III. LEGAL ANALYSIS

A. Background and Introduction

The purpose of this Study is to evaluate whether there is a need and basis for the continuation of the Minority, Female and Disabled – Owned Businesses (MFD) Program by the local government of Montgomery County, Maryland (the "County"). In order to ensure that public contracting opportunities are equally available to minorities, women and disabled individuals, the County has dedicated itself to creating a program that will not only address the needs of willing and capable minority, women and disabled business owners, but also render a more diverse and equitable business environment that will benefit all its citizens.

Government initiatives which seek to employ "race conscious" remedies to ensure equal opportunity must satisfy the most exacting standards in order to comply with constitutional requirements. These standards and principles of law were applied and closely examined by the Supreme Court in City of Richmond v. J.A. Croson Company[2] and Adarand Constructors, Inc. v. Pena[3]. The Croson decision represents the definitive legal precedent which established "strict scrutiny" as the standard of review by which state and local programs that grant or limit government opportunities based on race are evaluated. The Adarand decision subsequently extended the "strict scrutiny" standard of review to race conscious programs enacted by the federal government.

In rendering the Croson decision in January 1989, the U.S. Supreme Court held that the City of Richmond's minority business enterprise ordinance--which mandated that non-MWBE- owned prime contractors, to whom the City of Richmond had awarded contracts, subcontract 30% of their construction dollars to minority owned subcontractors--violated the equal protection clause of the Fourteenth Amendment to the United States Constitution. In a six-to-three majority decision, the Court held that state and local programs which use race conscious measures to

[2] Richmond v. J.A. Croson Co., 488 U.S. 469, (1989; Johnson v. California, 543 U.S. 499(2005).

[3] Adarand Constructors v. Pena, 515 U.S. 200 (1995); Parents Involved in Community Schools v. Seattle Sch. Dist., 551 U.S. 701. (2007).

allocate, or "set aside," a portion of public contracting exclusively to minority owned businesses must withstand a "strict scrutiny" standard of judicial review.

The strict scrutiny test requires public entities to establish race- or ethnicity-specific programs based upon a compelling governmental interest and that such programs be narrowly tailored to achieve the governmental interest.[4] The strict scrutiny test further requires a "searching judicial inquiry into the justification" for the race-conscious remedy to determine whether the classifications are remedial or "in fact, motivated by the illegitimate notions of racial inferiority or simple racial politics".[5]

It is important to note that the "strict scrutiny" standard of review represents the highest level of judicial scrutiny, and is used to test the legality of all state programs which consider race as a determining factor for the award of benefits or services. Concurrently, some lower courts have applied an "intermediate" level of scrutiny to state programs that use gender as a determining factor and assist women owned businesses. However, Maryland law may require a higher standard based upon the Equal Rights Amendment to the state constitution.[6]

Various governmental entities throughout the State of Maryland have confronted the issue of "affirmative action" in the Fourth Circuit Court of Appeals and the federal District Courts on several occasions. Generally, the decisions have been consistent with the analysis and principles of law set forth in Croson. However, there are anomalies which present judicial modification and expansion of the principles of law in Croson, with regard to data collection and other evidentiary matters. These cases are of particular importance to Montgomery County. This legal analysis includes, *inter alia*, an extended discussion of public contracting and Equal Protection Clause cases from the aforementioned courts which have had a direct impact on the methodology employed by Griffin & Strong in conducting this Study. This report discusses the legal principles outlined by the United States Supreme Court and implemented by lower courts in setting forth

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[4] See Eisenberg ex rel. v. Montgomery County Schools, 197 F.3d 123 (4th Cir. 1999); Daniel Podberesky v. University of Maryland at College Park, et al, 38 F.3d 147 (4th Cir. 1994); Rosenfeld v. Montgomery County Schools, 41 F. Supp.2d 581 (D. Md. 1999); Marc Alexander, et al. v. Prince George's County, Maryland, et. al., 901 F. Supp. 986 (D. Md. 1995); Concrete General, Inc. v. Washington Suburban Sanitary Commission, et al, 779 F. Supp. 370 (D. Md. 1991); Belk v. Charlotte-Mecklenburg Bd. of Educ., 269 F.3d 305

[5] Croson, 488 U.S.at 493.See also In re Legislative Districting of State of Maryland, 369 Md. 601(2002); Jones v. State, 105 Md. App. 257(1995). ; In re Adoption/Guardianship No. 2663 in Circuit Court of Washington County, 101 Md. App. 274(1994).

