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THE FUTURE OF FEDERAL DISADVANTAGED BUSINESS ENTERPRISE PROGRAMS: DID THE SUPREME COURT’S DECISION IN ADARAND CONSTRUCTORS V. PENA REALLY MAKE A DIFFERENCE?

By Jennifer L. Haynes

I INTRODUCTION

Upon remand from the Supreme Court, the United States District Court for the District of Colorado rendered the final decision in Adarand Constructors v. Pena. The district court held that the Disadvantaged Business Enterprise (DBE) program implemented by the Federal Highway Administration failed the strict scrutiny standard of review. The United States Senate, however, recently voted to reject an amendment which would eliminate this DBE program. Although the program survived the Senate, the district court’s decision highlights the difficulty that Congress faces in developing national affirmative action legislation that meets the strict scrutiny standard. Strict scrutiny erodes Congress’ enforcement powers under section five of the Fourteenth Amendment. Consequently, Congress’ ability to alleviate discrimination through affirmative action is impaired.

Both business and government employers implement affirmative action programs to rectify past discrimination. There are generally three reasons why employers implement such programs. First, employees or other identifiable victims of discrimination sue the employer for discriminatory practices. In response to the lawsuit, the employer establishes a private affirmative action plan. Second, employers may voluntarily enact affirmative action programs to avoid litigation if demonstrated discrimination exists. Third, governments at all levels may implement affirmative action programs such as DBE’s. Therefore, Disadvantaged Business Enterprise programs fall under the larger umbrella of affirmative action.

DBE’s are affirmative action programs designed to give women and minorities preferential status in the government contract bidding process. DBE contracts typically provide the government with various services, products, manufacturing, or construction. The government generally maintains a goal of ten percent participation for DBE program members. DBE’s, like other affirmative action programs, attempt to rectify past and present discrimination in two ways. First, the programs seek to increase minority entrepreneurship in industries which discriminate. Second, such programs attempt to increase interaction between minority and nonminority

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2 Jennifer Haynes, candidate for Juris Doctor, 1999. I wish to thank Professor Roger Groot, Mr. Jesse Haynes, Elizabeth Garcia, and Cortland Putbrese for their assistance and comments on this article.
5 Alan Fram, Senate Preserves Minority Contracts, Washington Post, March 6, 1998. Congress rejected the amendment by a vote of 58 to 37. Id.
6 U.S. Const. amend. XIV, § 1 and § 5. These sections read:

§ 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . .

§ 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article. (emphasis added)

7 In fact, in Regents of the University of California v. Bakke, 438 U.S. 265 (1978), the Supreme Court outlined the factors necessary for the implementation of affirmative action. This decision coupled with the Supreme Court’s decisions in Title VII challenges to affirmative action outline the parameters of affirmative action programs. These factors will be discussed in detail later in the article.
8 See Peightal v. Metropolitan Dade County, 26 F3d 1545 (11th Cir. 1994), for an example of a government employer responsible for discriminatory conduct.
11 Most DBE programs include both women and racial minorities. The Supreme Court has addressed only the racial component when deciding cases dealing with DBE programs. In most states, however, women participate in DBE programs at a greater rate than racial minorities. See Adarand, supra, note 179.
13 The Use of Section 8a Contracts, Before the Senate Committee on Small Business, 103rd Congress (1994) (state-
entrepreneurs and further diminish or eliminate discrimination within the targeted industry.

The purpose of this article is to determine whether the Adarand decision has impacted Disadvantaged Business Enterprise programs. As stated previously, Congress traditionally has used its enforcement powers under the Fourteenth Amendment to redress the problem of racial discrimination. Unfortunately, the Adarand decision may undermine Congress' ability under the Constitution to eliminate discrimination through affirmative action legislation. Each of the fifty states has unique demographics with differing proportions of various racial groups. Because of this diversity, Congress alone is in the best position to develop and implement legislation that addresses nationwide racial discrimination within particular industries. Adarand's requirement of strict scrutiny raises the issue of whether Congress can continue to effectively remedy racial discrimination through programs like DBE's. This article will examine the current state of affirmative action law and its impact on DBEs. It will conclude by analyzing federal DBE program data to determine if the Supreme Court's decision in Adarand has affected Disadvantaged Business Enterprise programs.

