

ARTICLES

Passing Strict Scrutiny: Using Social Science to Design Affirmative Action Programs

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The authors appreciate the comments and assistance received from Joshua Aronson, Ian Ayres, Stuart Banner, John Donohue, Marc Galanter, Phoebe Haddon, Deborah Malamud, Richard O. Lempert, Theodore Ruger, Timothy Sprague, Claude M. Steele, and Thomas J. Sugrue. An earlier version of this article was presented at the workshop on Law and Society in Contemporary India at Harvard University on May 4, 2001 and benefited from the discussion at that session. The authors are members of a group of social science and comparative law scholars who filed an amicus brief in support of neither party on June 1, 2001 in the United States Supreme Court in *Adarand Constructors, Inc. v. Mineta*, 122 S. Ct. 511 (2001) (dismissing grant of certiorari as improvidently granted). This Article expands on many of the points made in that amicus brief. The amicus brief, selected materials cited in the brief, other briefs filed in *Adarand*, and other information related to the case are available at *Rethinking Equality in the Global Society*, <http://law.wustl.edu/equality> (last updated Apr. 22, 2002).

A PARABLE

Imagine a mad bomber with a stockpile of biological and radiation weapons. The bomber takes a state map that indicates the boundaries of every county. He picks out a dozen counties and colors some of those counties red, some green, and the rest blue. Taking that map aloft, he drops biological weapons on the red counties, radiation weapons on the green counties, and all that he has left of both kinds on the blue counties. He then kills himself in a suicide crash. Although many residents of the targeted counties become ill almost immediately, the terrible extent of the harm he caused becomes apparent only as the years go by and public health officials begin to notice patterns of cancer and birth defects. The situation is complicated not only by the puzzling variety of problems within and among the counties, but also by the passage of time as people move out of the targeted counties, carrying illness with them, and others move into the counties where the still potent effects of the bombing linger. The government becomes increasingly frustrated by the complexity of the problem, its persistence, and the limited, and occasionally counterproductive, results of efforts to restore public health. Then the bomber's map is discovered in the rubble of his crashed plane.¹

INTRODUCTION

In the parable, should the government use the bomber's map in its efforts to restore public health? The answer would seem to be an obvious yes. No one would say that the government was perpetuating the bomber's vicious "discrimination" against the colored counties by using his map to guide its public health programs. Nor can one imagine that residents of the uncolored counties would claim that they were being discriminated against because people with links to the colored counties were given free health care or preferential admission to cancer treatment facilities.

For many social scientists, it seems equally obvious that the "map" used in the United States to categorize people into racial and ethnic categories remains a necessary tool for public policy. Because the "map" projects the complex patterns of past and continuing discrimination onto the current geography of our nation, a well-designed affirmative action plan would use that map to guide the uncertain but essential task of restoring social and economic health for the victims of discrimination. However, there are few, if any, affirmative action plans that can be described as carefully designed; in particular, relevant information and methods developed by the social sciences are not used.

To return to the parable, one analogy to some affirmative action programs might be if the map users were literally color-blind and thus treated all targeted counties alike even though the bombing pattern varied among counties. Another

1. This hypothetical was written many weeks before the destruction of the World Trade Center on September 11, 2001.

analogous mistake would be if the public health officials in the parable failed to take into account population changes after the bombing event, putting all their public health efforts only into the targeted counties, providing identical health care to longtime residents and people who had moved in after the bombing, and ignoring residents and their descendants who had moved out after the bombing. If there was a judicial role in the parable, it would be to make sure that the government had, in fact, the right map and was using it appropriately to remedy the harm the bomber caused.

This Article will suggest that an important reason many affirmative actions programs do not seem “narrowly tailored” is that, although the primary goal of the programs is to remedy the lingering effects of racial discrimination, the “map” used to design and implement the programs was created decades ago with then-current practices of deliberate discrimination against all “nonwhite” people in mind. The “map” is, thus, both insufficiently detailed like the “color-blind” map of counties targeted by the mad bomber as well as outdated.

When the Supreme Court held in 1995 that strict scrutiny must be applied to all affirmative action programs, including programs authorized by Congress acting pursuant to its constitutional power to enforce the provisions of the Fourteenth Amendment,² Justice O’Connor provided the following much-quoted and discussed explanation:

[W]e wish to dispel the notion that strict scrutiny is “strict in theory, but fatal in fact.” The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it.³

Looking at affirmative action from a comparative law perspective and with insights from the social sciences suggests that it may be helpful to separate the problems of present practice from those of lingering effects. Our mad bomber parable is intended to illustrate this analytic distinction, as the only problems in the parable are lingering effects. Unlike the contemporary U.S. scene, no one in the parable deliberately continues to harm people based on the color of the county where they live.

This Article seeks to clarify how lingering effects can be a compelling interest even if it is assumed that there are no relevant present practices of discrimination. Racialized categories based on assumptions about conscious discrimination may be less relevant when the compelling interest is to remedy lingering effects of discrimination, creating a need for an empirical basis to determine which groups are presently disadvantaged by the lingering effects of

2. U.S. CONST. amend. XIV, § 5 (“The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”).

3. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995) (plurality opinion) (citation omitted) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 519 (Marshall, J., concurring in the judgment)).

past discrimination. An affirmative action program thus designed with the benefit of social science methods should pass strict scrutiny.

I. USING SOCIAL SCIENCE TO MAP THE EFFECTS OF DISCRIMINATION

Ian Ayres, who is both an economist and a legal scholar, has reported the results of empirical research on retail car negotiations showing that black male testers received final offer mark-ups that were much higher than those given white male testers.⁴ Although the present practices of deliberate discrimination may indeed have caused the behavior of the car retailers, consider the following model that could also explain these results.

Suppose automobile dealers think that black buyers have higher reservation prices than whites—prices above which they will simply walk away rather than haggle further. On this belief, dealers will be tougher when bargaining with blacks, more reluctant to offer low prices, more eager to foist on them expensive accessories, and so on. Now, given that such race-based behavior by dealers is common, blacks will come to expect tough dealer bargaining as the norm when they shop for cars. As such, a black buyer who contemplates walking away will have to anticipate less favorable alternative opportunities and higher search costs than will a white buyer who entertains that option. And so the typical black buyer may find it rational to accept a price rather than continue searching elsewhere, even though the typical white may reject that same price. Yet this racial difference in typical behavior by buyers is precisely what justified the view among dealers that a customer's race would predict bargaining behavior. Thus, even if there are no intrinsic differences in bargaining ability between the two populations, a convention can emerge in which the dealers' rule of thumb, "be tougher with blacks," is all too clearly justified by the facts.⁵

This model predicts a particularly insidious form of lingering effect. Outright racial bigotry in an earlier generation of car dealers, based on the stereotype of blacks as naive and foolish consumers, would condition black consumer expectations and bargaining behavior. A current generation of car dealers motivated purely by business considerations, without invidious bias against blacks, would engage in a practice of hard bargaining only to learn from repeated interactions that they can safely demand higher prices from black consumers.⁶ The result is

4. Ian Ayres, *Further Evidence of Discrimination in New Car Negotiations and Estimates of Its Cause*, 94 MICH. L. REV. 109, 116 (1995) [hereinafter Ayres, *Further Evidence of Discrimination*] (controlling for exogenous variables, black males received final offers that were \$1132 higher than offered to white males); see also Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817, 828 (1991) (reporting similar results in prior study with smaller sample of testers).

5. This model was first presented in Loury's DuBois Lectures, Loury, *supra* note **, and was further developed in LOURY, *supra* note **, at 31–32 (internal citations omitted).

6. Anecdotal evidence reported in a recent newspaper article about racial disparity in car sales is consistent with our model's hypothesis that dealers will assume that black buyers are likely to have

to reinforce the stereotype born in bigotry and maintain a racial inequity in the market for automobiles.

Research by Claude Steele, Joshua Aronson, and a number of other psychologists provides evidence that racial and ethnic stereotypes are a very real lingering effect that continues to harm in ways that cannot be attributed to any present practices of intentional discrimination. Steele initially hypothesized that if a person fears that low performance in a particular testing situation will confirm a stigmatic stereotype, this felt threat, which may have its influence below the level of conscious awareness, is likely to depress the test performance.⁷ Steele and Aronson have since accumulated an extensive set of experimental results that support this hypothesis, showing dramatically depressed scores for stigmatized group members that cannot be attributed to bias on the part of the test designer nor to inferior skills of the test taker. In one experiment, white and black students at Stanford University were given twenty-seven difficult questions from the verbal sections of past Graduate Record Exams.⁸ In the diagnostic test group students were told that their abilities were being measured, while in the non-diagnostic group they were told that the purpose of the experiment was “to examine the psychology of problem solving.”⁹ In the diagnostic group the black students performed much worse—eight correct answers—than in the nondiagnostic group—twelve correct—while the white students performed at the same level in both groups.¹⁰ Other researchers have replicated these results and the stereotype threat theory is now widely accepted within the field of psychology.¹¹

higher reservation prices. See Norm Parish, *Blacks Pay More than Whites for Car Loans, Researchers Report*, ST. LOUIS POST-DISPATCH, Aug. 19, 2001, at B1. (“Michael Henderson, Sr., a former salesman at a Nissan dealership in Hazelwood, [Missouri,] says that in the 1990s he regularly watched as African-Americans paid more money than whites for the same automobiles. The white salesmen eagerly rushed to African-American customers before they reached the door, because the salesmen believed they could easily convince blacks to pay more, he said.”); see also Diana B. Henriques, *Nissan Says It Can Refute Report of Bias in Car Loans*, N.Y. TIMES, July 12, 2001, at A19 (reporting Nissan’s response to report that blacks pay higher markups than whites at Nissan dealerships); Diana B. Henriques, *Review of Nissan Car Loans Finds That Blacks Pay More*, N.Y. TIMES, July 4, 2001, at A1 (reporting on original study finding that blacks pay higher markups than whites at Nissan dealerships). Additionally, Ian Ayres ran a variety of economic models on his testing data; the results were consistent with a hypothesis that sellers believed that black buyers had higher reservation prices than white buyers. Ayres, *Further Evidence of Discrimination*, *supra* note 4, at 141.

7. See Claude M. Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, 52 AM. PSYCHOL. 613, 614 (1997); see also Claude M. Steele, *Thin Ice: Stereotype Threat and Black College Students*, ATLANTIC MONTHLY, Aug. 1999, at 44 (reviewing research into effects of stereotypes on academic performance and proposals to eliminate stereotype threats), available at <http://www.theatlantic.com/issues/99aug/9908stereotype.htm>.

8. See Claude M. Steele & Joshua Aronson, *Stereotype Vulnerability and African-American Intellectual Performance*, in READINGS ABOUT THE SOCIAL ANIMAL 409, 411 (Elliot Aronson ed., 7th ed. 1995).

9. *Id.*

10. *Id.* at 414; see also Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 J. PERSONALITY & SOC. PSYCHOL. 797, 808 (1995).

11. See generally Jim Blascovich et al., *African Americans and High Blood Pressure: The Role of Stereotype Threat*, 12 PSYCHOL. SCI. 225 (2001); Michael Inzlicht & Talia Ben-Zeev, *A Threatening*

The disparity between the students' test scores studied by Steele and Aronson and between car prices offered to the testers in Ayres's study simply cannot be explained adequately without reference to race. The disparity should not be attributed to innate racial differences in test-taking ability or consumer sophistication. Yet, this racial disparity can be explained without assuming bigotry on the part of either the test givers or car retailers.

One of the most profound lingering effects of past illegal discrimination is continuing educational and residential segregation. A recent study by the Harvard Civil Rights Project documents that seventy percent of African-American students and seventy-six percent of Hispanic students in kindergarten through twelfth grades attended predominantly minority schools in the 1998–1999 school year.¹² The study also reported that these percentages have been steadily increasing over the past decade.¹³ Analysis of the 2000 census by social scientists at the State University of New York at Albany shows “little change in community integration” in the past decade despite growing ethnic diversity throughout the nation; residential segregation for African-Americans, particularly in urban areas, has remained high and unchanged since 1970.¹⁴ Much of this segregation can be attributed to what might be called “discrimination in contact,” a legal form of discrimination as distinguished from illegal “discrimination in contract.”¹⁵ “Discrimination in contact” refers to the unequal treatment of persons based on racial categories “in the associations and relationships formed among individuals in social life, including the choice of social intimates, neighbors, friends, heroes and villains. It involves discrimination in the informal, private spheres of life.”¹⁶ Given that all individuals socialized in the United States understand themselves today partly in racial terms and that the law recognizes their autonomy regarding the choice of their most intimate associations, it is inevitable that the selective patterns of social intercourse that

Intellectual Environment: Why Females Are Susceptible to Experiencing Problem-Solving Deficits in the Presence of Males, 11 PSYCHOL. SCI. 365, 371 (2000); Diane M. Quinn & Steven J. Spencer, *The Interference of Stereotype Threat with Women's Generation of Mathematical Problem-Solving Strategies*, 57 J. SOC. ISSUES 55 (2001); Jeff Stone et al., *Stereotype Threat Effects on Black and White Athletic Performance*, 77 J. PERSONALITY & SOC. PSYCHOL. 1213 (1999).

12. Diana J. Schemo, *U.S. Schools Turn More Segregated, A Study Finds*, N.Y. TIMES, July 20, 2001, at A12. More than thirty-six percent of both African-American and Hispanic students attended “intensely minority” schools where ninety percent or more of the students were either African-American or Hispanic. *Id.* For the full report, see GARY ORFIELD, *SCHOOLS MORE SEPARATE: CONSEQUENCES OF A DECADE OF RESEGREGATION*, HARVARD CIVIL RIGHTS PROJECT (July 2001), at <http://www.law.harvard.edu/groups/civilrights/publications/resegregation01/presseseg.html>.

13. Schemo, *supra* note 12. The percentages of African-American students in predominantly minority schools were sixty-three percent in 1980–1981 and sixty-six percent in 1991–1992 as compared to seventy percent in 1998–1999; the Hispanic percentages went from seventy-three in 1991–1992 to seventy-six percent in 1998–1999. *Id.*

14. JOHN R. LOGAN ET AL., LEWIS MUMFORD CTR., *SEPARATING THE CHILDREN* 1 (2001), <http://mumford1.dyndns.org/cen2000/Under18pop/U18Preport/page1.html>.

15. LOURY, *supra* note **, at 95–96, introducing this distinction.

16. *See id.*

lead to discrimination in contact will arise.¹⁷

Discrimination in contact, in turn, is related to another lingering effect of past discrimination: developmental bias. Defined as an unequal chance to realize one's productive potential based on race, the concept of development bias can be contrasted with reward bias, or unequal returns to equally productive contributors based on race.¹⁸ The concept is based on the distinction, first introduced by Glenn Loury and now widely accepted among economists and sociologists, between human capital and social capital.¹⁹ Human capital refers to an individual's own characteristics that are valued by the labor market. Social capital refers to the value an individual receives from membership in a community, such as access to information networks, mentoring, and reciprocal favors. "Whom you know affects *what* you come to know and what you can *do* with what you know."²⁰ Thus, potential human capital can be augmented or stunted depending on available social capital. Economic models developed by Loury and others demonstrate how labor market discrimination, even several generations in the past, when combined with ongoing segregated social structure can perpetuate indefinitely huge differences in social capital between ethnic communities.²¹ Historians, like Thomas Sugrue, have corroborated these models:

[H]iring practices drew from and reinforced communal, religious, and ethnic networks In northern cities, building trades became a niche of whiteness, drawing their membership from ethnically diverse European American communities. Kinship still mattered, but union references also came from neighborhood friendship networks, schoolmates, and connections formed in churches

17. *Id.* at 98. Glenn Loury proposes that continuing patterns of social segregation affecting African-Americans be understood not as some form of anti-black enmity but rather in terms of "subtle dynamics . . . of racially based social cognition" that he later terms "stigma." *Id.* at 70.

My use of the term "racial stigma" alludes to [the] lingering residue in post-slavery American political culture of the dishonor engendered by racial slavery. It is crucial to understand that this is not mainly an issue of the *personal attitudes* of individual Americans. To reject my argument here with the claim that "stigma cannot be so important because attitude surveys show a continued decline in expressed racism among Americans over the decades" is to thoroughly misunderstand me. I am discussing *social meanings*, not *attitudes*.

Id. at 70. "Discrimination is about how people are treated; stigma is about who . . . they are understood to be." *Id.* at 167.

18. *Id.* at 93.

19. See, e.g., JAMES S. COLEMAN, FOUNDATIONS OF SOCIAL THEORY 304 (1990); Glenn C. Loury, *A Dynamic Theory of Racial Income Differences*, in WOMEN, MINORITIES AND EMPLOYMENT DISCRIMINATION 153, 176 (Phyllis A. Wallace ed., 1977); Alejandro Portes, *Social Capital: Its Origins and Applications in Modern Sociology*, 22 ANN. REV. SOC. 1, 4 (1998).