[6] Md. Dec. of R. art. 46 (2003).

the specific requirements that governments must follow in forming affirmative action plans. Moreover, this legal analysis will assess the potential impact on the County's minority owned business program of recent Supreme Court decisions regarding race-conscious measures.

B. The Croson Decision

In its Croson decision, the Supreme Court ruled that the City of Richmond's Minority Business Enterprise (hereinafter "MBE") program failed to satisfy both prongs of the strict scrutiny standard: the program must be justified by a compelling governmental interest and it must be narrowly tailored to achieve that compelling goal or interest.[7] The City failed to show that its minority set-aside program was "necessary" to remedy the effects of discrimination in the marketplace. The City of Richmond had not demonstrated the necessary discrimination. The Court reasoned that a mere statistical disparity between the overall minority population in Richmond (50 percent African American) and awards of prime contracts to minority owned firms (0.67 percent to African American firms) was an irrelevant statistical comparison and insufficient to raise an inference of discrimination. Regarding the evidence that Richmond provided to support its goal program, the Court emphasized the distinction between "societal discrimination", which it found to be an inappropriate and inadequate basis for social classification, and the type of identified discrimination that can support and define the scope of race-based relief. The Court noted that a generalized assertion that there has been past discrimination in an entire industry provided no guidance to determine the present scope of the injury a race-conscious program seeks to remedy. The Court emphasized, "...there was no direct evidence of race discrimination on the part of the City in letting contracts or any evidence that the City's prime contractors had discriminated against minority owned subcontractors."[8]

In short, the Court concluded there was no prima facie case of a constitutional or statutory violation by anyone in the construction industry. Justice O'Connor did opine, however, what evidence might indicate a proper statistical comparison: "where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the

[7] Id. at 469, 507.

[8] Id. at 480.

locality's prime contractors, an inference of discriminatory exclusion could arise".[9] In other words, the statistical comparison would be one between the percentage of MBEs in the market that are qualified, willing, and able to perform contracting work (including prime contractors and subcontractors) and the percentage of total City contracting dollars awarded to minority firms. The relevant question among lower federal courts has been how to determine this particular comparison. See discussion of statistical comparison, *infra*.

Additionally, the Court stated that identified anecdotal accounts of past discrimination could provide the basis to establish a compelling interest for local governments to enact race-conscious remedies. However, conclusory claims of discrimination by City officials, alone, would not suffice. In addition, the Court held that Richmond's MBE program was not remedial in nature because it provided preferential treatment to minorities such as Eskimos and Aleuts, groups for which there was no evidence of discrimination in Richmond[10]. In order to uphold a race- or ethnicity-based program, there must be a determination that a strong basis in evidence exists to support the conclusion that the remedial use of race is necessary. A strong basis in evidence cannot rest on an amorphous claim of societal discrimination, on simple legislative assurances of good intention, or congressional findings of discrimination in the national economy. [11]

Regarding the second prong of the strict scrutiny test, the Court ruled that Richmond's MBE program was not narrowly tailored to redress the effects of discrimination[12]. First, the program extended to a long list of ethnic minorities (e.g., Aleuts) for which the City had established no evidence of discrimination. Thus, the scope of the City's program was too broad. Second, the Court ruled that the thirty percent (30%) goal for MBE participation in the Richmond program was a rigid quota not related to identified discrimination. Specifically, the Court criticized the City for its lack of inquiry into whether a particular minority business, seeking racial preferences, had suffered from the effects of past discrimination. Third, the Court expressed disappointment that the City failed to consider race-neutral alternatives to remedy the under-representation of minorities in contract awards. Finally, the Court highlighted the fact that the City's MBE program

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[9] Id. at 509.

[10] Id. at 487.

[11] Id. at 506.

[12] Id. at 506.

contained no sunset provisions for a periodic review process intended to assess the continued need for the program.[13]

Thus, in order for states, municipalities, and local governments to satisfy the narrow tailoring prong of the strict scrutiny test, the Croson Court suggested analyzing the following factors:

- Whether the MBE program covers minorities or women for which there is evidence of discrimination (i.e., statistical disparity, anecdotal evidence, etc.);
- Whether the size of the MBE participation goal is flexible and contains waiver provisions for prime contractors who make a "good faith" effort to satisfy MBE utilization goals, but are unsuccessful in finding any qualified, willing and able MBEs;
- Whether there was a reasonable relationship between the numerical goals set and the relevant pool of MBEs capable of performing the work in the marketplace;
- Whether race-neutral alternatives were considered before race-conscious remedies were enacted; and
- Whether the MBE program contains sunset provisions or mechanisms for periodic review to assess the program's continued need.