This article is divided into five parts. Part I deals with the United States Supreme Court's treatment of constitutional challenges to affirmative action. Part II examines Title VII challenges to affirmative action programs. Title VII cases are included because the district court in Adarand relied on many of the same factors that courts utilize in evaluating Title VII claims. Part III discusses the Colorado district court's application of the strict scrutiny standard as articulated by the Supreme Court in Adarand. This case illustrates the difficulties which Congress faces in enacting future race-based legislation such as DBE programs. Part IV predicts trends in the law and implementation of DBE programs. Part V concludes with a discussion of the Federal Highway Administration's DBE program. This particular program illustrates Adarand's economic impact on DBE programs. The Federal Highway Administration's DBE program further demonstrates the manner DBE programs are administered at the state level.

I. CONSTITUTIONAL CHALLENGES TO AFFIRMATIVE ACTION

This section examines the major Supreme Court decisions on affirmative action. The Supreme Court first addressed the issue of affirmative action in Regents of the University of California v. Bakke. Until Bakke, the Court had not considered the use of benign racial classifications. In Bakke, the Supreme Court addressed a Fourteenth Amendment equal protection challenge to a strict quota system. The Court examined the admissions policy at the University of California Davis Medical School, which set aside sixteen slots exclusively for members of racial minorities to increase the number of minorities in the medical school. Bakke argued that the strict quota system unfairly discriminated against white students. The University of California claimed that while the school had never discriminated on the basis of race, the strict quota system was necessary because societal factors had placed minorities at a disadvantage in the admissions process.

The Bakke decision outlined the basic framework of affirmative action case law. The Court stated that a strict quota system was an improper use of affirmative action. Furthermore, broad-based societal discrimination does not justify the use of an affirmative action plan. The affirmative action plan must be tied to the actual conduct of the entity implementing the program. Despite the Court's rejection of a strict quota system, a plurality stated that using race as a "plus" factor was acceptable. Essentially, this means that when evaluating two equal candidates, the university could choose a racial minority over a nonminority in the interest of establishing a diverse student body. Thus, the Court disassembled the school's affirmative action program, but allowed the university to consider race when making admission decisions.

To some degree, the Bakke decision was dependent on its facts. Unlike affirmative action in the workplace, the Court recognized the unique environment created in the educational arena. As early as the first desegregation cases, the Court acknowledged that the educational process benefits from the free flow of ideas exchanged among people of different races, genders and economic backgrounds. In evaluating the stated goals of the California affirmative action program, Justice Powell wrote:

[A diverse student body] clearly is a constitutionally permissible goal for an institution of higher education. Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body.
In the employment sphere, the Supreme Court required more than a desire for a diverse workforce to justify the use of affirmative action. Some commentators fear that the same justifications used to substantiate discrimination in the past will be used to validate discrimination against whites. These commentators believe that affirmative action programs prevent the development of an impartial process for allocating jobs, government resources, and college admissions. In response to these concerns, the Court articulated two important limits. First, the Court stated that a qualified affirmative action plan must have a logical stopping point. Second, the Court articulated a desire to establish a strong correlation between the groups targeted by the plan and the local demographic area.

In *City of Richmond v. J.A. Croson*, the Supreme Court increased the standard of review for race-based legislation enacted at the state level. *Croson* dealt with a city-sponsored DBE program which provided preferences for all identifiable racial and ethnic groups without regard to their actual presence within Richmond. The plan included blacks, Spanish-speaking individuals, orients, Indians, Eskimos, and Aleuts. In addition, the plan did not have a geographical limit, and any qualified DBE could participate in the program. *Croson* argued that the plan was overinclusive and that it discriminated against white contractors. The Court increased the standard of review for state race-based legislation and remanded the case to the district court for further proceedings. The decision required strict scrutiny review of any state or local government race-based legislation. As a result of this decision, localities began to increase the use of statistical analysis to prove with particularity that discrimination exists.

