights Act of 1964 established nondiscrimination requirements on recipients of federal funds in their non-federally funded programs.[152] In *Coral Construction v. San Francisco*[153] the California Superior Court determined that Proposition 209 barred San Francisco's race-conscious program.[154] On April 18, 2007 the First District Court of Appeals affirmed that judgment but remanded the case for a determination of whether the defendant's evidence met the majority opinion's test that the discrimination was intentional.[155]

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[149] *Id.*

[150] *Cantrell v. Granholm* is a constitutional challenge, framed in the context of higher education, to the Michigan Civil Rights Initiative (a *Ward Connerly*-backed measure similar to Proposition which became law in 2006). Plaintiffs argue that MCRI (1) discriminated against them on account of race; (2) use of the initiative process to amend of Michigan Constitution placed a unique and too heavy a burden on racial minorities in that they in that they would have obtain a constitutional amendment to reverse that policy; and (3) the federal government preempted the field of race and gender discrimination from the states by Title VI of the 1964 Civil Rights Act and Title IX of the Education Amendments of 1972. On March 18, 2008, the District Court granted summary judgment for the Attorney General, rejected each of plaintiffs' challenges, holding that race conscious state or locally funded programs were a prohibited "preference" within the meaning of MCRI.

[151] 5 U.S. 137 (1803).

[152] The 1987 Civil Rights Restoration Act reversed court decisions that restricted its reach.

[153] *Coral Construction, Inc. v. City & County of San Francisco*, *See* 116 Cal. App. 4th 6 (2004).

[154] It is also challenging the procedural propriety of the court granting plaintiff summary judgment because the factual record did not support one.

[155] 149 Cal.App.4th 1218 (2007). The City's appeal is pending in the California Supreme Court.

The application of Title VI to the Sacramento Municipal Utility District was also raised in *C&C Construction v. Sacramento Municipal Utility District (SMUD).*[156] The majority Court of Appeals opinion began with the point that race-neutral programs are the only ones Proposition 209 permits in California but also acknowledged that its provisions were subject to federal law. It viewed the regulations of the U.S. Departments of Energy, Defense, and Transportation as not *requiring* recipients of federal funds to use race-conscious remedial programs for identified discrimination. Moreover, its reading of the regulations themselves was that SMUD's actions had to be consistent with Proposition 209.[157] Also, both SMUD's 1993 disparity study and its 1998 update found *Croson*-level discrimination against MBEs, but they did not look at whether race-neutral remedies would suffice to meet its federal nondiscrimination obligations.[158] Indeed, the majority observed that the disparity study update was specifically instructed not to consider this factor. Finally, the Court found that SMUD, under its reading of the federal regulations, had a burden to show that it would *lose* funds if it did not put in place the race-conscious program.

Citing *S.J. Groves & Sons v. Fulton County,*[159] the dissent's view of the regulations was that, properly read, a race-conscious program is not an *option* where a race-neutral one will suffice. The required "affirmative action" did not refer only to race-neutral programs; it also included race-conscious programs.[160] The Department Secretary determined whether SMUD was in compliance. What the majority did in affirming the trial court decision to enjoin the use of race interfered with that authority and SMUD's obligation to comply with the regulations. As such, SMUD violated the Supremacy Clause. However, the majority held that what could be seen as a cogent argument was raised too late to be considered during the appeal.

The dissent summarized its position as follows:

> Since the requirement of "affirmative action" includes both race-neutral and race-conscious action and the undisputed evidence establishes that SMUD has attempted to use race-neutral outreach and other methods and concluded in good faith that they were not sufficient to remedy the statistical underutilization reflected in the disparity studies, SMUD was

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[156] 122 Cal. App. 4th 284 (Cal. App. 2004).

[157] SMUD offers no argument or authority that the Department of Energy requires race-based discrimination [a violation of Proposition 209], either in general or specifically, in SMUD's case, as an "appropriate remedial step." It would appear that the Department of Energy, by using the general term "'appropriate,' meant for the funding recipient to consider the state laws and regulations relevant to that recipient when determining what action to take. In SMUD's case, such consideration includes the limitations of [Proposition 209]." The opinion interpreted the Department of Transportation's regulations as also not *requiring* race conscious responses.

[158] By implication, we note, if SMUD had, it could have move to a race-conscious program.

[159] 920 F.2d 752 (11th Cir. 1991).

[160] The applicable regulation "condone[s], and in some cases *require[s]*, race-conscious regulations and/or action". (*italics* added), *S.J. Groves*, 920 F.2d at 764-765.

> left with no other alternative but to adopt a race-conscious remedial plan to eliminate the effects of its own discriminatory practices.[161]

The decision of the U.S. Supreme Court in the *Croson* and *Adarand* cases changed the legal landscape for business affirmative action programs. The U.S. Supreme Court altered the authority of local government to use local and federal funds to institute remedial race-conscious public contracting programs. This chapter has examined what *Croson*, *Adarand*, and their progeny require for Metro to institute a constitutional race-conscious public contracting program. The case law interpretation has also considered the significance of Section 31of the California constitution.

Because California is in the Ninth Circuit, a disparity study should provide the factual predicate for any legal race-conscious affirmative action contracting program. If Metro determines on public contracting because this amendment calls into question the application of the DBE regulations, its program should operate differently from the specifications in the DBE regulations. As a result of the statistical findings, a waiver can be sought from Federal Transportation Authority. As established above, *Western States* requires USDOT recipients to establish a factual predicate confirming a finding of statistically significant disparity for each ethnic group to be included in its race-conscious remedies.

VIII. LIST OF AUTHORITIES

A. Cases

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Associated General Contractors of California v. Coalition for Economic Equity and City and County of San Francisco, 950 F.2d 1401 (9th Cir. 1991).

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Associated General Contractors of Ohio v. Drabik, 50 F.Supp. 741 (S.D. Ohio 1999).

Builders Ass'n of Greater Chicago v. City of Chicago, 298 F.Supp2d 725 (N.D.Ill. 2003).

Builders Ass'n of Greater Chicago v. County of Cook, 256 F.3d 642 (7th Cir. 2001).

[161] 122 Cal. App. 4th 284 at 324.

C&C Construction v. Sacramento Municipal Utility District (*SMUD*), 122 Cal. App. 4th 284 (Cal. App. 2004).

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Gross Seed Co. v. Nebraska Department of Roads, et. al., 345 F.3d 964 (8th Cir. 2003).

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B. Statutes

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49 CFR Parts 23 and 26.

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