The Croson Court clearly contemplates that there will be circumstances under which the strict scrutiny test can be met by a state, municipality or other local governmental entity. The Court contemplates that it will be necessary for state and local entities, in certain circumstances, to redress identified discrimination. The court carefully specifies the elements of the analysis to be utilized to determine whether an entity has met the constitutional test. Since the Croson decision a number of state and local governmental entities have met the strict scrutiny test.

[13] Id. at 500.

C. Procedural Posture, Permissible Evidence and Burdens of Proof

This section is a four-part review of the methodology upon which courts rely in reviewing legal challenges to MWBE programs. First, we will discuss the standing requirements for a plaintiff to maintain a suit against a MWBE program. Second, we will analyze the standard of review of equal protection that governs judicial inquiry. Third, we will review the evidentiary requirements courts utilize to determine proof of discrimination. Fourth, we will address the burden of production and proof the courts require of the parties in these cases.

1. Standing

As a result of the Croson decision, courts have entertained numerous legal challenges to MWBE set-aside programs. Standing is important because it usually is pivotal in determining a party's ability to bring a lawsuit. Thus, if an MWBE program is properly constructed and administered, there should be no legitimate claims of discrimination by non-MWBE contractors resulting in a lawsuit. "Injury in fact" is one of the three elements required to obtain Article III standing, along with causation and redressability. Under the traditional standing analysis, in order to satisfy the "injury in fact" requirement, plaintiffs must establish a causal connection between the injury, the ordinance, and the likelihood that the injury will be redressed by a favorable decision. Moreover, the Courts may dismiss a lawsuit when the plaintiff fails to show some "concrete and particularized" injury that is in fact imminent and which amounts to something more than "conjectural or hypothetical" injury.[14]

For example, in Rob Farmer v. Ramsay, et al[15] , the United States District Court for the District of Maryland addressed the standing of a white male student who twice was denied admission to the University Of Maryland School Of Medicine (the "UMSM"). Farmer, based upon his low income, participated in UMSM's Advanced Premedical Development Program (the "Program") following his initial application to UMSM. UMSM designed the Program to increase the number of medical students from "minority and/or disadvantaged" backgrounds. All participants in the Program

[10] See Cone Corp. v. Hillsborough County, 157 F.R.D. 533(1994). (Court imposed Rule 11 sanctions based on plaintiffs' complaint which failed to establish injury in fact). See also Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992); See also Dajani v. Governor and General Assembly of Maryland, 59 Fed. Appx. 740(6th Cir.2003); Wolf v. Gregory, 2009 U.S. Dist. LEXIS 23994.

[15] Farmer v. Ramsay, 41 F. Supp. 2d 587 (D. Md. 1999).

received special counseling and a free MCAT preparation course. Thereafter, Farmer retook the MCAT and improved his score. The plaintiff claimed that his second application for admission to UMSM would have qualified him for admission had he been a minority candidate.[16] Upon a motion to dismiss by the individual and institutional defendants, the court denied the motion – in part – because it ruled that Farmer had standing to sue. The District Court relied on the United States Supreme Court ruling in Adarand to determine that : "For standing purposes...Farmer is not required to allege that he would have been admitted but for the illegal discrimination. The Supreme Court has held that being forced to compete in a discriminatory selection process constitutes an injury sufficient to establish standing."[17]

Prior to the Adarand decision, the United States Supreme Court in Northeastern Florida Chapter of Associated General Contractors of America v. City of Jacksonville, Florida, et al.[18],modified the traditional standing requirement for contractors challenging local and state government minority preference schemes. The Court relaxed the injury in fact requirements by holding that so long as the Non-Minority contractor can show that it was "able and qualified to bid" on a contract subject to the City's ordinance, the "injury in fact" arises from an inability to compete with MWBEs on an equal footing due to the ordinance's "discriminatory policy."[19] Specifically, the Court stated:

> When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The "injury in fact" in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit. And in the context of a challenge to a set-aside program, the "injury in fact" is the inability to compete on an equal footing in the bidding process, not the loss of a contract. To establish standing,

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[16] Id. at 589-90.