In the year following the *Croson* decision, the Court in *Metro Broadcasting v. Federal Communications Commission* revived the reasoning in *Bakke*. In *Metro Broadcasting*, the Court upheld a Federal Communications Commission (FCC) program which granted minorities preferential status in the purchasing of television and radio stations. The petitioner challenged the program, arguing that white buyers were denied equal protection because the FCC only allowed people of color to purchase broadcast stations at the special low rate. The Court upheld this program under an intermediate level of scrutiny. Although the Court later overruled this application of intermediate scrutiny in *Adarand*, the Court did not reject the reasoning of the *Metro Broadcasting* case. In ruling for the FCC, the Court stated that the "wildest [sic] possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." The Court also noted that enhancing broadcast diversity is an important governmental objective and a sufficient basis for upholding the FCC program. Thus, the Supreme Court in *Metro Broadcasting* gave weight to the First Amendment concerns articulated in *Bakke*. Just six years after the *Croson* Court discussed the greater latitude afforded the federal government in race-based legislation, the Supreme Court issued the *Adarand* decision. In *Adarand*, the Court extended the strict scrutiny standard articulated in *Croson* to congressional legislation. The *Adarand* Court evaluated a DBE program established by the United States Department of Transportation. This DBE program, established under the Intermodal Surface Transportation Act, included nearly every racial minority within the United States. The DBE program applied to all states equally and allowed individual state departments of transportation to implement the program. State transportation officials determine the eligibility of businesses wishing to participate in the program. Furthermore, state transportation

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29 Id.
31 Id.
32 Id. at 478.
33 Id.
34 J.A. Croson Co., 488 U.S. at 478.
35 Id.
36 Id. at 490.
37 Id. at 493.
39 Id. at 552.
40 Id. at 558.
41 Id. at 566.
43 Metro Broadcasting, 497 U.S. at 566 (quoting Associated Press v. United States, 326 U.S. 1, 20 (1945)).
44 Id. at 567-68.
45 J.A. Croson, 488 U.S. at 469. In this case, the Supreme Court states: "The power 'to enforce' may at times also include the power to define situations which Congress determines threaten principles of equality and to adopt prophylactic rules to deal with those situations." Id. at 490.
46 Adarand, 515 U.S. at 227.
47 Id. at 205.
49 Adarand, 515 U.S. at 207.
50 Id. at 208.
51 Id.
52 Id.
officials are responsible for monitoring the DBE program and its participants.

The Court began its analysis in *Adarand* by noting that the Fourteenth Amendment applies to individuals and not groups. As a result of the Constitution's emphasis on the individual, group-based legislation is subject to detailed inquiry to ensure that each citizen's right to equal protection has been maintained. This heightened scrutiny required that Congress establish a remedy narrowly tailored to meet the stated objective of addressing discrimination in highway construction.

The recent Supreme Court decisions of *Croson* and *Adarand* highlight the evolution of the Court's treatment of affirmative action plans. Through *Adarand*, the Court has eroded Congress' power to ameliorate the vestiges of discrimination. Historically, Congress has taken the initiative to end racial discrimination by enacting race-conscious remedies. As the Court articulated in *Croson*, because states had been reluctant to address problems of racial equality, state action on racial issues has been suspect. The practical application of strict scrutiny at the state level, however, does not preclude state or local governments from enacting race-conscious legislation. Many states can successfully implement DBE programs once the government proves that discrimination exists and a remedy is needed. By contrast, *Adarand*'s strict scrutiny requirement forces Congress to evaluate the scope of discrimination across the country. It further requires Congress to draft legislation that addresses the unique needs of each state so that the program is neither overinclusive nor underinclusive. Because *Adarand* applies a strict scrutiny standard to federal affirmative action legislation, Congress no longer enjoys the deference it once possessed under *Croson* in enacting such legislation.

II. TITLE VII CHALLENGES TO AFFIRMATIVE ACTION

In recent years, constitutional challenges to affirmative action have incorporated many of the factors used in traditional Title VII analysis. In many cases involving Title VII analysis, the employer has implemented an affirmative action plan because that specific employer has discriminated. Courts utilize Title VII in assessing these employment discrimination cases because they are a subset of affirmative action much like governmental DBE legislation. However, traditional Title VII analysis is inappropriate for evaluating government conduct in DBE programs for a number of reasons. Unlike DBEs, a Title VII plan does not address the entire industry in which the business participates. Furthermore, employees under Title VII plans typically stay within the confines of their business whereas contractors under DBE programs may travel throughout a region or across the country to their worksite. Finally, the goal in private affirmative action plans is to rectify the immediate problem and change long-term hiring policies. In contrast, governments implementing DBE programs have different motives. DBE programs have the secondary goal of changing society by increasing the number of minority entrepreneurs in the United States.

Typically, Title VII affirmative action plans are either court-mandated or implemented by the employer to prevent litigation. Affirmative action plans that comply with Title VII are of limited duration and attempt to remedy the results of prior discrimination. The cases involving Title VII affirmative action plans include agreements between unions and companies to increase the numbers of minorities in industries which have historically discriminated against people of color. The Supreme Court has also established that the antidiscrimination language in Title VII applies to whites as well as blacks. This decision provides the basis for nonminorities to make Title VII challenges to voluntary affirmative action plans, as well as challenges to race-based legislation such as DBE programs.