20. GLENN C. LOURY, *Economic Discrimination: Getting to the Core of the Problem*, in ONE BY ONE FROM THE INSIDE OUT: ESSAYS AND REVIEWS ON RACE AND RESPONSIBILITY IN AMERICA 93, 103 (1995).

21. See, e.g., LOURY, *supra* note 20; George Borgas, *Ethnic Capital and Intergenerational Mobility*, 107 Q. J. ECON. 123 (1992); David M. Cutler & Edward L. Glaeser, *Are Ghettoes Good or Bad?*, 112 Q. J. ECON. 827 (1997); Glenn C. Loury, *Intergenerational Transfers and the Distribution of Income*, 49 ECONOMETRICA 843 (1981).

and parochial schools. All of these networks shared one element: they did not include African Americans.²²

The relevance of social capital to the problem of lingering effects can be illustrated in the context of a major federal affirmative action program. The Department of Transportation's Disadvantaged Business Enterprises (DBE) program was the subject of the Supreme Court's 1995 decision in *Adarand Constructors, Inc. v. Peña*²³ and was reviewed by the Supreme Court on October 31, 2001 in a continuation of the *Adarand* litigation.²⁴ Following the 1995 *Adarand* decision, the U.S. Department of Justice (DOJ) conducted a review of federal affirmative action programs and summarized reasons for continuing such programs in a statement published in the *Federal Register* in 1996.²⁵ This DOJ statement, which has been widely cited by Congress and the federal courts, contained a collection of alleged incidents including the following: "low bidding Hispanic contractor told that he was not given subcontract because the prime contractor 'did not know him' and that the prime 'had problems with minority subs in the past.'" ²⁶ The latter reason (I've had problems with minority subs in the past) is obviously discrimination in contract. But what if the first reason (I don't know you) was the *only* reason for rejecting the lowest bid? The prime contractor is not legally obligated to accept the lowest bid and indeed may be acting prudently in contracting with a higher bidder who is known to the contractor. Personal familiarity is probably the best source of information about reliability and capacity to perform the work well and on time.

The unsuccessful bidder in the example above may not have personally known any other prime contractor nor have known other people who knew any prime contractors. The bidder's own social network would, thus, have provided no useful social capital. Not only would there be no prime contractors within that person's circle of friends and relatives, but the usual methods of forming new trusting affinities outside that circle—such as in-law relationships, church membership, neighbors, parents of your children's friends—would be blocked

22. Thomas J. Sugrue, *Breaking Through: The Troubled Origins of Affirmative Action in the Workplace*, in *COLOR LINES: AFFIRMATIVE ACTION, IMMIGRATION, AND CIVIL RIGHTS OPTIONS FOR AMERICA* 31, 41–42 (John D. Skrentny ed., 2001) (emphasis omitted); see also MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH, WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* (1995) (relating the wealth gap between whites and African-Americans to lingering effects of discrimination, particularly in housing markets); John Donohue & James Heckman, *Continuous Versus Episodic Change: The Impact of Civil Rights Policy on the Economic Status of Blacks*, 29 J. ECON. LITERATURE 1603 (1991) (linking black economic progress between 1960 and 1975 and the lack of relative progress since that period to effective enforcement of federal antidiscrimination policy).

23. 515 U.S. 200 (1995); see *supra* notes 2–3 and accompanying text.

24. *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103 (2001) (dismissing writ of certiorari as improvidently granted).

25. Proposed Reforms to Affirmative Action in Federal Procurements, 61 Fed. Reg. 26,042 (May 23, 1996).

26. *Id.* at 26,059 n.100 (citing BBC RESEARCH & CONSULTING, REGIONAL DISPARITY STUDY: CITY OF LAS VEGAS, at IX–12 (1992)).

by legal patterns of social segregation.²⁷ Creating an incentive for the prime contractor to do business with this bidder not only acknowledges the present harm caused by past discrimination but also helps to eliminate its lingering effects by infusing social capital into the bidder's community. If the bidder does a good job on time, not only does the bidder become someone known to the prime contractor, but the bidder also becomes someone who knows someone within his or her community.

Social science findings that show how racial discrimination practiced by past generations can have powerful continuing effects in the present make clear the importance of including lingering effects along with present practice in the *Adarand* definition of compelling interest. The federal government is uniquely situated to learn what is going on and to intervene by short-circuiting the feedback loop that produces inequality.

The government is in the position of what could be called a monopolistic observer.²⁸ A monopolistic observer is a single observing agent who is able to act on an entire population of subjects.²⁹ In contrast, a competitive situation involves "a large number of observing agents, each encountering subjects from an even larger, common population, each taking actions in relation to these subjects but knowing that, owing to their relatively insignificant size, no feasible action will affect the population's characteristics."³⁰ For example, in our model for car sales, a retail car dealer who was troubled about a pattern of higher prices paid by black consumers for the same vehicles could not alter black consumer behavior simply by changing his own bargaining practices and

27. In 1972, the House Select Committee on Small Business issued a report on "the 'complex problem [of] how to achieve economic prosperity despite a long history of racial bias.'" *Fullilove v. Klutznick*, 448 U.S. 448, 511 n.11 (1980) (Powell, J., concurring) (quoting H.R. REP. NO. 92-1615, at 3 (1972)). The report provided the following explanation of the effects of past discrimination on minority businesses:

In attempting to increase their participation as entrepreneurs in our economy, the minority businessman usually encounters several major problems. These problems, which are economic in nature, are the result of past social standards which linger as characteristics of minorities as a group.

. . . Because minorities as a group are not traditionally holders of large amounts of capital, the entrepreneur must go outside his community in order to obtain the needed capital. Lending firms require substantial security and a track record in order to lend funds, security which the minority businessman usually cannot provide.

. . . .
Functional expertise is a necessity for the successful operation of any enterprise. Minorities have traditionally assumed the role of the labor force in business with few gaining access to positions whereby they could learn not only the physical operation of the enterprise, but also the internal functions of management.

Id. (quoting H.R. REP. NO. 92-1615, at 3-4) (second omission in original) (internal quotation marks omitted).

28. Loury developed this terminology in his DuBois lectures, *see* Loury, *supra* note **, ¶ 17, at 1-13, borrowing from economics by analogizing to the distinction between sellers who do and those who do not have the power to set market prices. *See* LOURY, *supra* note **, at 38-39.

29. LOURY, *supra* note **, at 38.

30. *Id.*

offering black consumers the same deal as white consumers. Such an idealistic car dealer would simply end up making less money than the other dealers in the community who continued to assume correctly that black purchasers would accept higher prices. On the other hand, a monopolistic observer is more likely to see a racially disparate outcome as anomalous or surprising and is in a better position to experiment to learn about the structure that is generating his observations.

As a monopolistic purchaser of construction work on a huge scale, the U.S. Department of Transportation (DOT) is in a key position to observe the lingering effects of racial discrimination and experiment with ways to alter the market and social mechanisms that perpetuate those effects. This account is consistent with the DOT's own explanation when it published revised regulations for the DBE program after reevaluation in light of the 1995 *Adarand* decision: "The most significant evidence demonstrating the necessity of a goal-oriented program is the evidence cited of the fall-off in DBE participation in state contracting when goal-oriented programs end, compared to participation rates in the Federal DBE program."³¹ The DOT quoted extensively from the 1998 congressional debates regarding the Transportation Equity Act for the 21st Century,³² which contained a provision retaining the DBE program.³³ In particular the DOT cited the following statement by Senator Robb:

Where DBE programs at the State level have been eliminated, participation by qualified women and qualified minorities . . . has plummeted. There is no way to know whether this discrimination is intentional or subconscious, but the effect is the same. This experience demonstrates the sad but inescapable truth that, when it comes to providing economic opportunities to women and minorities, passivity equals inequality.³⁴

Of course it is possible that the virtual disappearance of DBE subcontractors in the absence of affirmative action incentives for prime contractors might have been in part due to DBE inability to submit the lowest bids or, as discussed above, bids viewed as most likely to be performed per specifications and on time. Prime contractors who accept the lowest bids, or prefer bidders they know personally, are not obviously engaging in reward-bias discrimination, but the inability of DBE contractors to win a competitive bidding process may nonetheless be the product of the lingering effect of development bias. The most significant point made by Senator Robb is that government should not be a

31. Participation by Disadvantaged Business Enterprises in Department of Transportation Programs, 64 Fed. Reg. 5096, 5102 (Feb. 2, 1999) (codified at 49 C.F.R. pts. 23, 26).

32. Pub. L. No. 105-178, 112 Stat. 107 (1998) (codified at 23 U.S.C. §§ 101-142 (1994 & Supp. 1999)).

33. *Id.* § 101(b), 112 Stat. at 113-15.

34. Participation by Disadvantaged Business Enterprises in Department of Transportation Programs, 64 Fed. Reg. at 5101 (quoting 144 CONG. REC. S1422 (1998) (statement of Sen. Robb)).

passive participant in an unregulated market for highway construction work, even if the government is not yet able to trace all the complex and subtle causes of the situation.³⁵ As Justice O'Connor said in her plurality opinion for the Court in the 1995 *Adarand* decision, "government is not disqualified from acting in response" to such a situation.³⁶

Responding to the *Adarand* decision through the process of legislative deliberation and administrative rulemaking, the federal government seems to be trying to experiment in just the ways a monopolistic agent concerned about racial inequity should act by redesigning the DBE program and recruiting state governments as partners in the endeavor. States that engage in DOT-funded highway construction are required to compile and analyze data to estimate the level of DBE participation in such construction that would be expected "absent the effects of discrimination,"³⁷ including a possible adjustment to "account for the continuing effects of past discrimination."³⁸ Each state must then submit to the DOT an annual overall state-wide goal that reflects this "discrimination-free" estimate of DBE participation.³⁹ The state must then endeavor to meet this state-wide goal through "race-neutral" means and is only permitted to set contract-specific goals for DBE participation if the race-neutral approach is not expected to meet the overall state goal.⁴⁰ The current DBE program thus attempts to determine empirically in each state whether there are lingering effects of discrimination affecting the market in highway construction work and whether affirmative action is needed to prevent perpetuation of those effects.

The DBE program was developed in response to a congressional mandate that "not less than 10 percent" of federal highway funds be expended "with small business concerns owned and controlled by socially and economically disadvantaged individuals."⁴¹ The concept of social and economic disadvantage

35. *Id.* The Department of Transportation (DOT) paraphrased a statement by Senator Baucus that "DBE participation in the state-funded portion of the highway program [in Michigan] fell to zero in a nine-month period after the state terminated its DBE program, while the Federal DBE program in Michigan was able to maintain 12.7 percent participation." *Id.* (citing 144 CONG. REC. S1404 (statement of Sen. Baucus)). The DOT also quoted a follow-up statement by Senator Kerry, "[I]s that just the economy of our country speaking, an economy at one moment that is capable of having 12 percent and at another moment, where they lose the incentive to do so, to drop down to zero . . . ? You could not have a more compelling interest if you tried." *Id.* (quoting 144 CONG. REC. S1409-10 (statement of Sen. Kerry)). The congressional debates described similar drastic drops in DBE participation when affirmative action programs in state or local government procurement ended in California, Florida, Louisiana, Missouri, Nebraska, and Pennsylvania. *Id.*

36. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995) (plurality opinion of O'Connor, J.).

37. 49 C.F.R. § 26.45(b) (2001). This estimate should take into account discrimination in the private market. See generally Ian Ayres & Frederick E. Vars, *When Does Private Discrimination Justify Public Affirmative Action?*, 98 COLUM. L. REV. 1577 (1998).

38. 49 C.F.R. § 26.45(d)(3).

39. *Id.* § 26.45(b), (f).

40. *Id.* § 26.51.

41. For the most current source of this mandate, see section 1101(b) of the Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, 112 Stat. 107, 113-115 (1998) (codified at 23 U.S.C. §§ 101-142 (1994 & Supp. 1999)).

came from two preexisting programs of the Small Business Administration (SBA): the Minority Small Business and Capital Ownership Development (BD) program authorized by section 8(a) of the Small Business Act⁴² and the Small Disadvantaged Business (SDB) program for federal contracts authorized by section 8(d) of the Small Business Act.⁴³ The statutory provisions for the SBA's BD program provide the following definitions, incorporated by reference into the DBE program:

Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities.

. . . Economically disadvantaged individuals are those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged.⁴⁴

Thinking back to the parable at the beginning of this Article, the concept of social and economic disadvantage can be compared to the public health problems caused by the bomber. The "map" the federal government uses in its DBE program to cure such disadvantage is the following set of presumptions:

Socially and economically disadvantaged individual means . . .

- (2) Any individual in the following groups, members of which are rebuttably presumed to be socially and economically disadvantaged:
 - (i) "Black Americans," which includes persons having origins in any of the Black racial groups of Africa;
 - (ii) "Hispanic Americans," which includes persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race;
 - (iii) "Native Americans," which includes persons who are American Indians, Eskimos, Aleuts, or Native Hawaiians;
 - (iv) "Asian-Pacific Americans," which includes persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), the Commonwealth of the Northern Marianas Islands, Macao, Fiji, Tonga, Kiribati, Juvalu, Nauru, Federated States of Micronesia, or Hong Kong;
 - (v) "Subcontinent Asian Americans," which includes persons whose

42. 42 U.S.C. § 637(a).

43. 42 U.S.C. § 637(d).

44. 15 U.S.C §§ 637(a)(5)–(6)(A) (2000).

origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal, or Sri Lanka;
(vi) Women⁴⁵

Like the “color-blind” view of the mad bomber’s map, this list of presumptions makes no distinctions among the various categories of presumptively disadvantaged groups.

II. ARE AFFIRMATIVE ACTIONS PLANS USING THE WRONG MAP?

After the Supreme Court remanded *Adarand* in 1995 for application of the strict scrutiny standard, the case continued to be a focus for the affirmative action debate for the next six years. Indeed, until October 31, 2001, it appeared that the Court’s next major affirmative action decision was again going to be in the *Adarand* litigation, this time actually deciding whether the federal government’s affirmative action program for highway construction contractors passed strict scrutiny.

Adarand had its origins in a 1989 contract for a federal highway project in Colorado between the DOT and a prime contractor, Mountain Gravel & Construction Company (Mountain Gravel).⁴⁶ That contract contained a subcontractor compensation clause providing a financial bonus to the prime for using subcontractors that had been certified as Disadvantaged Business Enterprises.⁴⁷ At that time, DOT did not certify DBEs itself but instead relied on certifications provided either by the SBA or by state highway agencies (which had to certify DBEs for their own federally assisted highway projects).⁴⁸ *Adarand* Constructors, whose principal owner is a white man, submitted the low bid to Mountain Gravel for a guardrail subcontract. Mountain Gravel, however, awarded the subcontract to a company previously certified as a DBE by the Colorado Department of Transportation.⁴⁹

When the Supreme Court remanded the *Adarand* case in 1995 for application of the strict scrutiny standard, the case went back to the federal district court for Colorado. In 1997, the district court decided that the federal government *did* have a compelling interest in eliminating the lingering effects of past discrimination in the highway construction industry and was not limited to effects caused by discrimination by the federal government itself as *Adarand* Constructors

45. 49 C.F.R. § 26.5. The definition of social and economically disadvantaged also includes “[a]ny individual who a recipient finds to be a socially and economically disadvantaged individual on a case-by-case basis” and members of any group “designated as socially and economically disadvantaged by the SBA [Small Business Administration], at such time as the SBA designation becomes effective.” *Id.*

46. *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 218 (2000) (per curiam).

47. *Id.*

48. *Id.*

49. *Id.* at 219.

argued.⁵⁰ However, the district court granted summary judgment to Adarand Constructors on the ground that the DBE program was not narrowly tailored to this compelling interest, finding that the DBE system was both overinclusive and underinclusive.⁵¹ The court explained that DBE certification was overinclusive because it presumed that all individuals within the listed groups were socially and economically disadvantaged; it was underinclusive because it excluded other minority groups, unnamed by the court, whose members were in fact socially and economically disadvantaged.⁵² The district court quoted—with apparent approval—Adarand Constructors’ claim that the selection of racial groups was “random or haphazard,”⁵³ including Aleuts, Samoans, and Bhutans as ethnic groups who had suffered discrimination in the highway construction industry and added that even the famously rich Sultan of Brunei would qualify for a DBE certification.⁵⁴ The district court concluded that it was “difficult to envisage a race-based classification that is narrowly tailored.”⁵⁵

In response to the district court’s decision, the Colorado Department of Transportation altered its DBE certification rules to delete presumptions of social disadvantage for women or members of specified minority groups and instead granted DBE certification to business owners who simply stated on the application that they had “experienced social disadvantage based upon the effects of racial, ethnic or gender discrimination.”⁵⁶ Under these new rules, Adarand Constructors applied for and received DBE certification from the state department.⁵⁷ Meanwhile, the federal government’s appeal of the district court decision was pending before the U.S. Court of Appeals for the Tenth Circuit. Upon learning that Adarand Constructors had been certified as a DBE, the Tenth Circuit held that the case was moot and vacated the district court’s grant of summary judgment to Adarand Constructors.⁵⁸ In 2000, the Supreme Court issued a *per curiam* decision reversing the Tenth Circuit on the mootness issue, noting that Colorado’s elimination of presumptions in favor of a self-certification procedure was inconsistent with the federal DBE regulations and

50. *Adarand Constructors, Inc. v. Pena*, 965 F. Supp. 1556, 1573 (D. Colo. 1997), *rev’d sub nom. Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000), *cert. granted sub nom. Adarand Constructors, Inc. v. Mineta*, 121 S. Ct. 1598, *cert. dismissed as improvidently granted*, 122 S. Ct. 511 (2001).