[17] Id. at 593.

[18] Northeastern Fla. Chapter of Associated Gen. Contractors of Am., 508 U.S. 656 (1993).

[19] See Contractors Assn. of Eastern Pennsylvania v. City of Philadelphia, 6 F.3d 990, 995 (3rd Cir. 1993); Concrete Works of Colorado v. City and County of Denver, 36 F.3d 1513, 1518 (10th Cir. 1994) (Concrete Works submitted and the ordinance prevented it from competing on an equal basis.); Webster Greenthumb v. Fulton County, 51 F. Supp. 2d 1354 (N.D.Ga 1999).(Plaintiff Greenthumb demonstrated that it was able to bid on contracts and a discriminatory policy prevented it).

> therefore, a party challenging a set-aside program...need only demonstrate that it is able and ready to bid on contracts and that a discriminatory policy prevents it from doing so on an equal footing.[20]

In Associated Utility Contractors of Maryland v. the Mayor and City of Baltimore[21], a local federal court issued a decision which addressed the injury-in-fact element of the standing requirement. In Associated Utility Contractors, a contractors association brought an action challenging the constitutionality of the City of Baltimore's minority business set-aside ordinance. The United States District Court for the District of Maryland enjoined Baltimore from granting public contracts pursuant to its MWBE ordinance and the City moved to stay the injunction, *inter alia*, until it completed a pending disparity study. The court held, in pertinent part, that the contractors association had demonstrated the injury-in-fact required to establish standing to challenge the constitutionality of the MBWE ordinance enacted by the City. "For the purposes of an equal protection challenge to affirmative action set-aside goals the Supreme Court has held that the 'injury-in-fact' is the inability to compete on an equal footing in the bidding process."[22] This ruling also raised the issue of representational standing.

The United States Supreme Court in Hunt v. Washington State Apple Advertising Comm.[23] established a three-prong test to determine whether an association has standing to bring a lawsuit on behalf of its members: a court must determine whether "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation in the lawsuit of the individual members."[24] The federal courts in Maryland have adhered to this standard through numerous cases.

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[20] Northeastern, 508 U. S. at 666; see also Alexander v. Prince George's County, 901 F. Supp. 986(1995).

[21] Associated Util. Contrs. of Md., Inc. v. Mayor of Baltimore, 83 F. Supp. 2d 613(D. Md. 2000).

[22] Id. At 616. (citing Adarand and Northeastern Florida Chapter).

[23] Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333(1977).

[24] Id. At 343.

The Court in Associated Utility Contractors submitted the AUC to the three-prong test established by the Supreme Court in Hunt, and found that the group had demonstrated its standing. Similarly, the Court ruled that a political association had standing to sue a state agency in Maryland State Conference of NAACP Branches v. Maryland Department of State Police.[25] By comparison, the Court ruled that a contractors association lacked representational standing in its lawsuit regarding the constitutionality of the state's MBE statute.

In Maryland Highway Contractors Association v. State of Maryland, et al[26], the Maryland Highway Contractors Association (the "MHCA") sought declaratory and injunctive relief against the State of Maryland in an effort to stop it from employing its MBE statute. The state responded that the MHCA lacked standing to sue and filed a motion for summary judgment. The trial Court granted the motion and the MHCA appealed. In the interim, the state repealed the statute which was the subject of the suit and replaced it with a revised version. Although the Fourth Circuit Court of Appeals ruled that the MHCA's lawsuit had been mooted by the repealed legislation, it did address the issue of representational standing in its order to vacate and opined that MHCA failed to meet the final prong of the test. "[T]he members of [the MHCA] have conflicting interests. Some of the members of the Association are certified MBEs; they benefit from the continued enforcement of the MBE statute. Other Non-Minority members of the Association would benefit if the MBE statute were declared unconstitutional. Thus, there are actual conflicts of interest which would require that the individual members come into the lawsuit to protect their interests."[27]

Lastly, in Adarand, the Supreme Court continued to find standing in cases in which the challenging party made "an adequate showing that sometime in the relatively near future it will bid on another government contract."[28] That is, if the challenging party is very likely to bid on future contracts, and must compete for such contracts against MBEs, then that contractor has standing to bring a lawsuit.