The first Title VII cases which came before the Supreme Court determined the manner in which discriminatory conduct would be evaluated. In such cases, if a violation is found, the defendant is required to remedy the problem. Typically, this remedy takes the form of an affirmative action plan. The following cases illustrate the manner in which affirmative action plans are evaluated under Title VII.

In *United Steel Workers of America v. Weber*, the
Supreme Court examined the validity of a voluntary affirmative action program. In Weber, only 1.7 percent of all skilled craftsmen at the Kaiser Aluminum plant were black. Blacks, however, comprised 39 percent of the overall work force. To rectify this situation and prevent a lawsuit, the local union and Kaiser Aluminum attempted to increase the number of skilled workers through a special training program. This voluntary affirmative action plan required black and white workers to be chosen on a one-to-one basis until the racial disparity was eliminated. Although the remedy provision for Title VII envisions race-based action to rectify past incidents of discrimination, typically, there is an identifiable victim. In Weber, however, there was no such victim. Kaiser Aluminum, the employer, attempted to avoid a lawsuit and potential punitive damages by implementing the voluntary affirmative action plan. Weber, a white unskilled laborer, filed suit on the grounds that the program was race-based and discriminated against whites.

The Weber Court stated that the text of Title VII was intended to encourage employers to evaluate their practices and endeavor to end racial discrimination. Although section 703 of Title VII prohibits discrimination on the basis of race under any circumstances, the Court carved out an exception for companies attempting to prevent litigation. The Court held that Title VII does not prohibit all private voluntary affirmative action plans. It recognized that by allowing companies to voluntarily rectify past discrimination, they would be abiding by the spirit of the law. An affirmative action plan that increases opportunities for racial minorities without intruding on the rights of white employees is acceptable. The program implemented must be a temporary plan to eliminate racial disparity and not a permanent plan to maintain racial balance.

Seven years later, the Supreme Court addressed another Title VII challenge to affirmative action in Local 28 of the Sheet Metal Workers' International Association v. Equal Employment Opportunity Commission. In this case, the Local Sheet Metal Workers' union refused to admit nonwhite members. In 1969, the union altered its policy and permitted minorities to join. Although official policy had changed, there were still no nonwhite members by 1974. Minorities subsequently sued for admission.

The Supreme Court held that section 706(g) of Title VII does not prevent a court from ordering race-conscious relief as a remedy for past discrimination, nor does the code only provide relief for the actual victims of an employer's discrimination. The Court noted that the availability of relief under Title VII allowed the judicial system to fashion the most complete possible remedy for past discrimination. It further recognized that enjoining an employer or union from discrimination was often an insufficient remedy if there was evidence of long-standing or egregious discrimination. Even after formal discrimination had ceased, informal actions could obstruct equal opportunities. For example, companies may have a reputation for discrimination even after formal policy has changed, thus discouraging minority applicants. Requiring the party at fault to admit qualified minorities in the same proportions as found in the labor pool may be the only effective way of eliminating discrimination.

As illustrated by these cases, affirmative action plans implemented under Title VII address the narrow problem of a specific employer's conduct. The Supreme Court has held that once an affirmative action plan is implemented, the plan must be of a limited duration. Furthermore, the plan may or may not address an identifiable victim, and it must have realistic goals based on the relevant labor pool. These factors are determined by the demographics of the area, the nature of the employer's conduct, and the extent to which the employer complies

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68 Id. at 198.
69 Id.
70 Id.
71 Weber, 443 U.S. at 198.
72 Id.
73 Id.
74 Id.
75 Id. at 204.
76 Section 703(a), 42 U.S.C. § 2000e-2(a) provides: "(a) . . . It shall be an unlawful employment practice for an employer - (1) to fail or refuse to hire or to discharge any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin; or employment in any way (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin." Id.
77 Weber, 443 U.S. at 204.
78 Id. at 208.
The final difficulty the district court faced involved deter-
mination which party had the burden of proof. 