51. *Id.* at 1579.

52. *Id.* at 1580.

53. *Id.*

54. *Id.* at 1581 n.17.

55. *Id.* at 1580.

56. *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 219–20 (2000) (*per curiam*) (quoting App. to Pet. for Cert. at 110) (internal quotation mark omitted).

57. Adarand Constructors applied for DBE certification to retain standing in a separate lawsuit against the State of Colorado. *Id.* at 221–22. Apparently the basis for Adarand Constructors’ claim of social disadvantage was that, as a white-owned company, it had been discriminated against by the federal government under the DBE program. *Id.* at 218–20.

58. *Adarand Constructors Inc. v. Pena*, 169 F.3d 1292, 1296–97, 1299 (10th Cir. 1999).

thus unlikely to receive the necessary approval from the DOT.⁵⁹

After being reversed on the mootness issue, the Tenth Circuit decided not to remand the case once again to the district court, but proceeded to the merits even though the DBE regulations had changed substantially since the 1997 district court decision.⁶⁰ In an opinion issued in September 2000, the Tenth Circuit agreed with the district court both that the DBE program was justified by a compelling interest and that the program as it existed in 1996 was not narrowly tailored and was therefore unconstitutional.⁶¹ However, the Tenth Circuit went on to say that modifications to the DBE program since 1997 had made the program narrowly tailored.⁶² On March 26, 2001, the Supreme Court granted Adarand Constructors' petition for a writ of certiorari,⁶³ and on April 13, 2001, the Court revised its order granting certiorari to limit the questions on review to (1) "whether the court of appeals misapplied the strict scrutiny standard in determining if Congress had a compelling interest to enact legislation designed to remedy the effects of racial discrimination," and (2) whether the DOT's "current Disadvantaged Business Enterprise program is narrowly tailored to serve a compelling governmental interest."⁶⁴

Up to this point, we have been referring to "the DBE program" as if there were a single program; however there are actually two different affirmative action programs regarding federally funded highway construction: one program for direct contracts between the federal government and private contractors and a different program for federally assisted contracts between state or local governments and private contractors.⁶⁵ Although the same statutes mandate both programs,⁶⁶ different regulations govern each program. The "Disadvantaged Business Enterprise program" referenced in the Court's revised writ of certiorari and discussed earlier in this Article,⁶⁷ is the program for federally assisted state or local contracts governed by regulations issued by the DOT.⁶⁸ However, when Adarand Constructors filed its brief to the Supreme Court, it insisted that it was not challenging the DBE program for state and local

59. *Slater*, 528 U.S. at 220–23. DOT did subsequently notify Colorado that its self-certification procedures were unacceptable. Letter from Rodney Slater, Secretary of Transportation, to Thomas F. Norton, Executive Director, Colorado Department of Transportation (March 28, 2000) (appended to petitioner's Reply to Brief in Opposition to Petition for Certiorari, Adarand Constructors, Inc. v. Mineta, 534 U.S. 104 (2001) (dismissing grant of certiorari as improvidently granted)).

60. *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1157–60 (10th Cir. 2000).

61. *Id.* at 1176, 1187.

62. *Id.* at 1187.

63. *Adarand Constructors, Inc. v. Mineta*, 532 U.S. 941 (2001).

64. *Adarand Constructors, Inc. v. Mineta*, 532 U.S. 967, 967 (2001).

65. *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 104 (2001) (dismissing writ of certiorari as improvidently granted).

66. *See infra* notes 190–206 and accompanying text.

67. *See Mineta*, 121 S. Ct. at 1598; *see also supra* text accompanying notes 23–40.

68. *Mineta*, 122 S. Ct. at 513. The DOT regulations are found at 49 C.F.R. pt. 26 (2000).

contracts but only the program for direct federal contracts.⁶⁹ The Court viewed this assertion by Adarand Constructors as an important change from its petition for certiorari.⁷⁰

Oral arguments on October 31, 2001 were largely devoted to whether Adarand Constructors still had standing to challenge the program for direct federal contracts and whether the Court should decide the constitutionality of the program for direct federal contracts even though the Tenth Circuit had not addressed that issue.⁷¹ Less than a month later, the Court unanimously dismissed the writ of certiorari as improvidently granted, declining to review either the constitutionality of the direct federal contract program or Adarand Constructors' standing to challenge that program because neither issue had been decided below by the Tenth Circuit.⁷²

The dismissal of the Court's 2001 writ of certiorari in the *Adarand* case leaves undisturbed the Tenth Circuit's 2000 decision upholding the constitutionality of the post-1997 DBE program.⁷³ However, the constitutionality of the DBE program and similar federal affirmative action programs in government contracting remains in doubt in other federal circuits. For example, in August 2001 the Court of Appeals for the Federal Circuit reversed a district court decision upholding a program at the U.S. Department of Defense (DOD) equivalent to the DBE program, finding that the district court had failed to use a true strict scrutiny approach and remanding for further proceedings.⁷⁴ In 1997 the Court of Appeals for the D.C. Circuit reinstated another lawsuit against the DOD, allowing the plaintiff to overcome standing problems by amending its complaint to raise a general challenge to the SBA's section 8(a) affirmative action program as applied to DOD contracting.⁷⁵ Both of these remanded lawsuits remain pending at the trial court level along with a number of cases in other federal circuits.⁷⁶

69. *Id.* Regulations for direct federal contracts for highway construction are found at 48 C.F.R. pt. 19.

70. *Mineta*, 122 S. Ct. at 513.

71. U.S. Supreme Court Official Transcript, *Mineta*, 2001 WL 1398608, at *3–22 (No. 00-730); see also Linda Greenhouse, *Supreme Court Debate Focuses on Procedural Issues in Affirmative Action Case*, N.Y. TIMES, Nov. 1, 2001, at A22.

72. *Mineta*, 122 S. Ct. at 513–15.

73. For an argument that the Tenth Circuit misinterpreted the current DBE regulations and would have held the current DBE program unconstitutional even using the current interpretation, see Amicus Brief of Social Science and Comparative Law Scholars at 15–17, *Mineta* (No. 00-730); and Clark D. Cunningham, *Should the Government Confess Error in Adarand Constructors?* (Sept. 14, 2001), at <http://law.wustl.edu/equality/AD-ERROR.html>.

74. *Rothe Dev. Corp. v. United States Dep't of Def.*, 262 F.3d 1306, 1332 (Fed. Cir. 2001), *rev'g* 49 F. Supp. 2d 937 (W.D. Tex. 1999).

75. *Dynalantic Corp. v. Dep't of Def.*, 115 F.3d 1012, 1015, 1018 (D.C. Cir. 1997), *rev'g* 937 F. Supp. 1 (D.D.C. 1996). For a description of the SBA's section 8(a) program, see *infra* text accompanying notes 159–176.

76. See, e.g., Federal Defendant-Intervenors' Post-Trial Brief 1, 3, *Gross Seed Co. v. Neb. Dep't of Rds.*, No. 4:00CV-3073 (D. Neb. Docketed Aug. 17, 2001), available at www.usdoj.gov/crt/emp/documents/grossbrief901.htm (defending DOT's DBE program); *Klaver Constr. Co. v. Kansas*, No. 99-2510-KHV, 2001 WL 1000679 (D. Kan. Aug. 23, 2001) (denying motion to stay proceedings

The anticlimactic resolution of the *Adarand* litigation has caused Court-watchers to speculate that the next important Supreme Court decision on affirmative action will be in the context of admission to institutions of higher education, in which the issue of narrow tailoring is also important.⁷⁷ The 1996 decision of the U.S. Court of Appeals for the Fifth Circuit in *Hopwood v. Texas*⁷⁸ is best known for its holding that diversity in higher education is not a compelling interest that can justify affirmative action,⁷⁹ denying any precedential effect to Justice Powell's famous opinion to the contrary in *Regents of University of California v. Bakke*.⁸⁰ However, the Fifth Circuit also rejected the law school's affirmative action program on the alternative ground that it was not narrowly tailored to address lingering effects of past discrimination. The court said there was no "strong evidence in the record showing that today's law school applicants still bear the mark of those past systems."⁸¹ Absent such evidence, the claim of lingering effects seemed "grossly speculative."⁸² The court questioned why twice as many Mexican-Americans were targeted for preference than African-Americans even though African-Americans have experienced more discrimination.⁸³ Both the majority and concurring opinion also raised an underinclusion concern about the failure to provide preferential treatment to other Hispanic minorities and Native Americans in the program.⁸⁴

The recent federal district court decision enjoining the University of Michigan Law School's affirmative action admission program also criticized the group categories used.⁸⁵ Although that court followed *Hopwood's* lead by

pending Supreme Court's decision in *Adarand* in case challenging DOT's DBE program); see also *Builders Ass'n of Greater Chi. v. City of Chicago*, No. 96-C-1122, 2001 WL 1464757 (N.D. Ill. Nov. 16, 2001) (denying defendant's motion for judgment on the pleadings in challenge to city program for minority business enterprises); *Sherbrooke Turf v. Minn. Dep't of Transp.*, No. 00-CV-1026, 2001 WL 1502841 (D. Minn. Nov. 15, 2001) (upholding constitutionality of DBE program).

77. See Otis Bilodeau, *More Fights Ahead on Affirmative Action*, LEGAL TIMES, Aug. 20, 2001, at 6; Greenhouse, *supra* note 71.

78. 78 F.3d 932 (5th Cir. 1996).

79. *Id.* at 944-48.

80. 438 U.S. 265, 311-14 (1978) (opinion of Powell, J.).

81. *Hopwood*, 78 F.3d at 954 n.46.

82. *Id.*

83. *Id.* at 955 n.50. The court assumed that Texas could only address the lingering effects of discrimination in Texas and, thus, saw an overinclusion problem because the law school's affirmative action program extended to out-of-state applicants. *Id.* at 951. "In 1992 . . . a majority of all blacks who matriculated [were] out-of-state residents." *Id.* at 955 n.50.

84. *Id.* at 948 n.37; *id.* at 966 (Wiener J., specially concurring). The University of Texas law school affirmative action program only applied to Mexican-American and African-American applicants. *Hopwood*, 78 F.3d at 936.

85. *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 839-43 (E.D. Mich. 2001). The district court's injunction was stayed by the court of appeals. *Grutter v. Bollinger*, 247 F.3d 631, 633 (6th Cir. 2001). A different judge in the same federal district upheld the University of Michigan affirmative action program for undergraduate admission, on the ground that Justice Powell's opinion in *Bakke*, 438 U.S. at 310, is precedential authority for the principle that diversity in higher education can be a compelling interest. *Gratz v. Bollinger*, 122 F. Supp. 2d 811, 820 (E.D. Mich. 2000); see also *Smith v. Univ. of Wash. Law Sch.*, 233 F.3d 1188, 1201 (9th Cir. 2000) (holding that Powell's opinion in *Bakke* is still

rejecting diversity as a compelling interest, the court went on to say that even if diversity was a compelling interest, the law school's "use of race has not been so narrowly tailored at any time under consideration in this case."⁸⁶ The district court found "no logical basis for the law school to have chosen the particular racial groups which receive special attention."⁸⁷ Calling this selection of groups "haphazard," the district court expressed concern that "there is nothing to prevent [the law school] from enlarging, reducing, or shifting its list of preferred groups tomorrow without any reasoned basis or logical stopping point."⁸⁸

Closer review of the record in both *Hopwood* and the Michigan Law School cases reveals, however, that the selection of categories was not haphazard. In 1982, the Office of Civil Rights of the U.S. Department of Education informed the Governor of Texas that the state's plan to remedy the effects of its past policies of educational segregation was deficient because Texas's numeric enrollment goals of blacks and Mexican-Americans in professional and graduate programs was not in proportion to their representation among graduates of the state's undergraduate institutions.⁸⁹ The University of Texas Law School's goal of an entering class containing ten percent Mexican-American students and five percent black—the relative proportions of each group graduating from Texas's undergraduate institutions—originated in the state's efforts to comply with this 1982 directive explicitly aimed at the problem of lingering effects.⁹⁰ The selection of only these two groups and the higher goal for Mexican-Americans makes sense in light of this history. However, this map designed for a Texas-specific history of discrimination understandably did not seem narrowly tailored to the professed goal of academic diversity.⁹¹

binding precedent). The Sixth Circuit took the unusual step of bypassing the usual procedure of decision by a panel of three judges. Instead, the hearing of both the plaintiffs' appeal of *Gratz* and the law school's appeal of *Grutter* were consolidated into a single hearing before all nine active judges of the Sixth Circuit on Dec. 6, 2001. On May 14, 2002, in a 5-4 decision, the Sixth Circuit held that the law school's affirmative action program was constitutional. *See infra* note 269.

86. *Grutter*, 137 F. Supp. 2d at 850.

87. *Id.* at 851. In its brief to the full Sixth Circuit, the law school said that the district court made a factual error in treating the racial and ethnic categories used in current admissions procedures to *report* on the results of admission decisions as if those categories were used to *make* admission decisions. Brief of Defendant-Appellants at 14-15, *Grutter v. Bollinger*, No. 01-1447 (6th Cir. Docketed May 16, 2001), available at www.umich.edu/~urel/admissions/legal/grutter/grutter_appeal.html.

88. *Grutter*, 137 F. Supp. 2d at 852.

89. *Hopwood v. Texas*, 861 F. Supp. 551, 556 & n.6 (W.D. Tex. 1994), *rev'd and remanded in part*, 78 F.3d 932 (5th Cir. 1996). Justice Clarence Thomas, then Assistant Secretary of Education, was the author of this 1982 decision. *See id.* at 556.

90. *Id.* at 557.

91. On August 27, 2001, the U.S. Court of Appeals for the Eleventh Circuit struck down the affirmative action program for undergraduate admission to the University of Georgia, holding that it was not narrowly tailored to achieve the University's stated goal of diversity. *Johnson v. Bd. of Regents*, 263 F.3d 1234, 1234 (11th Cir. 2001). The University of Georgia added a half point to a factor score ranging from zero to 8.15 for all applicants who designated themselves as Asian, Pacific Islander, African-American, Hispanic, American Indian, or "Multiracial." *Id.* at 1241. The court found that the university did not "even come close" to showing that this approach was "narrowly tailored," noting in

The history of the University of Michigan Law School's affirmative action program also reveals an original concern for remedying the effects of past discrimination; a 1988–1989 law school announcement stated:

In administering its admissions policy, the Law School recognizes the racial imbalance now existing in the legal profession and the public interest in increasing the number of lawyers from the ethnic and cultural minorities significantly under represented in the profession [Therefore,] Black, Chicano, Native American, and many Puerto Rican applicants are automatically considered for a special admissions program designed to encourage and increase the enrollment of minorities.⁹²

When the law school rewrote its admissions policy in 1992 after extensive faculty deliberation, the commitment to inclusion of “groups which have been historically discriminated against, like African-Americans, Hispanics and Native Americans” was justified in terms of diversity.⁹³ Professor Richard Lempert, who chaired the faculty admissions committee that drafted the 1992 policy, testified in the district court that the reference to historic discrimination “was not intended as a remedy for past discrimination, but as a means of including students who may bring to the law school a perspective different from that of members of groups which have not been the victims of such discrimination.”⁹⁴

Like the U.S. Department of Transportation, law schools and other selective institutions of higher education also can be considered monopolistic observers

particular the testimony of the admissions director that “the choice of a particular point bonus for race is made ‘out of the blue’ [and reflects] nothing more than a guess as to how much weight . . . race should carry” in the admission decision. *Id.* at 1251, 1257. Indeed, according to the court, the university “had [not] analyzed the projected change in African-American enrollment if the racial bonus were eliminated.” *Id.* at 1260 n.25. Although the intervening defendants were allowed to argue that the program was also needed to remedy the lingering effects of past discrimination, the university denied that the program was designed to remedy past discrimination. *See id.* at 1244. Additionally, unlike the intervenors in the University of Michigan Law School case, *see infra* notes 103–05 and accompanying text, the Georgia intervenors limited their claim to past discrimination by the University of Georgia but the university did not build a significant evidentiary record. *See id.* at 1242, 1259.