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[25] Maryland State Conf. of NAACP Branches v. Maryland Dep't of Md. State Police, 72 F. Supp. 2d 560(D. Md. 1999).; see also Maryland Minority Contractor's Ass'n v. Maryland Stadium Auth., 70 F. Supp. 2d 580 (D. Md. 1998); Bogdan v. Hous. Auth. of Winston-Salem, 2006 U.S. Dist. LEXIS 94129

[26] Maryland Highways Contractors Ass'n v. Maryland, 933 F.2d 1246 (4th Cir. 1991).

[27] Id. at 1253.

[28] Adarand, 515 U.S.at 2105.

2. Equal Protection Clause Standards of Review

The second preliminary matter that courts address is the standard of equal protection review that governs their analysis. The Fourteenth Amendment provides that "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."[29]

Courts determine the appropriate standard of equal protection review by examining the protected classes embodied in the statute. The courts apply *strict scrutiny* to review an ordinance's race-based preference scheme and inquire whether the law is narrowly tailored to achieve a compelling governmental interest.[30] Conversely, gender-based classifications are evaluated under the *intermediate scrutiny* rubric, which provides that the statute must be substantially related to an important governmental objective.[31] Therefore, race-conscious affirmative action is subject to a much higher standard of judicial review than gender-conscious affirmative action. However, given the Equal Rights Amendment to the Maryland Constitution, gender-based discrimination claims brought under state law may be subject to a higher standard than similar claims brought under federal law.[32]

a) *Strict Scrutiny*

In order for a local government to enact a constitutionally valid MWBE ordinance which applies to awards of its contracts, it must show a *compelling governmental interest*. This compelling interest must be proven by particularized findings of past discrimination. The strict scrutiny test ensures that the means used to address the compelling goal of remedying past discrimination "fit" so closely that there is little likelihood that the motive for the racial classification is illegitimate racial prejudice or stereotype.[33] In a Maryland case, which considered a racially preferential

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[29] U.S. Const. amend. XIV, § 1.

[30] See, e.g., Hayes v. North State Law Enforcement Officers Ass'n, 10 F.3d 207, 212 (4th Cir. 1993); Wessmann v. Gittens, 160 F.3d 790.

[31] Mississippi Univ. for Women v. Hogan, 458 U.S. 718(1982). See Engineering Contractors Ass'n of South Florida, Inc., et al v. Metropolitan Dade County, et al, 122 F.3d 895 (11th Cir. 1997). (Eleventh Circuit explaining U.S. v.Virginia, and the appropriate gender-based affirmative action equal protection analysis).

[32] Md. Dec. of R. art. 46 (2003).

[33] Croson, 488 U.S. 469(1989). See also, Adarand, 515 U.S. at 200, 235, 2097, 2117.; Hopwood v. State of Texas, 78 F.3d 932, 951 (5th Cir. 1996).

university scholarship program, Podberesky v. University of Maryland, 38 F.3d 147 (4th Cir. 1994), the Court noted that "absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics."[34] Only after legislative or administrative findings of constitutional or statutory violations, do local governments have a compelling interest in remedying past discrimination.

The courts have ruled that general societal discrimination is insufficient to justify the use of race-based measures to satisfy a compelling governmental interest.[35] Rather, there must be some showing of prior discrimination by the governmental actor involved, either as an "active" or "passive" participant.[36] Just such a finding by the State of Maryland, through its Minority Business Utilization study, resulted in the creation of its MWBE statute.[37] Even if the governmental unit did not directly discriminate, it can take corrective action. As the Court noted in Tennessee Asphalt v. Farris, "[g]overnmental entities are not restricted to eradicating the effects only of their own discriminatory acts."[38]

The governmental entity must point to specific instances or patterns of identifiable discrimination in the area and in the industry to which the plan applies. A *prima facie* case of intentional discrimination is deemed sufficient to support a local government's affirmative action plan. However, generalized assertions that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to redress.[39]

Since all racial classifications are viewed as legally suspect, the governing body must show a "strong basis in evidence" of discrimination in order to justify any enactment of race-conscious

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[34] Podberesky, 38 F.3d at 153 (quoting Croson, 488 U.S. at 493).

[35] Id. at 496-97, 723. See Miller v. Johnson, 515 U.S. 900, 922, 115 S.Ct. 2475, 2491 (1995).

[36] Id. at 498, 724.

[37] Maryland Highways Contractors Ass'n, 933 F.2d at 1249.