The strict scrutiny standard is com-
pressed of a two prong test. First, the state must demon-
strate a compelling interest in the enacted legislation. Sec-
ond, the legislation must be narrowly tailored to achieve the compelling state interest. On remand, the Colorado district court noted the difficulty in evaluating the Intermodal Surface Transportation Act under the guidelines of the Supreme Court's vague ruling. The court noted that the Adarand decision is ambiguous because the Supreme Court failed to identify when the state has a compelling interest in discrimination. Furthermore, the Court provided no guidance for the district court in determining what constitutes narrowly tailored race-based legislation. The final difficulty the district court faced involved determining which party had the burden of proof. Must the plaintiff establish that the legislation was not narrowly tai-
lored, or did the government have the burden of proving that the legislation was narrowly tailored? These questions left a great deal of discretion to the district court in its analysis of federal race-based legislation.

The district court began its analysis by discussing the issue of compelling state interest. The court stated that government has a compelling state interest in eliminating discrimination through affirmative action. Because the United States argued that Congress' scope of authority differs from state and local governments, the evidence required to demonstrate a compelling governmental interest will likewise be different. Under Croson, states must demonstrate that the racial groups targeted in the legislation exist within the borders of the state. Furthermore, they must have statistical and anecdotal evidence of discrimination within the state. In Adarand, however, the district court stated that Congress' power under section five of the Fourteenth Amendment is broader than that of the state and local governments. Congress may evaluate the entire nation in determining whether there is industry-wide discrimination. The district court noted that Congress' ability to legislate nationwide problems places it on a higher constitutional plane than a city council. Therefore, the dis-

tinct court concluded that evidence of discriminatory barriers facing DBE's in federal construction contracts nationwide would be sufficient to support a compelling governmental interest. This discrimination may be passive participation in private acts of discrimination or active discrimination on the part of the government entity in question. Despite the district court's recognition that Congress is not required to prove discrimination with the same particularity as that required of the states, the court made it clear that Congress must still establish that the interest in eliminating the targeted evil is so compelling that it justifies the use of race, the most suspect of all classifications.

Notwithstanding the discussion of what constitutes a compelling state interest, the district court stated that Congress had an even more difficult hurdle to jump. The court noted that the second prong of strict scrutiny requires that any nationwide legislation be narrowly tai-
lored to meet the compelling state interest. Under the

III. THE ADARAND DISTRICT COURT'S EVALUATION OF FEDERAL AFFIRMATIVE ACTION UNDER THE STRICT SCRUTINY STANDARD

As indicated earlier, Adarand's extension of strict scrutiny to federal DBE programs places several hurdles before Congress. Now, when enacting race-based legislation, Congress will have to meet standards such as those articulated in the above Title VII affirmative action cases. After the Supreme Court decided Adarand in 1995, the Court remanded the case to the district court for a rehearing under the strict scrutiny standard of review. Two years later, on June 2, 1997, the United States District Court for the District of Colorado announced the final decision in the Adarand case.

The Supreme Court's application of strict scrutiny to federal race-conscious legislation left more questions unanswered than answered. The strict scrutiny standard is comprised of a two prong test. First, the state must demonstrate a compelling interest in the enacted legislation. Second, the legislation must be narrowly tailored to achieve the compelling state interest. On remand, the Colorado district court noted the difficulty in evaluating the Intermodal Surface Transportation Act under the guidelines of the Supreme Court's vague ruling. The court noted that the Adarand decision is ambiguous because the Supreme Court failed to identify when the state has a compelling interest in discrimination. Furthermore, the Court provided no guidance for the district court in determining what constitutes narrowly tailored race-based legislation. The final difficulty the district court faced involved determining which party had the burden of proof. Must

93 Id. at 1577.
94 Id. at 1571.
95 Id. at 1577.
96 Adarand, 965 F. Supp. at 1570.
97 Id.
98 Id.
99 Id.
100 Id.
101 Adarand, 965 F. Supp. at 1571.
102 Id. at 1576.
103 Id. at 1573.
104 Croson, 488 U.S. at 497.
105 Adarand, 965 F. Supp. at 1576.
106 Id. at 1573.
107 Id.
108 Id. at 1572 (quoting Croson, 488 U.S. at 489.)
109 Id. at 1576.
110 Adarand, 965 F. Supp. at 1573.
111 Id. at 1574.
112 Id. at 1577.
113 Id. at 1576. The district court outlined five factors that may be relevant in determining whether an affirmative action plan is narrowly tailored to achieve its goal. First, the court
district court's reasoning, Congress failed to satisfy the second prong of the strict scrutiny test. The court held that the DBE program is both overinclusive and underinclusive. The program is overinclusive in that it presumes that the named minority groups are economically and socially disadvantaged. The court stated that Congress must determine whether a particular entity seeking a racial preference has suffered from past discrimination. The district court also held that the plan is underinclusive because it excludes groups whose members are economically and socially disadvantaged due to past and present discrimination. Although there were safeguards in the program designed to prevent over- or underinclusiveness, the court determined that these measures were insufficient. Finally, the court found that the remedial measures were unlimited in duration and, therefore, failed to meet the standards set forth in other Supreme Court cases.