92. *Grutter*, 137 F. Supp. 2d at 830 (quoting Exhibit 55 at 85–86).

93. *Id.* at 827. The specific reference to African-Americans, Hispanics, and Native Americans follows a paragraph that gives a broad definition of diversity and provides two examples of actual “diversity admissions” in 1991 that do not fall into those categories: (1) an immigrant from Bangladesh and (2) the child of Greek immigrants who was fluent in three languages. *Id.* (internal quotation marks omitted) The relevance of “lingering effects” is still implicit in the policy, which describes African-Americans, Hispanics, and Native Americans as “one particular type of diversity [with] special reference” to historic discrimination and the reality that “without this commitment [these groups] might not be represented in our student body in meaningful numbers.” *Id.* (quoting Exhibit 4, Admissions Policy, at 12).

94. *Id.* at 835. Professor Lempert also testified that the law school's affirmative action program helped to integrate the legal profession. *Id.* at 863. The law school's 1996–1997 bulletin mentioned this goal: “In addition to its own interest in forming a class which is strengthened by the talents and diversity of its members, Michigan recognizes the public interest in increasing the number of lawyers from groups which the faculty identifies as significantly underrepresented in the legal profession.” *Id.* at 829 (quoting Trial Exhibit 6 at 81).

because they can act to contravene, at least in part, ongoing social processes that perpetuate the ill effects of past societal discrimination.⁹⁵ Exclusive reliance in the law school admissions process on apparently race-neutral criteria—college grades and Law School Admission Test (LSAT) scores, for instance—creates patterns of exclusion that match historical group-based discrimination to a remarkable degree. An empirical study by Linda Wightman, the former director of research for the Law School Admissions Council, graphically illustrates this point. Wightman showed that if a “race-blind” admissions process—one based solely on undergraduate grade point average (UGPA) and LSAT scores—had been applied to the group of persons entering law school in 1991, then ninety percent of those self-identified as black would not have been admitted to any law school in the United States.⁹⁶ Wightman’s finding is consistent with the actual experience at state law schools in California and Texas that have been barred from using racial or ethnic information in making admission decisions. At Boalt Hall, the law school at the University of California-Berkeley, in 1997, the first year after passage of Proposition 209,⁹⁷ none of the African-Americans or Native Americans who applied, and only seven of the Latino applicants, were admitted.⁹⁸ In 1998, Boalt Hall experimented with giving special consideration to “socioeconomically disadvantaged” applicants, in an attempt to reduce the relative importance of LSAT scores.⁹⁹ And yet, even so, only eight African-Americans and two Native Americans were admitted.¹⁰⁰ Concluding that the

95. See *supra* notes 28–40 and accompanying text. Law schools like those at the University of Michigan, University of Texas, and University of California-Berkeley have a particularly strong role as both observer and influencer of racial patterns because they play a dominant part in forming the legal profession in their respective states and are also among the most selective law schools in the country with a large, national applicant pool. According to the influential annual rankings of law schools by U.S. News, the University of Michigan ranked seventh, the University of California-Berkeley ranked ninth, and the University of Texas ranked fifteenth among the top fifty law schools in the country for 2001; these rankings are based in part on reputation among judges and lawyers and selectivity in admission. See Best Graduate Schools: Top Law Schools available at <http://www.usnews.com/edu/beyond/gradrank/law/gdlaw1.htm>.

96. Linda F. Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admission Decisions*, 72 N.Y.U. L. REV. 1, 50–51 (1997). It is important to note that Wightman’s study also indicates that seventy-eight percent of those black students admitted to law school in 1991 who would have been excluded by using UGPA/LSAT criteria did in fact graduate. Furthermore, approximately seventy-three percent of those black graduates (who would have been excluded) did pass a bar examination. *Id.* at 36–38. The seventy-three percent bar passage rate is a projection based on data available to Wightman. *Id.* at 37.

97. Proposition 209 was enacted as a state constitutional amendment by referendum on November 5, 1996. CAL. CONST. art. I, § 31 (prohibiting the state from granting “preferential treatment to . . . any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of . . . public education”).

98. One African-American enrolled at Boalt Hall in 1997 had been previously admitted under the old affirmative action program but had deferred entry into the law school. Rachel F. Moran, *Diversity and Its Discontents: The End of Affirmative Action at Boalt Hall*, 88 CAL. L. REV. 2241, 2247 (2000). Half of the Latinos who entered in 1997 were also deferred admits. *Id.*

99. See *id.* at 2247–48.

100. *Id.* These numbers are fifty percent or more lower than the number of African-Americans and Native Americans admitted in 1996, the year before Proposition 209 took effect. See *id.* at 2246–47.

program for socioeconomically disadvantaged students did not benefit African-American, Latino, or Native American applicants, Boalt Hall abandoned that program, and in 1999 admitted only seven African-Americans, two Native Americans, and sixteen Latinos out of a total class of 269.¹⁰¹ Even more significant drops in African-American enrollment can be seen at the law schools

Twenty-three Latinos were admitted in 1998 as compared to twenty-eight Latinos in 1996. *Id.* at 2246–47, 2258.

101. *Id.* at 2248. Boalt Hall's post-Proposition 209 experience suggests that, absent some use of race in the admissions process, the ability of a selective institution of higher education to counteract the ill-effects of past societal discrimination may be severely limited. Wightman's research found that adding a preference based on socioeconomic factors to the UGPA/LSAT criteria would not significantly increase the number of African-Americans, because among applicants with similar socioeconomic backgrounds, those self-identified as "white" significantly outperformed African-Americans on the LSAT. Wightman, *supra* note 96, at 45. Wightman's study also showed that the mean LSAT score for black students was consistently seven to eight points lower than white students of the same socioeconomic class for each of the four socioeconomic classifications (upper, upper-middle, middle, lower-middle). *See id.* at 42. Indeed, the group of black law students classified as upper class—both parents had graduate or professional training and held professional jobs—had a mean LSAT score about six points lower than white law students in the lowest classification, lower-middle—neither parent was college educated and both were engaged in blue collar work. *See id.* at 41–42. Wightman's findings have been further corroborated by a recent empirical study by a researcher at Testing for the Public, a nonprofit educational corporation that helps students prepare for graduate school admission examinations. William C. Kidder, *Does the LSAT Mirror or Magnify Racial and Ethnic Differences in Educational Attainment? A Study of Equally Achieving "Elite" College Students*, 89 CAL. L. REV. 1055 (2001). Kidder's study used a database of 1996, 1997, and 1998 applicants to Boalt Hall from fifteen highly selective colleges and universities. *Id.* at 1058. For each undergraduate institution, he matched the LSAT score of each African-American, Latino, Native American, and Asian Pacific applicant with the average LSAT scores of white applicants who had comparable UGPAs. *Id.* at 1073. Thus, the LSAT score of a minority applicant from UCLA with a UGPA of 3.4 would be compared with the average LSAT score of all white applicants from UCLA with UGPAs ranging from 3.3 to 3.5. *Id.*

Kidder then calculated the average gap in LSAT score between, for example, all Latino applicants (from all fifteen undergraduate institutions) and white applicants from the same institution with comparable UGPAs. *Id.* His results showed that the 247 African-American applicants had an average LSAT gap of 9.2 as compared to white applicants with comparable grades at the same college or university. *Id.* at 1074. The LSAT gap for the 407 Latino applicants was 6.8; for the 33 Native American applicants, 4.0; and for the 1043 Asian Pacific applicants, 2.5. *Id.* Because the Boalt Hall application database further distinguished among various Asian Pacific nationalities, Kidder was able to determine that some Asian applicant groups had higher LSAT gap scores than the overall average Asian gap: Filipinos, 5.5 and Vietnamese/Thai/Cambodian/Laotian, 5.3. *Id.* at 1075. Kidder also did a second, even more precise study matching each African-American, Latino, and Asian Pacific applicant with white applicants who had comparable UGPAs and were also taking the same major. *Id.* at 1079. For example, a Latino applicant from UCLA majoring in political science would be compared only to white political science majors from UCLA with comparable grades. *Id.* The LSAT gaps did not change appreciably. *Id.*

This research, particularly if read in light of the work on stereotype threat by Steele and Aronson, *see* notes 7–11 and accompanying text, indicates that unequal results in university admission associated with racial and ethnic identity cannot be fully explained in terms of socioeconomic status. The problem is further complicated by the possibility that affirmative action programs in higher education themselves may have unintended negative effects on internalized racial stigma and incentives to invest in educational effort. *See* LOURY, *supra* note **, at 32–33. Courts may serve a useful function if they prompt universities to make better use of empirical research to guide their actions, but at the same time, courts must give universities sufficient freedom to experiment.

at the University of California-Los Angeles (UCLA) and the University of Texas: from 10.3% in 1996 to 1.4% in 2000 at UCLA and from 7% in 1996 to 1.7% in 1999 at Texas.¹⁰²

Although the University of Michigan chose to defend its law school affirmative action program only in terms of diversity, a group of intervening defendants was allowed to present evidence and argue for a lingering effects rationale.¹⁰³ The district court's rejection of their position is telling:

[T]he court concludes that the comparatively lower grades and test scores of underrepresented minorities is attributable, at least in part, to general, societal racial discrimination against these groups. While the court may agree with some of the factual underpinnings of the intervenors' argument, the legal conclusion they draw therefrom is flawed both as a matter of logic and as a matter of constitutional law.

The logical flaw in the argument is that it assumes all members of the underrepresented minority groups have suffered adversity entitling them to some degree of upward adjustment in their UGPA [undergraduate grade point average] and LSAT scores There is no basis in logic or in the evidence for assuming that all members of some racial groups are victims of adverse circumstances or, conversely, that all members of other racial groups are beneficiaries of privilege.

The legal flaw in the intervenors' conclusion is even more daunting, and it is this: the Supreme Court has held that the effects of general, societal discrimination cannot constitutionally be remedied by race-conscious decision-making.¹⁰⁴

In the above section of the *Grutter* decision, the district court begins by rejecting the intervenors' arguments on narrow tailoring grounds—the groups receiving affirmative action are both overinclusive and underinclusive as measures of societal discrimination. The court then states as a matter of law that remedying the effects of societal discrimination can never be a compelling interest.¹⁰⁵ This oft-asserted but mistaken claim that the problem of “societal discrimination” is not a compelling interest sufficient to justify affirmative action can be traced to Justice Powell's opinion in *Bakke*.¹⁰⁶

102. Defendant-Intervenors Final Reply Brief at 18, *Grutter v. Bollinger*, No. 01-1447 (6th Cir. docketed July 26, 2001), available at http://www.umich.edu/~urel/admissions/legal/grutter/gru_fin_reply.html.

103. *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 855–64 (E.D. Mich. 2001). There was also a group of intervening defendants in the case involving undergraduate admission to the University of Michigan. *Gratz v. Bollinger*, 122 F. Supp. 2d 811 (E.D. Mich. 2000). However, their claim was limited to the argument that the undergraduate affirmative program was to remedy the university's past discrimination against minorities. *Id.* at 814 n.3. That claim was rejected by the district court in a separate opinion. *Gratz v. Bollinger*, 135 F. Supp. 2d 790 (E.D. Mich. 2001).

104. *Grutter*, 137 F. Supp. 2d at 868–69.

105. *Id.* at 869.

106. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (opinion of Powell, J.).

When read in context, however, Justice Powell's opinion is not a bizarre assertion that government is blocked by the Fourteenth Amendment from addressing problems of society-wide racial inequity, but rather addresses what procedures should be followed and which government institutions should design the program if an affirmative action plan has such an ambitious goal:

The State certainly has a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination. The line of school desegregation cases, commencing with *Brown*, attests to the importance of this state goal That goal was far more focused than the remedying of the effects of 'societal discrimination,' an amorphous concept of injury that may be ageless in its reach into the past.¹⁰⁷

Justice Powell also stated that the Court has "never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations."¹⁰⁸ His opinion went on to state:

Petitioner [the Davis Medical School] does not purport to have made, and is in no position to make, such findings [I]solated segments of our vast governmental structures are not competent to make those decisions, at least in the absence of legislative mandates and legislatively determined criteria. Before relying upon these sorts of findings in establishing a racial classification, a governmental body must have the authority and capability to establish, in the record, that the classification is responsive to identified discrimination.¹⁰⁹

Understood in context, the judicial concern about invocation of "societal discrimination" first voiced in *Bakke* should be seen as directed primarily toward the design of affirmative action plans and, thus, as more a matter of inadequate tailoring than "uncompelling" interest, despite the unfortunate labeling of this concern in many places as a question of compelling interest. In 1980 Justice Powell made it clear that he did consider remedying the effects of societal discrimination to be a compelling interest when he voted in *Fullilove v. Klutznick*¹¹⁰ to uphold the minority set-aside provision for federal contracts adopted by Congress in 1977. Applying the strict scrutiny standard,¹¹¹ Powell

107. *Id.* at 307.

108. *Id.*

109. *Id.* at 309 (citations omitted).

110. 448 U.S. 448, 495 (1980) (Powell, J., concurring).

111. *Id.* at 496 n.1. Justice Powell wrote separately from the plurality opinion authored by Chief Justice Burger primarily because the plurality opinion did not specifically apply strict scrutiny. *Id.* at 495-96.

wrote that the set-aside program was “justified as a remedy that serves the compelling governmental interest in eradicating the continuing effects of past discrimination identified by Congress.”¹¹² The key phrase was “identified by Congress”; the continuing effects had actually been identified by an appropriate government institution. Distinguishing his opinion in *Bakke*, Powell explained: “Unlike the Regents of the University of California, Congress properly may—and indeed must—address directly the problems of discrimination in our society.”¹¹³ He cited the following excerpts from various House reports issued from 1972 to 1977 as examples of continuing effects identified by Congress:

[M]inority businessmen face economic difficulties that “are the result of past social standards which linger as characteristics of minorities as a group” . . . [and] “[t]he effect of past inequities stemming from racial prejudice have not remained in the past” “Currently, we more often encounter a business system which is racially neutral on its face, but because of past overt social and economic discrimination is presently operating, in effect, to perpetuate these past inequities.”¹¹⁴

When the rejection of “societal discrimination” rationales appear in later Supreme Court decisions involving plans developed by a local school board¹¹⁵ and a city council,¹¹⁶ these decisions should not be understood as saying that all government institutions should ignore the lingering effects of past society-wide discrimination, but instead as questioning the competence—and perhaps the sincerity—of very localized government bodies in tackling such an ambitious problem. Indeed, Justice O’Connor begins her critique of the Richmond City Council’s invocation of societal discrimination in *City of Richmond v. J.A. Croson Co.* by assuming that “Congress may identify and redress the effects of society-wide discrimination,”¹¹⁷ foreshadowing the firm assertion of the same point in her plurality opinion in the 1995 *Adarand* decision.¹¹⁸

It is true that later in the *Croson* opinion, Justice O’Connor criticized the societal discrimination rationale as “based on inherently unmeasurable claims

112. *Id.* at 496.

113. *Id.* at 499.

114. *Id.* at 505 (quoting H.R. REP. NO. 92-1615, at 3 (1972); H.R. REP. NO. 94-468, at 1-2 (1975); and H.R. REP. NO. 94-1791, at 182 (1977)) (second alteration in original).

115. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274-76 (1986) (plurality opinion of Powell, J.).

116. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505 (1989) (plurality opinion of O’Connor, J.).

117. *Id.* at 490.

118. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995) (plurality opinion of O’Connor, J.). It was primarily this assertion that caused Justice Scalia to qualify his support of the plurality opinion: “I join the opinion of the Court, except . . . [i]n my view, government can never have a ‘compelling interest’ in discriminating on the basis of race in order to ‘make up’ for past racial discrimination in the opposite direction.” *Id.* at 239. (Scalia, J., concurring in part and concurring in the judgment). Justice Thomas apparently had similar reservations. *See id.* at 240 (Thomas, J., concurring in part and concurring in the judgment).

of past wrongs.”¹¹⁹ However, to explain this concern, her next sentence quoted a famous paragraph in Justice Powell’s *Bakke* opinion: “Courts would be asked to evaluate the extent of the prejudice and consequent harm suffered by various minority groups. Those whose societal injury is thought to exceed some arbitrary level of tolerability then would be entitled to preferential classifications”¹²⁰ Once again, it is useful to return to the full context of Justice Powell’s opinion. In the quoted passage, he was rejecting specifically the position that “the *level of judicial review* [be varied] according to a perceived ‘preferred’ status of a particular racial or ethnic minority.”¹²¹ Whereas at a different point in his opinion Justice Powell doubted the competence of a state university to measure the effects of past discrimination,¹²² the quoted passage focused his skepticism on a different government institution—the courts. The end of Powell’s paragraph makes this clear:

As these preferences began to have their desired effect, and the consequences of past discrimination were undone, new judicial rankings would be necessary. The kind of variable sociological and political analysis necessary to produce such rankings simply does not lie within *the judicial competence*—even if they otherwise were politically feasible and socially desirable.¹²³

To date, the Supreme Court has not had occasion to apply strict scrutiny to a case in which there is evidence that a government institution has carefully designed an affirmative action program to address the lingering effects of past discrimination.¹²⁴

III. THE HISTORY OF OUR AFFIRMATIVE ACTION MAP

The origins of the list of “official minorities” found in the DBE program and replicated in a wide variety of affirmative action programs beyond the federal government can be found in the actions of a few bureaucrats in the Eisenhower Administration.¹²⁵ Eisenhower, like Roosevelt and Truman before him, issued an executive order prohibiting discrimination on the bases of race, national

119. *Croson*, 488 U.S. at 505–06.

120. *Id.* at 506 (quoting *Regents of University of California v. Bakke*, 438 U.S. 265, 296–97 (1978) (opinion of Powell, J.)) (internal quotation marks omitted).

121. *Bakke*, 438 U.S. at 295 (emphasis added).

122. *See id.* at 309.

123. *Id.* at 297 (emphasis added).

124. In *Fullilove*, only Justice Powell applied strict scrutiny. *See infra* note 185.

125. The basis for much of the history in this and the following paragraphs is found in Harold Orlans, *The Origins of Protected Groups* 2–16 (1986) (unpublished manuscript, on file with John David Skrentny). Orlans conducted his study in 1985–1986 with the assistance of Philip Lyons while working at the U.S. Commission on Civil Rights. *See* Letter from Harold Orlans to John David Skrentny (July 16, 1999) (on file with John David Skrentny). His research included interviews with a number of people directly involved in the development of the “official list” in the 1950s and 1960s, including David Mann, the Director of Surveys for Eisenhower’s Committee on Government Contracts and the

origin, and religion by government contractors.¹²⁶ The order established the President's Committee on Government Contracts to oversee the program.¹²⁷ In 1956, the Committee began using a survey requiring contractors to count their "Negro," "other minority," and "total employees."¹²⁸ If there were many "other minority" employees, the survey instructions added that "the contractor may be able to furnish employment statistics for such groups" including "Spanish-Americans, Orientals, Indians, Jews, Puerto Ricans, etc."¹²⁹

By including "etc.," the survey designers kept an open mind regarding who may suffer discrimination in America. However, the survey form obviously treated the problems of blacks as paradigmatic. Noticing the special emphasis on blacks, some Mexican-American groups demanded that they be promoted from other minorities and placed on every form along with blacks. The League of United Latin American Citizens, the GI Forum (a group of Mexican-American veterans), the Mexican-American Political Action Committee, and Alianza argued that Mexican-Americans had suffered discrimination on a par with blacks.¹³⁰ They recruited help from Mexican-American legislators Edward Roybal, Henry B. Gonzales, and Joseph Montoya.¹³¹ Accordingly, "Spanish-Americans" were subsequently elevated to a specified category on the standard form.¹³²

The successor to Eisenhower's Committee on Government Contracts under Kennedy was the President's Committee on Equal Employment Opportunity (PCEEO), a short-lived body created by a Kennedy executive order to enforce nondiscrimination in employment by government contractors.¹³³ The PCEEO created "Form 40" for monitoring purposes, but did not integrate the form into enforcement activities.¹³⁴ Form 40 copied the official minorities designated by the Eisenhower committee.

Advocates for Japanese- and Chinese-Americans had lobbied for inclusion on the Eisenhower-era form. The Japanese American Citizens League had demanded that Japanese-Americans be included explicitly in nondiscrimination

Committee's successor under Kennedy, the President's Committee on Equal Employment Opportunity. See Orlans, *supra*, at 3 n.8, 4 nn.9-10, 5 nn.11-13, 7 nn.16 & 18, 8 n.21.

126. Orlans, *supra* note 125, at 2.

127. *Id.*

128. *Id.*

129. *Id.* at 2-3 (quoting PRESIDENT'S COMM. ON GOV'T CONTRACTS, COMPLIANCE GUIDE: RECOMMENDATIONS FOR OBTAINING COMPLIANCE WITH THE NONDISCRIMINATION PROVISIONS IN GOVERNMENT CONTRACTS 21 (1958)).

130. *Id.* at 3.

131. *Id.*

132. *Id.* at 5.

133. JOHN D. SKRENTNY, THE IRONIES OF AFFIRMATIVE ACTION 114 (1996).

134. *Id.* at 127. Form 40 used the categories: Negro, Oriental, American Indian, and Spanish American. For a reproduction of Form 40, see MICHAEL I. SOVERN, LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT 123 (1966) or ALFRED BLUMROSE, BLACK EMPLOYMENT AND THE LAW 68 (1971).

guarantees even before World War II began.¹³⁵ When Hawaii became a state in 1959, its congressional representatives, Senator Hiram L. Fong and Representative Daniel K. Inouye, supported inclusion of a category for “Orientals.”¹³⁶ In response, the “Oriental” category was added in 1962 by David Mann, the Director of Surveys for both Eisenhower’s Committee on Government Contracts and the PCEEO.¹³⁷ Mann added American Indians to the form as well, although Indian advocates had not lobbied for inclusion. He later recalled believing that they suffered discrimination and suffered from a “woeful economic state.”¹³⁸

While lobbying played a role in this process, the importance of lobbying should not be overstated. Because the administrators had already identified the nonblack groups within the list included in the form instructions, the nonblack groups were easily elevated to specified categories after just a few meetings or without any meeting at all as in the case of American Indians. It appears that for these administrators something was self-evident about the plausibility of these particular groups. They did not consider independent studies of relative discrimination to be necessary.

The same official minorities were then adopted by the Equal Employment Opportunity Commission (EEOC), which used the forms for the first time in comprehensive enforcement efforts, mandated by Title VII of the Civil Rights Act of 1964.¹³⁹ Section 703(a) of Title VII states that “it shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual” regarding terms of employment “because of such individual’s race, color, religion, sex, or national origin.”¹⁴⁰

Title VII assigned to the EEOC the job of investigating complaints of discrimination, but only allowed the Commission the power to investigate and attempt to conciliate a finding of discrimination. Failing such a finding, the EEOC could refer the case to the Attorney General. The EEOC could also, according to section 705(g), furnish technical information to those covered by the Act and “make such technical studies as are appropriate to effectuate the purposes and policies of this title.”¹⁴¹ Section 709(c) declares that “[t]he Commission shall, by regulation, require each employer, labor organization [and apprenticeship organizations] to maintain such records as are reasonably necessary to carry out the purpose of this title”¹⁴²

Rather than being limited to federal government contractors as was the

135. Orlans, *supra* note 125 at 4.

136. *Id.*

137. *Id.*

138. *Id.* at 4–5.

139. Civil Rights Act of 1964 § 701, 42 U.S.C. § 2000 (1994).

140. 42 U.S.C. § 2000e-2(a).

141. 42 U.S.C. § 2000e-4(g)(3), -4(g)(5).

142. 42 U.S.C. § 2000e-7(c)

PCEEO, the EEOC had jurisdiction over all firms with more than 100 employees and, thus, needed to create a new form. In developing what became the EEO-1 form, however, EEOC officials simply copied the PCEEO's Form 40 with only minor changes. When the proposed regulation requiring the form was printed in the *Federal Register*, an explanatory note stated that the form was nearly identical to Form 40.¹⁴³ This meant that it retained the four official minority groups—black, Spanish-American, Oriental, and American Indian—plus male and female categories for all groups.

Did Congress give any guidance regarding which groups were covered by Title VII? The debate over Title VII was so focused on African-Americans that no one in Congress apparently gave much thought to which groups should be included. In an interpretive memo explaining Title VII, Senators Joseph Clark and Clifford P. Case barely hinted at something like the EEO-1, simply writing that

[r]equirements for the keeping of records are a customary and necessary part of a regulatory statute. They are particularly essential in [T]itle VII because whether or not a certain action is discriminatory will turn on the motives of the respondent, which will usually be best evidenced by his pattern of conduct on similar occasions.¹⁴⁴

The idea of race-reporting forms was, in short, hardly discussed in Congress, and the issue of which groups were to be counted and designated America's official minorities was not discussed at all.

Within the EEOC itself, no official record of the discussion about who was to be included on the EEO-1 exists. Herbert Hammerman, the EEOC's Chief of Reports at the time, later recalled that the focus was simply on obtaining maximum information without being overly complex and that "[m]inority groups, sex data, and job categories were carried over from Form 40 without discussion."¹⁴⁵ Charles Markham, then EEOC's Director of Research and Reports, remembered that EEOC Vice Chairman Luther Holcomb raised the issue of native Alaskans and wondered where they might fit.¹⁴⁶ No one at the time raised the issue of adding religious groups to the form, and no one questioned inclusion of all four groups. According to Hammerman, representatives of Polish-Americans asked that a category of "Polonians" (the term used by Polish leaders to refer to Polish-Americans) be added, but the EEOC rejected the request.¹⁴⁷ Among the likely reasons for this rejection was the EEOC's reliance

143. Employer Reporting Requirements, 30 Fed. Reg. 14,658 (Nov. 25, 1965).

144. 110 CONG. REC. 7214 (1964) (interpretative memorandum of Title VII submitted by Sens. Clark and Case).

145. Letter from Hammerman, EEOC Chief of Reports, to John Skrentny at 1 (June 18, 1998) [hereinafter Letter from Hammerman to Skrentny] (on file with John David Skrentny).

146. Telephone Interview by John David Skrentny with Charles Markham, Director of Research and Reports, EEOC (June 15, 1998) [hereinafter Telephone Interview by Skrentny with Markham].

147. Letter from Hammerman to Skrentny, *supra* note 145, at 1.

on visual appearance in designing the reporting form.¹⁴⁸

Instructions for the EEO-1 stated that employers were to avoid asking any employees to which group they belonged, but were to rely on visual identification. The importance of relying on visual surveys came as a result of consultations and compromise with African-American civil rights groups. Hammerman stated:

I recall vividly a group conversation with the [NAACP's] Washington representative, Clarence Mitchell. He angrily declared that he had fought the tendency of employers to ask applicants for employment to state or write their race for several years and was not about to change his mind now. We were at a crossroads. With the opposition of the NAACP, the EEO-1 would be dead. It also seemed obvious to me that it made sense for employers to identify minorities in the same way that they were discriminated against, by observation. After all, employers were not sociologists.¹⁴⁹

Appeasing the NAACP meant relying on a visual basis for categorization, with important consequences. Perhaps most importantly, it meant government policy would mirror basic social patterns of discrimination. It meant reinforcing the "one-drop rule" by which white Americans have long categorized African-Americans: Anyone who looked at all black was black.¹⁵⁰ Thus, as Hammerman commented, "there could be no discussion of interracial or interethnic marriages."¹⁵¹ The visual appearance rule was applied to American Indians and Asian-Americans as well, two groups not normally forced into the one-drop rule but that have high rates of intermarriage with Euro-Americans. Employers might use the one-drop rule to make minorities of persons of any combination of mixed ancestry, or they might not count them as minorities, though it would be in their interest to count them as minorities to increase the minority percentages in their workforces.

There was also no clear way of identifying the "Spanish-Americans," who might be of any race. Presumably, the nonsociologist employers would be able to discern a Spanish surname from sometimes similar Italian or Portuguese surnames.¹⁵² Visual identification also reinforced the exclusion of white ethnics and religious groups from the form. Visual identification, reliance on surnames, and the form categories also erased any national origin differences within

148. Skrentny, *supra* note ***, at 111.

149. Letter from Hammerman to Skrentny, *supra* note 145, at 2.

150. F. JAMES DAVIS, WHO IS BLACK? 5 (1991).

151. Letter from Hammerman to Skrentny, *supra* note 145, at 2.

152. During EEOC hearings in 1969, Anthony J. Frederick, Vice President of Universal Studios, complained about the difficulty of identifying Mexican-American employees: "I couldn't tell you a Mexican American, if I were to look at him. We are not permitted to ask a person his nationality, his national origin, in this state, and we don't, and you cannot tell by surname." EEOC, HEARINGS BEFORE THE UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ON UTILIZATION OF MINORITY AND WOMEN WORKERS IN CERTAIN MAJOR INDUSTRIES 130 (1969).

minority groups. Accordingly, a white Cuban would be grouped with a dark brown Mexican *indio* as Spanish-Americans, a Japanese-American would be grouped with a Laotian, and an immigrant from Jamaica or Kenya would be grouped with an American descendant of slaves.

These sorts of issues were invisible in 1965 because massive discrimination against African-Americans was such an obvious and urgent priority. Furthermore, immigration policy had not yet allowed great numbers of Latinos and Asians to come to the United States. The intermarriage issue came up only when Markham received letters from South Carolina pointing out the considerable racial mixing of the past and the difficulty this created for employers filling out the EEO-1. Markham, who with Hammerman had helped devise the method of determining group classifications, simply pointed out that the South Carolinians could rely on the method that they had been using for decades to segregate and discriminate against the African-Americans—visual surveys.¹⁵³

In 1967, Hammerman sought to remove the categories “Orientals” and “American Indians” from forms similar to the EEO-1 but designed for unions, arguing that the “groups were very small, that the statistics for Asians did not show any discrimination, and that American Indians living on reservations were excluded from Title VII (while many of those off reservations were not readily identifiable).”¹⁵⁴ No one at the EEOC disagreed with Hammerman’s reasoning, but Chairman Stephen Shulman blocked the proposal, saying that such an action would mobilize these groups and produce a loud outcry.¹⁵⁵

The determination of the official minorities and the beginnings of the affirmative action model of justice occurred in the EEOC, but employment affirmative action as a policy gained its most explicit regulatory formulation in the Labor Department’s Office of Federal Contract Compliance (OFCC). The OFCC established the goals and timetables requirement for racial and ethnic affirmative action in its 1969 Philadelphia Plan, aimed at integrating construction unions, and 1970 Order No. 4, aimed at all government contractors with contracts of at least \$50,000.¹⁵⁶ Also, the Small Business Administration (SBA) of the Commerce Department developed affirmative action programs for minority capitalists in 1968, and President Richard Nixon created the Office of Minority Business Enterprise (OMBE) in 1969.¹⁵⁷ In both cases, initiatives came from government officials who intended the policies for blacks but also included or quickly expanded the policies to include the official minorities of the EEO-1.

The early expansion of the policy to include the minorities of the EEO-1 form

153. Telephone Interview by Skrentny with Markham, *supra* note 146.

154. Herbert Hammerman, “Affirmative-Action Stalemate”: A Second Perspective, PUB. INT., Fall 1988, at 130, 131.

155. *Id.*

156. Skrentny, *supra* note *** (manuscript at 104, on file with author).

157. *Id.* (manuscript at 104–06, on file with author).

was a nonevent. There was no lobbying for expansion and almost no discussion at all.¹⁵⁸ This suggests that government officials saw no significant disparities between the different minority groups in terms of their relative disadvantage and deservedness of preference.

The Small Business Act created the SBA in 1953 to protect and encourage small businesses. Section 8(a) of this law authorizes the SBA to contract with federal agencies to provide goods and services to, and subcontract with, small businesses owned by “socially and economically disadvantaged” persons.¹⁵⁹ The SBA would also provide technical and managerial assistance to these disadvantaged persons.¹⁶⁰ Section 8(a) was designed to be a business training and procurement program. The original intended beneficiaries are uncertain, as this section of the law was ignored until 1967. In that year, SBA officials began to implement the program to aid unemployed persons in America’s burning inner cities.¹⁶¹ Congress encouraged this implementation. Funds for a formally color-blind program to give loans to inner city residents boosted the SBA budget in 1967 to \$2.65 billion from \$650 million.¹⁶² Clearly, African-Americans were the focus of this effort.

Richard Nixon won the election in November 1968 and followed through with a campaign promise to promote black capitalism. On March 5, 1969, Nixon issued Executive Order 11,458, creating the OMBE.¹⁶³ Like affirmative action in the SBA program, OMBE developed without a clear-cut antidiscrimination rationale. Simply giving more opportunities for designated underrepresented groups was the key.¹⁶⁴ It is not clear what convinced Nixon that the program should be broadened from its original incarnation as “black capitalism” to include the official minorities besides African-Americans, but it is certain the expansion did not involve struggle, lobbying, or protest.¹⁶⁵ The expansion took place early in 1969, and it occurred without debate, analysis, or criticism.¹⁶⁶ Secretary of Commerce Maurice Stans was the likely instigator of the expansion. Stans used the passive voice in a memo to Nixon’s chief domestic policy aide John Ehrlichman, obscuring exactly who pushed for the expansion while

158. *Id.* (manuscript at 102, on file with author).