These stringent requirements make it difficult to enact a nationwide race-based regulation such as the DBE program in question. In fact, the district court in Adarand even stated: "Contrary to the Court's pronouncement that strict scrutiny is not 'fatal in fact,' I find it difficult to envisage a race-based classification that is narrowly tailored." The district court's analysis here cripples nationwide race-conscious legislation and Congress' authority under section five of the Fourteenth Amendment. Moreover, the court's analysis fails to make the distinction between the federal government addressing a national problem and the Title VII scenario where a single employer is responsible for active discriminatory conduct. Furthermore, any participant in the program must demonstrate that it has been a victim of discrimination. The district court, however, did not address where that discrimination must have taken place. Because each state administers the DBE program individually, does the applicant have to demonstrate discrimination within the state in question or anywhere in the country?

As evidenced by the district court's holding in Adarand, the strict scrutiny standard articulated by the Supreme Court has a negative impact on federal race-conscious legislation. Once courts recognize that the government is a passive participant in discrimination, then they should also recognize that Congress has a duty to ameliorate the problem. The Fourteenth Amendment grants Congress the authority to enforce its prohibition against discrimination by government actors. Toward this end, Congress is authorized to implement affirmative steps to terminate this problem. Unlike discrimination within a locality, industry-wide discrimination requires a national remedy. If, however, Congress transfers to the states the responsibility of legislating on the issue of discrimination, then it is possible that some mobile businesses will move their operations to states that refuse to address discrimination. Furthermore, DBE legislation relates to business agreements with the federal government. Even if state governments implement the program, the money is still provided by the federal government. Therefore, Congress is the only entity that can effectively address the issue of discrimination.

IV. GOVERNMENT REACTION TO ADARAND

Congress faces many difficulties in writing race-conscious legislation for the entire nation. Even if state and local governments implement the program, the social and economic disadvantages plaguing many of America's citizens differ from city to city and from region to region. Even though the district court in Adarand stated that the federal government is not on the same constitutional plane as a city council, the court's criticism that the program was overinclusive and underinclusive indicates that the federal government is required to legislate with local specificity. This should not be the case. The Adarand decision creates unnecessary barriers to national redress of discrimination.

One method by which the federal government can provide race-conscious remedies at a national level is exemplified by the Intermodal Surface Transportation Act (ISTA) which was the subject of Adarand. The ISTA provides federal funding for state highway construction. As part of this funding, each state highway project has a goal for minority participation. The ISTA requires state highway officials to implement the DBE program. Although these state employees are fully funded by the federal government, and all monies associated with the program are provided by the federal government, each

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116 Id. at 1581.
117 Id.
118 Id.
119 Id.
120 Adarand, 965 F. Supp. at 1581.
121 Id. at 1579.
122 U.S. Const. amend. XIV, § 5.
123 Adarand, 965 F. Supp. at 1573.
124 Id. at 1570.
126 Id.
127 Id.
state has a great deal of latitude in implementing the DBE program. States must determine which businesses qualify for the DBE program and what groups are socially and economically disadvantaged.

In Adarand, the district court criticized the manner in which the Colorado Department of Transportation implemented the program. The state office did not provide adequate documentation to ensure that the participants in the program were victims of discrimination. The district court also criticized the presumption of disadvantage for minority contractors. As a result of the district court's decision, the Federal Highway Administration proposed new regulations for state highway officials administering this program. These regulations include a variety of components which provide state highway officials greater autonomy. For example, the regulations allow state officials to operate the DBE program according to the needs of the state without adhering to all of the federal mandates as long as the officials seek a waiver. In addition, states will also be required to meet the DBE goals through community outreach, free technical assistance in operating the business, and other similar race neutral methods. For example, state and regional transportation officials could sponsor free workshops on the DBE program. This increase in race-neutral remedies would help satisfy the district court's concern that state highway officials failed to use less intrusive methods for increasing minority participation.