159. 15 U.S.C. § 637(a)(1)(B) (2000).

160. 15 U.S.C. § 638(b) (2000).

161. Hugh Davis Graham, *Affirmative Action for Immigrants? The Unintended Consequences of Reform*, in *COLOR LINES: AFFIRMATIVE ACTION, IMMIGRATION, AND CIVIL RIGHTS OPTIONS FOR AMERICA*, *supra* note 22, at 53, 60; George R. La Noue & John C. Sullivan, *Presumptions for Preferences: The Small Business Administration’s Decisions on Groups Entitled to Affirmative Action*, 6 J. POL’Y HIST. 439, 442 (1994).

162. Dean Kotlowski, *Black Power Nixon Style: The Nixon Administration and Minority Business Enterprise*, 72 BUS. HIST. REV. 409, 416 (1998).

163. Exec. Order No. 11,458 3 C.F.R. § 779, *superceded* by Exec. Order No. 11,625, 3 C.F.R. § 616 (1971–1975), *reprinted as amended* in 15 U.S.C. § 631 (2000); Kotlowski, *supra* note 162, at 420.

164. *See* Statement About a National Program for Minority Business Enterprise, 1969 PUB. PAPERS 197, 197 (Mar. 5, 1969); Kotlowski, *supra* note 162, at 420–21.

165. *See* Skrentny, *supra* note *** (manuscript at 105–06, on file with author).

166. *Id.*

also giving the impression of a smooth process. He simply stated that, “[i]n view of the existence of the other significant minorities, the program was given the title of Minority Enterprise and the other ethnic groups were brought into it.”¹⁶⁷

In an interview two decades later, Stans attributed the expansion to his desire simply to put the program in line with previous designations of the official minorities. He recalled a meeting with Nixon at which Stans explained that

[w]e have to enlarge the scope of this, because there are more than blacks involved; there are four ethnic groupings of people in the United States that are considered by the Congress to be minorities: blacks, Hispanics, Asians, and American Indians. I’d like to wrap them all together into one program and call it “Minority Business.”¹⁶⁸

According to Stans, Nixon agreed to the change without discussion: “All right; let’s do it that way.”¹⁶⁹ In Nixon’s signing statement of Executive Order 11,458, however, he only mentioned blacks, Mexican-Americans, Puerto Ricans, Indians, “and others.”¹⁷⁰

It is not clear what congressional designation Stans was talking about, and it is unlikely Congress had anything to do with the designation. However, Stans probably knew of the other affirmative action regulations in employment and knew that they included other groups, which he called “the other ethnic groups.”¹⁷¹ Stans apparently felt that all of the groups were equal in their significance and a legitimate minority program had to include all of the official minorities.

In 1973, the SBA published for the first time a formal definition of “social and economic disadvantage” that used the idea of “presumption” to justify the continued use of the list of official minorities. “[B]lack Americans, American Indians, Spanish-Americans, Oriental Americans, Eskimos and Aleuts” were presumed to be socially and economically disadvantaged.¹⁷² There were no hearings or formal findings, and the announcement of the definition did not explain why these particular groups had been included.¹⁷³ However, operating

167. Memorandum from Maurice H. Stans, to John D. Ehrlichman at Fiche 173 (Sept. 17, 1971), *microformed on Papers of the Nixon White House Part 6a*. (Johan Hoff-Wilson ed., Univ. Publ’ns of Am.).

168. GERALD S. STROBER & DEBORAH H. STROBER, *NIXON: AN ORAL HISTORY OF HIS PRESIDENCY* 112 (1994) (internal quotation marks omitted).

169. *Id.* (internal quotation marks omitted).

170. See Statement About a National Program for Minority Business Enterprise, *supra* note 164, at 197–98.

171. Memorandum from Maurice H. Stans, to John D. Ehrlichman, *supra* note 167, at Fiche 173.

172. See 13 C.F.R. §124.8-1(c)(1) (1974).

173. See George R. LaNoue & John C. Sullivan, *Gross Presumptions: Determining Group Eligibility for Federal Procurement Preferences*, 41 SANTA CLARA L. REV. 103, 120 (2000).

procedures for the section 8(a) published by the SBA in 1976 required that a certified participant must both “identify with the disadvantages of his or her racial group generally” and show that such disadvantages “have personally affected the applicant’s ability to enter into the mainstream of the business system.”¹⁷⁴ In 1979, the SBA procedures spelled out the presumption in favor of, but not limited to, these groups: “The social disadvantage of individuals, including those within the above named [racial and ethnic] groups, shall be determined by SBA on a case by case basis. Membership alone in any group is not conclusive that an individual is socially disadvantaged.”¹⁷⁵

It was not until 1977 that Congress began legislating the “official minorities” into law. Section 103(f)(2) of the Public Works Employment Act of 1977 declared that “no grant shall be made under this Act for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises [(MBE)].”¹⁷⁶ The Act defined “minority group members” as “citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos and Aleuts.”¹⁷⁷ The ten percent minority set-aside provision originated in a floor amendment offered by Representative Parren Mitchell, Chair of the House Subcommittee on Housing, Minority Enterprise, and Economic Development, who specifically stated when introducing his amendment that it was based on the SBA’s section 8(a) program.¹⁷⁸ The Department of Commerce’s Economic Development Administration (EDA) administered the set-aside program. The EDA published a technical bulletin, which further defined the minority groups as follows:

- a) Negro—An individual of the black race of African origin.
- b) Spanish-speaking—An individual of a Spanish-speaking culture and origin or parentage.
- c) Oriental—An individual of a culture, origin or parentage traceable to the areas south of the Soviet Union, East of Iran, inclusive of islands adjacent thereto, and out to the Pacific including but not limited to Indonesia, Indochina, Malaysia, Hawaii and the Philippines.
- d) Indian—A individual having origins in any of the original people of North America and who is recognized as an Indian by either a tribe, tribal organization or a suitable authority in the community

174. OFFICE OF BUS. DEV., U.S. SMALL BUS. ADMIN., SECTION 8(A) PROGRAM, STANDARD OPERATING PROCEDURE 15-16 (1976) *quoted in* Fullilove v. Klutznick, 448 U.S. 448, 464 n.44 (1980).

175. OFFICE OF MINORITY SMALL BUS. & CAPITAL OWNERSHIP DEV., U.S. SMALL BUS. ADMIN., MSB AND COD PROGRAMS, STANDARD OPERATING PROCEDURE 20 (1979) *quoted in* Fullilove, 448 U.S. at 464 n.44.

176. Public Works Employment Act of 1977, § 103(f)(2), Pub. L. No. 95-28, 91 Stat. 116, 117 (codified as amended at 42 U.S.C. § 6705(f)(2) (1994)).

177. *Id.*

178. Fullilove v. Klutznick, 448 U.S. 448, 459-60 (1980) (plurality opinion of Burger, C.J.) (citing 123 CONG. REC. 5327 (1997) (remarks of Rep. Mitchell)).

- e) Eskimo—An individual having origins in any of the original peoples of Alaska.
- f) Aleut—An individual having origins in any of the original peoples of the Aleutian Islands.¹⁷⁹

Eight months after the Act's passage, several associations of construction contractors sought to enjoin the set-aside program as violative of the Equal Protection Clause of the Fourteenth Amendment. Both the district court¹⁸⁰ and court of appeals¹⁸¹ rejected this challenge, as did the Supreme Court in *Fullilove v. Klutznick*.¹⁸² Chief Justice Burger announced the Court's judgment in a plurality opinion joined by Justices White and Powell. He specifically noted that the plaintiffs had not challenged the classification categories in the courts below, stating, "[Therefore], there is no reason for this Court to pass upon the issue at this time."¹⁸³ Although not clearly stating that he was applying a strict scrutiny standard, Burger did say that even a congressional program that has "the objective of remedying the present effects of past discrimination [must be] narrowly tailored to the achievement of that goal."¹⁸⁴ In response to plaintiffs' complaint that the categories were overinclusive, Burger wrote:

Even in the context of a facial challenge . . . , the MBE provision cannot pass muster unless, with due account for its administrative program, it provides a reasonable assurance that application of racial or ethnic criteria will be limited to accomplishing the remedial objectives of Congress and that misapplications of the program will be promptly and adequately remedied administratively.¹⁸⁵

He noted with approval that Congress wanted the set-aside program to benefit only those group members who were actually disadvantaged.¹⁸⁶ He considered that because the presumption of disadvantage was rebuttable, it would provide adequate administrative safeguards against the risk of overinclusion: "That the

179. ECON. DEV. ADMIN., U.S. DEP'T. OF COMMERCE, EDA MINORITY ENTERPRISE TECHNICAL BULLETIN 1 (1977) quoted in *Fullilove*, 448 U.S. at 494-95 (appendix to plurality opinion of Burger, C.J.).

180. *Fullilove v. Kreps*, 443 F. Supp. 253, 262-63 (S.D.N.Y. 1977).

181. *Fullilove v. Kreps*, 584 F.2d 600, 609 (2d Cir. 1978), *aff'd sub nom. Fullilove v. Klutznick*, 448 U.S. 448 (1980) (plurality opinion of Burger, C.J.).

182. 448 U.S. at 492 (1980).

183. *Id.* at 487 n.73.

184. *Id.* at 480. Although joining in the plurality opinion, Justice Powell wrote a separate concurrence insisting upon the application of strict scrutiny. *Id.* at 495-517 (Powell, J., concurring).

185. *Fullilove*, 448 U.S. at 487.

186. He assumed that the sponsors of the set-aside program were relying in part on the 1975 Report of the House Subcommittee on SBA Oversight and Minority Enterprise, which "took special care to note that when using the term 'minority' it intended to include 'only such minority individuals as are considered to be economically and socially disadvantaged.'" *Id.* at 471 (quoting H.R. REP. NO. 94-468, at 1-2 (1975)). He also quoted a statement by Representative Roe of New Jersey in the legislative debates: "They are talking about people in the minority and deprived." *Id.* (quoting 123 Cong. Rec. 5330 (1977)) (remarks of Rep. Roe) (internal quotation marks omitted).

use of racial and ethnic criteria is premised on assumptions rebuttable in the administrative process gives reasonable assurance that application of the MBE program will be limited to accomplishing the remedial objectives contemplated by Congress and that misapplications of the racial and ethnic criteria can be remedied.”¹⁸⁷ He also emphasized that “[t]he MBE provision may be viewed as a pilot project, appropriately limited in extent and duration, and subject to reassessment and reevaluation by the Congress prior to any extension or reenactment.”¹⁸⁸

While the constitutional challenge to the 1977 Act was working its way up to the Supreme Court, Congress expanded affirmative action to all contracts let by any federal agency in the 1978 Amendments¹⁸⁹ to the Small Business Act and the Small Business Investment Act of 1958. This act amended Section 8(d) of the Small Business Act to create the Small Disadvantaged Business (SDB) program, sometimes simply called the 8(d) program. The amended section 8(d) added a clause to almost every federal contract requiring the contractor to give “small business concerns owned and controlled by socially and economically disadvantaged individuals . . . the maximum practicable opportunity” to participate as subcontractors.¹⁹⁰ The clause further directed the contractor to “presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, and other minorities, or any other individual found to be disadvantaged by the Administration pursuant to section 8(a) of the Small Business Act.”¹⁹¹

This 1978 amendment to section 8(d) of the Small Business Act created, perhaps inadvertently, two inflexible characteristics of the SDB program for federal contracts that contrast with the administrative flexibility of the prior BD¹⁹² created under section 8(a). The statutory provision creating the section 8(a) program does not list specific racial or ethnic groups. Racial identity is mentioned in the section 8(a) statutory provision only as a possible direct cause of social disadvantage and an indirect cause of economic disadvantage:

Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities.

. . . Economically disadvantaged individuals are those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged.¹⁹³

187. *Id.* at 489.

188. *Id.*

189. Pub. L. Act of Oct. 24, 1978, no. 95-507, 92 Stat. 1757 (1978).

190. *Id.* § 211, 92 Stat. at 1767 (codified at 15 U.S.C § 637(d)(3)(C) (2000)).

191. *Id.*

192. See *supra* notes 42–44 and accompanying text.

193. 15 U.S.C. § 637(a)(5)–(a)(6)(A).

Thus, in the section 8(a) program the SBA is free to define which, if any, group memberships give rise to a presumption of disadvantage. For example, the SBA could have chosen to define one or more smaller group categories of persons with Latin American heritage rather than the single broad category of Hispanic-Americans. The 1978 legislation, however, mandated that members of three groups—black Americans, Hispanic-Americans, and Native Americans—be presumed to be disadvantaged,¹⁹⁴ giving the SBA flexibility only to add groups to the list, not to remove or narrow any of the three listed groups. The SBA exercised this option to add Asian Pacific Americans in 1979 to its list of presumptively disadvantaged groups.¹⁹⁵ Congress then amended section 8(d) in 1980 to add Asian Pacific Americans to the statutory list of presumptively disadvantaged groups, locking in place the SBA's discretionary decision, and once again reestablishing the four official minorities.¹⁹⁶

The second inflexibility added by section 8(d) relates to economic disadvantage. The SBA has decided that group membership does not give rise to a presumption of economic disadvantage in the section 8(a) program. Economic disadvantage is instead determined by reviewing an applicant's "personal narrative" describing her economic disadvantage, supported by personal financial information.¹⁹⁷ In contrast, section 8(d) mandates the presumption of both social and economic disadvantage if a business owner is a member of one of the specified groups, including groups later added to the list by the SBA's administrative process.

In 1987, Congress made the "maximum practicable opportunity" affirmative action goal in section 8(d) more specific in the context of federal transportation programs. Section 106(c)(1) of the Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA)¹⁹⁸ specified that "not less than 10 percent" of the appropriated funds "shall be expended with small business concerns owned and controlled by socially and economically disadvantaged

194. *Id.* § 637(a)(5), (a)(6)(A).

195. LaNoue & Sullivan, *supra* note 173, at 124–26. The SBA specified that "Asian Pacific Americans" included citizens from Cambodia, China, Guam, Japan, Korea, Laos, the Northern Marianas, the Philippines, Samoa, Taiwan, the U.S. Trust Territory of the Pacific, and Vietnam. *Id.* LaNoue and Sullivan speculate that the SBA's action may have been prompted by an amendment to a disaster relief bill proposed on May 22, 1979 by then-Congressman Norman Mineta. *Id.* at 125. This amendment gave Asian Pacific Americans automatic qualification as a socially disadvantaged group. *Id.* at 125. The SBA's action was taken on June 27, 1979, before Mineta's amendment came to a vote in the Senate. *Id.* at 126. Mineta resigned from the House of Representatives in 2001 to become the Secretary of Transportation in the Bush Administration and became the new nominal defendant in the *Adarand* case when it was argued before the Supreme Court in 2001. *See* text accompanying notes 46–72.

196. Pub. L. No. 96-302, 94 Stat. 833 (1980), codified at 15 U.S.C. § 637(d)(3)(c)(ii) (2001). According to LaNoue and Sullivan, Representative Mitchell said that the omission of Asian Pacific Americans from the 1978 legislation was inadvertent. LaNoue & Sullivan, *supra* note 161, at 444 n.19. American Indians were also missing from the 1978 bill as introduced by Mitchell and only added at the last minute in the Conference Committee. *Id.*

197. 13 C.F.R. § 124.104 (2001).

198. Pub. L. No. 100-17, 101 Stat. 132.

individuals.”¹⁹⁹ STURAA stated that “[t]he term ‘socially and economically disadvantaged individuals’ has the meaning such term has under section 8(d) of the Small Business Act (15 U.S.C. 637(d)) and relevant subcontracting regulations promulgated pursuant thereto,” but also added that “women shall be presumed to be socially and economically disadvantaged individuals for purposes of this subsection.”²⁰⁰ The DBE program was developed pursuant to STURAA, and the *Adarand* litigation arose from a guardrail subcontract awarded to a company owned by a Hispanic-American on a federal highway contract funded under STURAA.²⁰¹

After the Supreme Court announced in *Adarand* that strict scrutiny applied to all affirmative action programs,²⁰² the DBE program was indeed given close scrutiny by both the executive and legislative branches. While the *Adarand* case worked its way back through the courts on remand, Congress renewed the DBE program²⁰³ in 1998 after extensive debate, including the rejection of two amendments that would have eliminated the program.²⁰⁴ Following congressional reauthorization, the DOT issued revised regulations for the DBE program in 1999.²⁰⁵

Although, as discussed above, the revised DBE program strives to narrowly tailor the use of goals and preferences to a state-by-state determination of need, the presumption of disadvantage based on group membership has changed only slightly since the 1995 *Adarand* decision. Business owners seeking certification as DBEs must now submit a signed and notarized statement that they are socially and economically disadvantaged and disclose the owner’s personal net worth, supported by documentation.²⁰⁶ If the disclosed net worth, excluding the owner’s equity in her home and in the business itself, is greater than \$750,000, then the presumption of economic disadvantage is reversed and DBE certifica-

199. Pub. L. No. 100-17, § 106(c)(1), 101 Stat. 132, 145 (1997).

200. *Id.*; see also *Id.* § 106(c)(2)(B), 101 Stat. at 146. In 1994, section 8(d) of the Small Business Act was also amended to provide affirmative action for women-owned businesses, but did so simply by adding women as a separate category to the required federal contract language rather than defining them as presumptively disadvantaged. Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, § 7106, 108 Stat. 3243, 3374–76.

201. The affirmative action mandate in STURAA was re-authorized as section 1003(b) of the Intermodal Surface Transportation Efficiency Act of 1991. Pub. L. No. 102-240, § 1003(b), 105 Stat. 1914, 1919–1921 (1991).

202. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995).

203. Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, § 1101(b), 112 Stat. 107, 113 (1998).

204. See 144 CONG. REC. S1496 (daily ed. Mar. 6, 1998); 144 CONG. REC. H2011 (daily ed. Apr. 1, 1998).

205. Participation by Disadvantaged Business Enterprises in Department of Transportation Programs, 64 Fed. Reg. 5096, 5102 (Feb. 2, 1999) (codified at 49 C.F.R. pts. 23, 26).

206. Participation by Disadvantaged Business Enterprises in Department of Transportation Programs, 49 C.F.R. § 26.67(a) (2001). In May 2001, the DOT published a proposed standardized affidavit form. Notice of Proposed Rulemaking, 55 Fed. Reg. 23,208, 23,227 (May 8, 2001). When faced with critical questioning about the affidavit form at oral argument for *Adarand* before the Supreme Court on October 31, 2001, the Solicitor General said, “That form has never been adopted. I’m . . . reasonably confident that it never will be adopted.” United States Supreme Court Official Transcript, *Mineta* (No. 00-730), 2001 WL 1398608, at *43.

tion must be denied.²⁰⁷ The \$750,000 net worth cap, intended to exclude “wealthy individuals” from the program,²⁰⁸ seems unlikely to exclude very many applicants. According to 1995 congressional testimony by the administrator of the SBA, more than ninety percent of all family-owned businesses in the United States are owned by families whose net worth (excluding primary residence and business equity) would be below the \$750,000 cap.²⁰⁹ However, the mandatory list of groups and rigid presumption of both social and economic disadvantage based on membership in those groups remain in section 8(d) of the Small Business Act and continue to be incorporated by reference into the DOT appropriation bills that authorize the DBE program, precluding any administrative changes by the SBA or DOT.²¹⁰

When the Supreme Court cautiously approved affirmative action in federal contracting in the 1980 *Fullilove* decision, it did so on the assumption that Congress and the executive branch would carefully reassess and reevaluate affirmative action programs to ensure that the use of racial and ethnic categories was indeed a necessary and reliable way to identify socially and economically disadvantaged business owners.²¹¹ However, the “map” still being used in 2001 to guide the designers of the major federal affirmative action plans was drawn basically in the mid-1950s, and its boundaries have been fixed by a congressional statute for over twenty years.²¹² Moreover, this “map” is based on unreflective assumptions that relevant group membership is fundamentally about how visual identification is used by “white” people to categorize “nonwhite” people. As pointed out by anthropologist Virginia R. Dominguez in a different context, “the names given these ‘groups’ generally imply identification by region or continent of origin but [really] replicate the divisions implied by straight *racial* talk in the United States—‘whites’ and their racialized Others (‘black,’ ‘red,’ ‘yellow,’ and ‘brown’).”²¹³ Thus, the seemingly haphazard listing of groups makes sense if the primary purpose of the DBE program is to provide a prophylactic against anticipated future behavior of prime contractors who would otherwise refuse to do business with people perceived by the prime contractors as nonwhite. However, both Congress and DOT seem much more concerned with what the district court in *Adarand* termed the ability of group

207. 49 C.F.R. § 26.67(b)(1).

208. Participation by Disadvantaged Business Enterprises in Department of Transportation Programs, 64 Fed. Reg. 5096, 5117 (codified at 49 C.F.R. pts. 23, 26).

209. LaNoue & Sullivan, *supra* note 161, at 439–467.

210. See *supra* text accompanying notes 192–208.

211. *Fullilove v. Klutznick*, 448 U.S. 448, 487–89 (1980) (plurality opinion of Burger, C.J.); see also *id.* at 513 (Powell, J., concurring).

212. See *supra* text accompanying notes 189–196.

213. Virginia R. Dominguez, *A Taste for “the Other”*: Intellectual Complicity in Racializing Practices, 35 CURRENT ANTHROPOLOGY 333, 335 (1994) (arguing that hiring and curricular efforts by educational institutions intended to counter historical patterns of racism may paradoxically perpetuate more than challenge those patterns).

members to compete effectively in the highway construction market²¹⁴—in other words, development bias.

Although many members of all four official minorities may share a common vulnerability to current practices of discrimination based on dark skin tone, the members differ greatly in terms of how their group membership may indicate development bias.²¹⁵ A significant percentage of members in several of the designated groups are first- or second-generation immigrants. Also, social science data indicates that the extent of contemporary social segregation differs considerably among the groups.²¹⁶ To the extent that eliminating lingering effects is the compelling interest for the DBE program, the undifferentiated aggregation of the four groups into a single presumption of disadvantage does create a risk of overinclusion. The development and implementation of state-wide goals may be particularly distorted by this problem.

The regulations appear to require that all existing DBEs and all persons who may be potential DBE owners absent the lingering effects of discrimination be included in a single total for setting the goal and measuring progress toward achieving the goal.²¹⁷ Persons from groups least affected by the intergenerational effects of past discrimination and current patterns of social segregation may be more likely to be successful competitors in the market for highway construction. Automatically presuming such persons as disadvantaged may not only expand the scope of the DBE program beyond that justified by the lingering effects rationale, but also create the risk of not really addressing the lingering effects problem. Participation of DBEs from less disadvantaged groups may, therefore, comprise a high proportion of all DBEs contracting in a state, disguising a continuing failure to assist persons whose group membership is actually more indicative of lingering effects and depriving the government of the feedback necessary to break the tragic cycle that reproduces inequality over time. This problem is even greater if there is no individualized determination of economic disadvantage.

IV. THE USE OF SOCIAL SCIENCE METHODS IN INDIA TO TAILOR GROUP PREFERENCES TO LINGERING EFFECTS

Does this history of unreflective use of a possibly outdated and inappropriate

214. 965 F. Supp. at 1562–64.

215. See Glenn C. Loury, *Double Talk*, NEW REPUBLIC 1, 23, Aug. 25, 1997; John D. Skrentny, *Affirmative Action and New Demographic Realities*, CHRON. HIGHER EDUC., Feb. 16, 2001, at B7, B8–B9.

216. The degree to which members marry outside their own group is considered a particularly strong indicator of social segregation and differs significantly among the groups designated by the DBE program. Skrentny, *supra* note 215 at B9. Another source of data are attitude surveys that ask whites to rate neighborhood desirability in terms of having black, Hispanic, or Asian-American neighbors; such surveys show very different responses in relation to each group. See Camille Zubrinsky Charles, *Neighborhood Racial-Composition Preferences: Evidence from a Multiethnic Metropolis*, 47 SOC. PROB. 379, 387 (2000).

217. 49 C.F.R. § 26.45(h) (2000) (“Your overall goals must provide for participation by all certified DBEs and must not be divided into group-specific goals.”).

“map” indicate that the Supreme Court’s skepticism about the competence and sincerity of small, localized government institutions to use racial and ethnic categories to remedy the lingering effects of discrimination must be extended even to the federal government? Can affirmative action plans be developed that are not “in fact motivated by illegitimate notions of racial inferiority or simple racial politics”?²¹⁸ We suggest that an encouraging answer can be found by looking outside the confines of our national borders. There is one major country in the world that has a longer history—a much longer history—than the United States of designing and evaluating affirmative action programs: India. India’s experience shows without a doubt that it is possible to design a program to remedy the effects of past discrimination in which beneficiary groups are designated through an objective process based on empirical research. A comparative study of India also illustrates the crucial role played by the courts in causing such a process to develop and keeping it free of “illegitimate notions of inferiority” and political pandering to ethnic voting blocks.²¹⁹ The suggestions at the end of this Article for modifying affirmative actions program to maximize narrow tailoring are inspired in large part by studying India’s approach.

Since the adoption of its constitution in 1950, India has afforded an extensive program of affirmative action to a set of caste groups known as Scheduled Castes—the former “untouchables”—and a set of tribal groups known as Scheduled Tribes, which together constitute about twenty-two percent of the total population.²²⁰ In addition, India has provided more selective affirmative action measures to a number of groups within Indian society, defined by the constitution as “socially and educationally backward classes,” which have suffered from a history of economic exploitation and social segregation comparable in some

218. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 226 (1995) (plurality opinion of O’Connor, J.) (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion of O’Connor, J.)).

219. See *infra* text accompanying notes 228–31.

220. The phrase “Scheduled Castes” is based on article 341 of the Indian Constitution, which authorizes the President of India to specify by public notification for each state certain “castes, races or tribes or parts of or groups within castes, races or tribes.” INDIA CONST. art. 341(1). This notification is the schedule and a caste becomes a Scheduled Caste for a particular state by being listed on this schedule. Although the constitution does not state criteria to be used in designating Scheduled Castes, the clearly understood intent was to list those groups that had been treated as “untouchable” in the traditional Hindu social hierarchy. MARC GALANTER, *COMPETING EQUALITIES: LAW AND THE BACKWARD CLASSES IN INDIA* 131–32 (1984). “Scheduled Tribes” refers to a comparable Presidential schedule promulgated under article 342 of “tribes or tribal communities.” INDIA CONST. art. 342(1). The Scheduled Tribes can be analogized to Native Americans in terms of their understood aboriginal status, religious, linguistic and cultural differences, and geographic isolation. By the time article 15(4) was added to the Indian Constitution, there was widespread consensus that the Scheduled Castes and Tribes were uniquely disadvantaged within Indian society. However, the amendment deliberately gave both the federal and state governments the flexibility to add “other backward classes” to the list of groups for whom “special provisions” could be made. INDIA CONST. art. 15(4). This option recognized that there were other groups in Indian society who had suffered discrimination in ways comparable to the untouchable castes and tribal peoples, although perhaps not as severe.

measure to that suffered by the untouchables.²²¹ The concept of social and educational backwardness can be seen as an Indian version of developmental bias and suggests a point of comparison with the idea of social and economic disadvantage in the DBE program.

In 1951, only a year after the newly independent India adopted its constitution containing guarantees of equality taken in part from U.S. law, the Supreme Court of India was faced with a case remarkably like *University of California Regents v. Bakke*.²²² A state medical school had used a detailed and rigid quota system based on caste and religious categories to assure that its entering class had a demographic make up similar to the general population.²²³ In *State of Madras v. Dorairajan*,²²⁴ the Supreme Court of India ruled in favor of the petitioner, a high-caste Hindu denied admission, holding that the quota system violated article 15(1) of the Indian Constitution,²²⁵ which states: "The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, [or] place of birth."²²⁶ The Indian Parliament immediately responded to the ruling. Using its power to amend the constitution by a two-thirds vote of each house, Parliament added the following provision to Article 15: "Nothing in this article . . . shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes."²²⁷

In 1953, the President of India appointed a commission to recommend criteria for identifying "other backward classes" (termed OBCs in India), but after two years the commission was unable to reach consensus.²²⁸ Thus, states were left on their own to develop criteria. A recurrent problem developed: the extension of affirmative action to caste groups was apparently based more on their political clout in a particular state than their actual need for preferential treatment relative to other groups, leading to repeated Supreme Court decisions ordering states to redesign their programs using more objective and transparent processes.²²⁹ Just as proposals for "class-based affirmative" action are now

221. For a brief overview of India's approach to affirmative action, see Clark D. Cunningham, *Affirmative Action: India's Example*, 4 Civ. Rts. J. 22, 23 (1999); and Clark D. Cunningham & N.R. Madhava Menon, *Race, Class, Caste . . . ? Rethinking Affirmative Action*, 97 MICH. L. REV. 1296, 1303 (1999). The classic account is presented in GALANTER, *supra* note 220; however, for an analysis that views India's approach as a failure, see THOMAS SOWELL, *PREFERENTIAL POLICIES* 91-103 (1990).

222. 438 U.S. 265 (1978). See text accompanying notes 106-09, *supra*.

223. *State of Madras v. Champakan Dorairajan*, A.I.R. 1951 S.C. 226, 226-27.

224. *Id.*

225. *Id.* at 228.

226. INDIA CONST. art. 15(1).

227. *Id.* art. 15(4).

228. *Indra Sawhney v. Union of India*, A.I.R. 1993 S.C. at 501, 505-07.

229. *Id.* at 521-29 (summarizing cases). For a more extensive overview of this history, see Clark D. Cunningham & N.R. Madhava Menon, *Seeking Equality in Multicultural Societies* (Oct. 17, 1997), at <http://law.wustl.edu/conferences/Equality/art-23index.html>. For a political science perspective, see generally SUNITA PARIKH, *THE POLITICS OF PREFERENCE: DEMOCRATIC INSTITUTIONS AND AFFIRMATIVE ACTION IN THE UNITED STATES AND INDIA* (1997).

being considered in the United States, India experimented for a time with using only economic criteria to define OBCs. However, a study by the renowned Tata Institute of Social Sciences concluded that under this approach “the poor of the upper castes easily beat the poor of the lower castes” in receipt of preferential benefits to higher education and government employment.²³⁰

Dissatisfaction with the state-level approaches led to appointment of a second Presidential Commission in 1979 (known as the Mandal Commission, after the chairperson), which issued a comprehensive report and recommendations for national standards.²³¹ Responding to the Supreme Court’s concern about objective and transparent processes, the Mandal Commission conducted a national survey that started with generally recognized group categories—typically based on caste name or hereditary occupation—and tested each group using standardized criteria of “backwardness”—such as comparing the percentage of group members who married before the age of seventeen or did not complete high school with other groups in the same state.²³² Eleven numerical factors, given varying weights, were assigned to each group based on the survey results and those groups with total scores below a specified cut-off point were then included in a list of OBCs.²³³

The Mandal Report generated lively debate, but it was not until 1990 that the national government actually proposed implementing the report. Although implementation was delayed until the Supreme Court reviewed various constitutional challenges to the report’s methodology and recommendations,²³⁴ the Supreme Court approved most of the recommendations of the Mandal Report in the 1992 *Sawhney* decision.²³⁵ Two aspects of *Sawhney* provide particularly interesting points of comparison with the DBE program. First, the court approved the basic assumption of the Mandal Report that neither traditional caste categorization nor economic status, standing alone, was a sufficient basis for classifying a group as an OBC.²³⁶ Traditional caste categories can be used as a starting point for identifying OBCs, but selection criteria must include empirical factors beyond conventional assumptions that certain castes are “backward.”²³⁷

Second, the court added a new criteria for affirmative action eligibility. The court ruled that OBC membership only creates a rebuttable presumption that a member needs preferential treatment.²³⁸ Therefore, the state must also use an individualized economic means test to eliminate persons from affluent or profes-

230. I O. CHINNAPPA REDDY, REPORT OF THE KARNATAKA THIRD BACKWARD CLASSES COMMISSION, 15–16 (1990).

231. *Sawhney*, A.I.R. 1993 S.C. at 507.

232. *Id.* at 510–14.

233. *Id.*

234. *Id.* at 514–16.

235. *Id.* at 585–89.

236. *Id.* at 585–86.