Additional Federal Highway Administration regulations include allowing DBE prime contractors to receive evaluation credits over non-DBE contractors. An evaluation credit will provide DBE prime contractors with a one to ten percent price advantage during the bidding process. DBE prime contractors may then be chosen if they are within one to ten percent of the lowest bid. Additionally, non-DBE prime contractors that use DBE subcontractors would also receive evaluation credits. States would be required to meet the DBE goal of ten percent on each project primarily through the race-neutral means articulated previously. However, if those efforts failed, states would provide evaluation credits to encourage minority participation in the program.

Although some critics believe the proposed regulations will cause state DBE programs to be quota driven, the flexibility of the regulations will allow states to ensure that their DBE programs are narrowly tailored. In this way, the state can tailor its program to include groups that are discriminated against within that locality. This amendment, however, fails to address the concern that minority groups which do not exist within the demographics of a state may still suffer from discrimination while doing business in the area. Under the regulations, any business may apply for certification as a DBE within a state. If that business is owned by an individual whose racial group does not exist within the demographics of the community, then the business may not qualify as a DBE even though it may suffer from discrimination. This fact vividly illustrates the drawback in applying Title VII analysis to a business problem rather than an employer/employee relationship.

Recent articles note that DBE programs are still imperiled. One commentator has noted that nonminority contractors continue to contest the validity of DBE programs which include percentage goals for minority participation. In fact, courts have held that such DBE programs fail the strict scrutiny standard. For example, in September 1997, the United States Court of Appeals for the Ninth Circuit ruled that a California state statute authorizing a DBE program was unconstitutional.

Despite recent court losses, President Clinton and the federal government remain committed to DBE programs and affirmative action plans. In a document dated March 12, 1996, the President stated that "[h]e supports affirmative action programs that are fair, effective and balanced." Furthermore, in a memorandum to general counsel of federal agencies, United States Associate Attorney General John R. Schmidt stated:

126 Id.
127 As stated earlier, most DBE programs include women as well as racial minorities. Additionally, the ISTA contains a provision that allows anyone to apply if social and economic disadvantage is demonstrated under the SBA section 8(a) program. Thus, the program does not exclude any group or individual. Demonstrated disadvantage will earn participation in the program.

128 Adarand, 965 F Supp. 15 1581.
129 Id.
130 Cordell Parvin, Proposed DBE Regs Can Modify Goals, Roads and Bridges, August 1997, at 12.
131 Id.
132 Id.
133 Parvin, supra at 1557.
134 Adarand, 965 F Supp. at 1557.
135 Id.
136 Id.
137 Id.
138 Id.
139 Monterey Mechanical Co. v. Wilson, 125 F3d 702 (9th Cir. 1997). Monterey Mechanical challenged a state DBE program. The program stated that contractors must meet the 15% DBE participation goal or demonstrate good faith efforts to do so. The 9th Circuit found the state statute unconstitutional. Id.
140 President's [sic] Clinton Supports Affirmative Action, March 12, 1996 (document given to the author by Jesse Haynes, West Virginia Department of Transportation).
The federal government is firmly committed to fair employment practices that open opportunities to all Americans. It is also committed to ensuring that its workforce draws on the full range of the nation’s talent. Affirmative action efforts can advance those vital objectives. Thus, to the extent that they comport with Adarand, such efforts should be continued.

With the support of the federal government and continued attempts by President Clinton’s administration to develop programs that meet the Supreme Court’s specifications, it is doubtful that affirmative action has even begun to “sing its swan song.”

V. DID ADARAND REALLY HAVE AN IMPACT ON DBE PROGRAMS?

When the Supreme Court decided Adarand in 1995, commentators predicted the demise of federal DBE programs and the end of minority-owned enterprises.151 Has Adarand significantly influence DBE programs? To evaluate the impact of Adarand, this last section will examine the number of DBEs participating in the Federal Highway Administration’s program. This section will also include data from the Small Business Administration’s (SBA) section 8(a) program for socially and economically disadvantaged entrepreneurs.

The ISTA defines a disadvantaged business enterprise to include such businesses which qualify under the SBA section 8(a) program and those groups presumed socially and economically disadvantaged.152 The state department of transportation determines whether a business qualifies for the program. This determination is reached by interviewing the applicant and evaluating its financial status.153 Minorities with great personal wealth or businesses with high gross incomes rarely qualify for the program.154 There is a rebuttable presumption that racial minorities are socially and economically disadvantaged.155 Nonminority entrepreneurs may qualify for the program by establishing that they are economically and socially disadvantaged.