237. *Id.*

238. *Id.* at 558–60.

sional families or the “creamy layer” of society.²³⁹ This creamy layer test looks to the occupation and income of a person’s parents, an approach consistent with Loury’s economic theory that distinguishes between “human capital” and “social capital.”²⁴⁰ The creamy layer test apparently assumes that if one’s parent has achieved substantial occupational and financial success—perhaps despite suffering personal discrimination—the parent will pass on that social capital to the child, minimizing the lingering effects of discrimination. The creamy layer test thus responds to two different criticisms of affirmative action commonly voiced in the United States: that many affirmative action beneficiaries come from privileged backgrounds and do not really need affirmative action and that affirmative action benefits do not reach the “truly needy” because they are monopolized by more privileged members of the group. Each state in India was directed to add a creamy layer test to its programs to benefit OBCs.²⁴¹

In 1996, the Supreme Court of India struck down the creamy layer tests of two state governments because the tests arbitrarily set the threshold for parental wealth and status so high as to make the tests ineffective.²⁴² In *Indra Sawhney v. Union of India (Sawhney II)*,²⁴³ the Supreme Court of India had to contend with another state government that “declared” by state legislation there was no creamy layer among any of the backward classes in that state.²⁴⁴ The Supreme Court appointed its own commission to establish interim creamy layer criteria for that state and then implemented the commission’s recommendations.²⁴⁵ The court pointedly observed that the state’s refusal to implement a creamy layer test “appears to us to have been taken because the real backwards [classes] obviously have no voice in that decision-making process.”²⁴⁶

Both the American DBE and the Indian OBC programs begin with a general, abstract category of “disadvantage” or “backwardness,” and both claim to provide preferential treatment to specific ethnic groups only because they happen to fit into the category. Both programs insist that disadvantage cannot be explained solely in economic terms. Moreover, social disadvantage provides the rationale for using ethnicity to identify and delimit beneficiary groups for both programs. The requirement of an individualized determination of economic disadvantage under the SBA’s section 8(a) program²⁴⁷ resembles India’s creamy layer test, although the Supreme Court of India requires that specific and objective economic criteria be set out, such as a cutoff for parental income or agricultural land

239. *Id.*

240. *Id.* at 560.

241. *Id.*

242. *Ashoka Kumar Thakur v. State of Bihar*, A.I.R. 1996 S.C. 75, 85.

243. A.I.R. 2000 S.C. 498.

244. *Id.* at 503.

245. *Id.* at 504.

246. *Id.* at 521.

247. *See supra* text accompanying note 197.

owned. Importantly, the Supreme Court of India does not itself decide whether any particular group is appropriately classified as eligible for affirmative action; rather, strict scrutiny in India focuses on the procedures and criteria used for selecting the group.

CONCLUSION: TOOLS FOR BETTER TAILORING

Although the phrase “narrow tailoring” appears both in cases involving judicially created remedies and in affirmative action programs developed by the other branches of government, the phrase seems to have somewhat different meanings in each context. When reviewing a trial judge’s injunction intended to desegregate public schools or remedy employment discrimination, narrow tailoring draws upon historic principles of equity law.²⁴⁸ Because a judge sitting in equity has potentially vast discretionary powers, a reviewing court will look closely at whether the injunctive relief is narrowly tailored to the evidentiary record as to injury.²⁴⁹ In this context, narrow tailoring operates as a constraint only on judicial power.

When reviewing an affirmative action plan created by a legislature or executive agency, narrow tailoring cannot mean that the legislature or agency is treated as a plaintiff with a burden of proof or as a trial court whose power is limited to remedying specific injuries proven by the parties before it.²⁵⁰ Instead, when reviewing legislative and agency action, narrow tailoring seems more focused on “smoking out” true motives rather than ensuring that all relevant facts have been established and used to design the most limited, effective remedy:

[T]he purpose of strict scrutiny is to “smoke out” illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen “fit” this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.²⁵¹

The narrow tailoring test, when applied to the legislative or executive branches, is particularly intended to reveal whether “classifications are in fact motivated

248. *Fullilove v. Klutznick*, 448 U.S. 448, 482–83 (1980) (plurality opinion of Burger, C.J.)

249. *Id.* at 483.

250. *Id.* (“[A] federal court is required to tailor “the scope of the remedy” to fit the nature and extent of the . . . violation.’ [But here we deal] not with the limited remedial power of a federal court, for example, but with the broad remedial powers of Congress.”) (citation omitted) (quoting *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 419–20 (1977) (quoting *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971))) (first alteration and omission in original); see also *id.* at 502 (Powell, J., concurring) (observing that “Congress is not an adjudicatory body called upon to resolve specific disputes between competing adversaries” in response to petitioners essentially arguing that Congress should be treated “as if it were a lower federal court”).

251. *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion of O’Connor, J.).

by illegitimate notions of racial inferiority or simple racial politics.”²⁵² Thus, in *Croson* the inclusion of Aleuts was problematic not so much because Aleuts may receive an undeserved benefit, but because this “random inclusion . . . suggests that perhaps the city’s purpose was not in fact to remedy past discrimination.”²⁵³

In 1994, George R. LaNoue, a political scientist, and John C. Sullivan, a lawyer at the Project on Civil Rights and Public Contracts at the University of Maryland, Baltimore County, published a thorough analysis of SBA decisions on whether to add new groups to the “four official minorities.”²⁵⁴ They found that the SBA decisions dating back to the 1950s only added ethnic groups that fit within the traditional four “official minorities.” Tongans, Indonesians, and persons with ancestry from the Indian subcontinent were added as “Asians” (or “Orientals”).²⁵⁵ Requests to add Hasidic Jews and Iranians were rejected.²⁵⁶ After their exhaustive review of SBA records, LaNoue and Sullivan concluded:

Examining this record, it is difficult to discern any consistent application of the agency’s published procedural or substantive standards [T]he relative economic disadvantage of groups is quantifiable and the data were often available from census records. The SBA never used the data and never analyzed them when petitioners [seeking to be added to the list of presumptively disadvantaged groups] introduced them, but instead employed a hodge-podge of rationales that appear largely to be pretexts for its decisions

On the other hand, when the agency did expand eligibility, . . . it did so without any independent examination of the actual social or economic status of those groups in America.²⁵⁷

The United States seems stuck at a point comparable to India before the Mandal Commission began its work. Our “map” of group categories, essential to program design, appears based on a mixture of inadequately examined folk categories and interest group politics.²⁵⁸ The key to the relative success of the

252. *Id.*

253. *Id.* at 506.

254. LaNoue & Sullivan, *supra* note 161, at 441. The original list of federally designated minority groups consisted of blacks, Hispanics, Asians, and American Indians. *Id.*

255. *Id.* at 450–56, 459–60.

256. *Id.* at 445–50, 456–59.

257. *Id.* at 461.

258. See Orleans, *supra* note 125, at 13–16. (“[W]hat must be labeled arbitrary—is the conglomeration of innumerable ethnic groups into the five categories . . . [which] are primarily geographic, not social, communal, cultural, racial, national, or in any sense scientific. It is a classification derived, by the historical process we have sketched, for purposes of statistical and political convenience Historically, a larger or smaller core of each minority population undoubtedly endured conquest, oppression, or discrimination within the changing boundaries of the American state. But the definition (and, hence, the number) of each population has not been the result of any objective determination of the extent of such discrimination Instead it originated in general convictions about discrimination held by key officials and advocated or rejected by leaders of minority organizations. The precise definition and scope of each minority population originated largely in survey requirements for clarity, simplicity, practicability, and government-wide uniformity, and in response to pressures to relax and broaden the definition of the Hispanic and Asian populations.” (footnotes omitted)). *Id.*

Mandal Commission approach seems to be that the criteria and procedures for deciding whether a group is sufficiently disadvantaged were announced in advance and then applied on the basis of empirical research.²⁵⁹ This approach helped ensure that classification was not “the product of rough compromise struck by contending groups within the democratic process,”²⁶⁰ or, as the Supreme Court said in *Adarand*, “simple racial politics.”²⁶¹

The *Chronicle of Higher Education* recently published a proposal by John Skrentny to create a bipartisan Presidential commission “to measure equal opportunity, throwing out all of the old assumptions and asking fresh questions.”²⁶² The report produced by such a commission

should not infer patterns of discrimination solely from statistics of employment representation or compensation, but should also include the “tester” studies favored by some civil-rights groups, whereby persons of varying races and ethnicities apply for jobs, housing, or loans at the same places, and the results are compared. Further, a truly comprehensive report would use interviews, and cull the results of past and new ethnographic studies of the role that discrimination may play in American life.²⁶³

Only one statutory provision prevents the SBA and DOT from using the report of such a commission to engage in more effective tailoring of “social and economic disadvantage” to remedying the lingering effects of past discrimination: section 8(d) of the SBA requiring federal contractors to “presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans.”²⁶⁴ If Congress simply removed the words “and economically,” then the DOT would be free to amend its regulations to conform with the SBA’s section 8(a) program, requiring an individualized determination of economic disadvantage. This change alone would go a long way toward tailoring the DBE program more closely to the lingering effects problem. However, India’s experience with implementing the comparable creamy layer test suggests that the DOT and SBA would be well-advised to promulgate objective criteria of economic disadvantage susceptible to judicial review to avoid an illusory economic means test that leaves racialized categories essentially unchanged.

259. Many intellectuals in India have been critical of the Mandal Commission report and questioned its methodology as outdated and simplistic. See, e.g., M.N. Srinivas, J.R.D. Tata Professor, National Institute of Advanced Studies, India (Nov. 10, 1997), in *Address at the Rethinking Equality in the Global Society Conference* 75 WASH. U. L.Q. 1561, 1657–60 (1997).

260. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 299 (1978) (opinion of Powell, J.).

261. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 226 (1995) (plurality opinion of O’Connor, J.) (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion of O’Connor, J.)).

262. Skrentny, *supra* note 215, at B10. Although Skrentny and Cunningham are co-authors of this Article, when Skrentny made his proposal for a Presidential commission he was unaware of Cunningham’s similar suggestion based on India’s Mandal Commission.

263. *Id.*

264. 15 U.S.C. § 637(d)(3)(c)(ii) (2001).

If Congress removed the entire mandatory presumption phrase from section 8(d), then the SBA would be free to reassess the list of disadvantaged groups using the kind of social science methods demonstrated by India's approach to affirmative action. Again, India's experience suggests that the SBA would be well-advised (and perhaps should be required) to start fresh and also to reexamine the list on a periodic basis, perhaps triggered by the ten-year census.

The work of a national, bipartisan commission may also cut the Gordian knot that currently prevents institutions of higher education from using—or admitting they are using—societal discrimination as a goal for affirmative action.²⁶⁵ Recall that Justice Powell's key swing vote in *Bakke*, rejecting societal discrimination and leaving only diversity as a permissible rationale for university affirmative action, is best understood as skepticism about the competence of universities to measure society-wide discrimination.²⁶⁶ Indeed, Justice Powell

265. Deborah Malamud points out that even if universities are forced by *Bakke* to justify their affirmative action programs in terms of the diversity rationale, they might in fact be more powerfully motivated by concern over the resegregation effect of abandoning race-based affirmative action measures. Deborah C. Malamud, *Affirmative Action, Diversity, and the Black Middle Class*, 68 U. COLO. L. REV. 939, 942–47 (1997). She also suggests that advocates of affirmative action not abandon the societal discrimination argument if they have the opportunity to address the Supreme Court. *Id.* at 947.

266. See *supra* text accompanying notes 106–123. In *Bakke* there was very little evidence whether the medical school was competent to design an admission program tailored to the lingering effects of past discrimination because the school did not even seem to try. As Justice Powell pointed out, the medical school was simply “unable to explain its selection of only the four favored groups—Negroes, Mexican-Americans, American Indians, and Asians—for preferential treatment.” *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 309 n.45 (1978) (opinion of Powell, J.). In the University of Michigan law school case, an impressive body of expert social science testimony was marshaled by the university. See *The Compelling Need for Diversity in Higher Educations*, 5 MICH. J. RACE & L. 241 (1999) (reprinting expert reports submitted in *Grutter v. Bollinger*, 137 F. Supp. 2d 821 (E.D. Mich. 2001)). This expertise could be used to design an affirmative action program based on lingering effects as well as diversity considerations.

Take, for example, the affidavit of Claude Steele submitted by the law school. *Id.* at 439 (affidavit of Claude M. Steele). The law school did not offer Professor Steele as a witness at the evidentiary hearing before the district court but only submitted his affidavit. See *id.* 867. The district court did not give much weight to Steele's affidavit, in part because the court was apparently unaware of the extent of Steele and Aronson's research and its widespread acceptance in the field of psychology. See *supra* notes 7–11 and accompanying text. Instead, the court dismissively said that Steele “once conducted an experiment” and said it does not know “whether the results were published and subjected to peer review.” *Grutter*, 137 F. Supp. 2d at 867 (emphases added). The district court also discounted Steele's affidavit because he had not applied his stereotype theory and methodology to the specific context of the LSAT and law school education. *Id.* (Steele's affidavit states: “My conclusions can be fairly generalized to the . . . LSAT exams . . .” *The Compelling Need for Diversity in Higher Education, supra*, at 439 (affidavit of Claude M. Steele) (emphasis added)). The district court said: “If there is evidence showing that stereotype threat accounts for some of the LSAT gap, it was not produced in this case.” *Grutter*, 137 F. Supp. 2d at 867–68. The law school's case would look quite different if it had commissioned Steele to study (1) whether a racial or ethnic stereotype effect can be found among applicants who take the LSAT; (2) whether a similar stereotype effect can be found in first year law school examination grades (which the LSAT is arguably good at predicting); (3) whether such a stereotype effect, if found, can be neutralized by changing the LSAT test; and (4) if the effect cannot be neutralized, how reliance on LSAT should be adjusted in light of the effect, and then if the law school had redesigned its admission policies in reliance on his findings. See Kidder, *supra* note 101, at

even qualified his statement about whether universities could attempt to remedy lingering effects of discrimination through affirmative action admission programs: “[I]solated segments of our vast governmental structures are not competent to make those decisions, at least in the absence of legislative mandates and legislatively determined criteria.”²⁶⁷ The Court of Appeals for the Fifth Circuit may have had Justice Powell’s language in mind when it suggested in *Hopwood* that a narrowly tailored, race-conscious admission program might be constitutional if there was (1) a finding by the state legislature that past segregation has present effects, (2) a determination of the magnitude of those present effects, and (3) a carefully limited “plus factor” designed to remedy that harm.²⁶⁸

If a competent national body, following the example of India’s Mandal Commission, provided the basic data on lingering effects of discrimination and provided the tools to refine that data both geographically and in terms of different programmatic settings, then a state legislature could act upon such a report to create the kind of mandate and criteria Powell found missing in *Bakke*. Given such a mandate and set of criteria, the nation’s great state-funded research universities could then lead the way in designing narrowly tailored admission programs and, thus, make their own contribution to our compelling national interest in eliminating the lingering effects of discrimination.²⁶⁹

1085–89 (hypothesizing that first-year law school grades for disadvantaged ethnic groups are even lower than predicted by LSAT scores because both forms of assessments are affected by stereotype threat effects).

267. *Bakke*, 438 U.S. at 309 (opinion of Powell, J.) (emphasis added).

268. *Hopwood v. Texas*, 78 F.3d 932, 951 (5th Cir. 1996). The Texas Legislature *has* responded to the *Hopwood* decision out of an apparent concern about the lingering effects of past discrimination—not in the way suggested by the 5th Circuit, but by using methods that may be formally “color blind” but are not “color neutral” in either purpose or effect. See Glenn C. Loury, *Admit It*, NEW REPUBLIC 1, 6, Dec. 27, 1999. First, the Texas Legislature promulgated the now-famous “ten percent plan,” which made the top ten percent of every graduating class from every public high school in Texas automatically eligible for admission to the undergraduate program at the prestigious Austin campus of the University of Texas. See William E. Forbath & Gerald Torres, *Merit and Diversity After Hopwood*, 10 STAN. L. & POL’Y REV. 185, 185–87 (1999). Because public schools remain tragically segregated in Texas, this plan had the effect of turning de facto segregation in secondary education into a de facto affirmative action program for undergraduate admission for higher education. *Id.* at 187. The “ten percent plan” does not apply to admission to law school or other graduate schools. However, on June 15, 2001, the Governor of Texas signed into law a statute affecting graduate and professional education that prohibits the use of standardized test scores “as the primary criterion to end consideration” of an applicant and requires that such scores, if used at all, must be compared to “other applicants from similar socioeconomic backgrounds.” Sec. 51.822 (b), Ch. 51, Education Code, as added by House Bill 1641. It will be important to study the implementation of this new statute to see if Texas is able to overcome the limitations of socioeconomic factors encountered in California in the effort to avoid resegregation of elite institutions of higher education. See *supra* notes 96–102 and accompanying text.

269. As this Article was going to press, the Court of Appeals for the Sixth Circuit issued a 5–4 decision in *Grutter* upholding the constitutionality of the law school’s affirmative action program. *Grutter v. Bollinger*, 2002 WL 976468 (6th Cir. May 14, 2002). (The Sixth Circuit had not yet announced a decision in *Gratz*.) Unfortunately neither the majority opinion nor the dissenting opinions considered the intervenors’ claim that affirmative action was justified not only by the need for diversity but also to remedy lingering effects of discrimination. *Id.* at *6 n.4; *id.* at *60 n.17 (Boggs, J. dissenting). For a discussion of how both the majority and dissenting opinions are impoverished by being limited to the well-rehearsed arguments of the diversity debate, see John D. Skrentny, *Judges in U. of Michigan Case Skirted the Thorniest Issues*, Chron. Higher Educ., May 31, 2002, at B20.