Every year, states compile data on their DBE program for an annual review by the Federal Highway Administration. Each state includes both the overall gross revenue earned by DBEs that worked in the state and the overall percentage of highway construction work done by DBEs during the year.156 The DBE administrator reviews this data and formulates the goals for the next year.157 To determine whether Adarand has had an impact on the DBE program to date, the figures from Region III of the Federal Highway Administration are listed below. This data compares both the number of DBE participants and their gross revenue from 1987 to 1996.

Table One158

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<tr>
<td>1987 % of All Contractors</td>
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Table Two159

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The above charts illustrate that despite changes in the law, the number of DBEs in Region III has not changed with any statistical significance. In a comparison of data across the fifty states, the percentage of DBE programs participating in the ISTA program has changed little over the past few years.160 The slight differences that are present may be explained by any number of factors including: (1) the type of projects undertaken each year; (2) the number of highway construction projects underway each year; and (3) the number of businesses that qualify for the DBE program. State and federal DBE administrators remained unaffected by the Croson and Adarand decisions. Despite subjecting DBE programs to strict scrutiny, the programs experienced little if any change in the total number of participants. If the Court’s ruling caused in change in the implementation of the program, the rulings certainly did not cause the elimination of DBE programs that might have occurred.

153 Id.
154 Id.
155 Id.
156 Id.
157 Id.
158 Id.
160 Id.
161 Id.
162 Telephone interview with Jesse L. Haynes, Division Director, Equal Employment Opportunity, West Virginia Division of Highways (November 15, 1997). Data includes women and minorities in the totals.
163 Id.
164 Id.
165 Id.
VI. CONCLUSION

The most compelling question raised by the Adarand decision remains unanswered. Currently, it is unclear whether the heightened standard of review required by Adarand will result in fewer DBEs. More importantly, it is uncertain whether DBE programs are truly necessary for the advancement of minority-owned businesses. In his book, How to Succeed in Business Without Being White, Earl Graves writes that racial problems in business are more pronounced today than they were twenty-five years ago. Graves' opinion comports with the view of many individuals that people of color are not given a fair chance without government influence. Grave's hypothesis is also supported by a recent congressional report. This 1994 House Committee report highlighted many of the purposes of DBE programs. According to the report, DBEs were necessary because minorities had fewer opportunities to develop business skills and attitudes, obtain necessary resources, and gain business experience. Such prejudices include public perceptions that minorities are a financial risk, that they are unable to operate a business for profit, and that minorities cannot survive in a competitive environment. With such negative perceptions, it is not difficult to understand why people of color would be daunted by the prospect of entering the business community.

In addition to the congressional report, recent studies have established the necessity of maintaining affirmative action programs. Some commentators believe that there are too few resources for the entire population to achieve wealth. Therefore, some nonminorities may fear DBE programs based on the principal of scarcity of wealth. In reality, these programs add to the wealth and economic stability of the country. Despite the popular notion that amassing money is the only way to wealth, the country's true wealth is its ability to help its citizens. Thus, there is a strong argument that government has a moral responsibility to eliminate discrimination and open doors for the poor and disadvantaged through such programs as DBEs.

The future of DBE legislation is fairly clear. The courts are likely to find that many federal DBE programs fail strict scrutiny unless Congress makes some significant changes in the programs. The DBE programs must have more race-neutral components to encourage minorities into the marketplace. Furthermore, strong barriers must be in place to insure that only the truly disadvantaged take part in the programs. Finally, the federal government must develop data to substantiate DBE programs which reflect the nation's demographics. In industries such as highway construction, there may be very few businesses in the country capable of certain types of construction. These programs should reflect the mobility of businesses within the industry.

Finally, the Supreme Court has yet to rule on an important aspect of the DBE program, women-owned businesses. These programs are still evaluated under intermediate scrutiny. The next major challenge to affirmative action will address women in the marketplace. The Supreme Court may duplicate its decisions in Croson and Adarand.

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152 U.S.C. § 637(a) (1988). The Small Business Administration section 8(a) program provides preferential treatment for socially and economically disadvantaged small businesses. Unlike the ISTA, the certification process occurs at federal offices, and the requirements for certification are more stringent. Id.

154 See appendix A. Data from HCR-20, January 10, 1997. Data does not include women.


156 Id.

157 Id.

### APPENDIX A

**TWELVE MONTH SUMMARIES OF FEDERAL-AID RACIAL MINORITY (DBE) AWARDS IN PERCENTAGES YEARS**

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