[38] Tennessee Asphalt Co. v. Farris, 942 F.2d 969, 974 (6th Cir. 1991).

[39] Id. at 498-99, 724. See Miller, 515 U.S. at 921, 115 S.Ct.at 2491.

legislation. Merely stating a "benign" or "remedial" purpose does not constitute a "strong basis in evidence" that the remedial plan is necessary, nor does it establish a *prima facie* case of discrimination. Thus, the local government must identify the discrimination it seeks to redress.[40] Particularized findings of discrimination are required under Croson.[41] Although Croson places the burden on the government to demonstrate a "strong basis in evidence," the Fourteenth Amendment does not require a court to make an ultimate judicial finding of discrimination before the government may take affirmative steps to eradicate discrimination. A particularized showing of discrimination in a marketplace and a determination that a state or local government is a "passive participant" in that marketplace discrimination establishes a compelling governmental interest. The City and County of Denver, Colorado were able to establish a compelling interest by demonstrating they were a passive participant in private discrimination.

In City and County of Denver, Colorado v. Concrete Works of Colorado, Inc.,[42] the Tenth Circuit Court of Appeals reversed the District Court's granting of summary judgment for the City of Denver, which had determined that Denver's factual showing of past race and gender discrimination justified its compelling government interest in remedying the discrimination. In reversing, the Tenth Circuit held that factual issues of dispute existed about the accuracy of Denver's public and private discrimination data, but noted that Denver had shown evidence of discrimination in both the award of public contracts and within the Denver metropolitan statistical area ("MSA") that was particularized and geographically based. On remand, Denver needed only to come forward with evidence that its ordinance was narrowly tailored, whereupon it became Concrete Works' burden to show that there was no such strong basis.

The types of evidence routinely presented to show the existence of a compelling interest include statistical and anecdotal evidence.[43] Where gross statistical disparities exist, they alone may constitute *prima facie* proof of a pattern or practice of discrimination. Anecdotal evidence, such as testimony from minority contractors, is most useful as a supplement to strong statistical

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[40] Id. at 500-501, 725.

[41] See also Alexander, 901 F. Supp. at 992-93 (re: particularized findings in the context of fair employment plans).

[42] Concrete Works v. City & County of Denver, 36 F.3d 1513 (10th Cir. 1994).

[43] Id. at 501, 725-26. See, United Black Firefighters Ass'n. v. City of Akron, 976 F.2d 999, 1009 (6th Cir. 1992); see also, Engineering Contractors, 122 F.3d 895 (11th Cir. 1997); Alexander, 901 F. Supp. at 993-94; Wessmann v. Gittens, 160 F.3d 790.

evidence.[44] Nevertheless, anecdotal evidence is rarely so dominant that it can, by itself, establish discrimination under Croson. The "combination of anecdotal and statistical evidence," however, is viewed by the courts as "potent."[45]

If there is a strong basis in evidence to justify a race- or ethnicity-based program, the next step of the strict scrutiny test is to determine whether the MWBE program is narrowly tailored to redress the effects of discrimination. Racial and ethnic specific programs must be a remedy of last resort.[46] In Croson, the Court considered four factors:

(1) whether the city has first considered race-neutral measures, but found them to be ineffective;
(2) the basis offered for the goals selected;
(3) whether the program provides for waivers; and,
(4) whether the program applies only to MBEs who operate in the geographic jurisdiction covered by the program.

Other considerations include the flexibility and duration of the program; that is, whether the program contains a sunset provision or other mechanisms for periodic review of its effectiveness. These mechanisms ensure that the program does not last longer than necessary to serve its intended remedial purpose. Furthermore, such mechanisms keep pure the relationship of numerical goals to the relevant labor market, as well as the impact of the relief on the rights of third parties.[47] In Marc Alexander v. Prince George's County, the U.S. District Court for the District of Maryland also held that these factors should be taken into account when evaluating whether a race- or ethnicity-conscious affirmative action program is narrowly tailored:

(1) the necessity for the relief and the efficacy of alternative remedies;
(2) the flexibility and duration of the relief, including the availability of waiver provisions;
(3) the relationship of the numerical goals to the relevant labor market; and

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[44] Concrete Works, 36 F.3d at 1513, 1520 (10th Cir. 1994). See Engineering Contractors, 122 F.3d 895, 125-26 (11th Cir. 1997); Ensley Branch v. Seibels, 31 F.3d 1548, 1565 (11th Cir. 1994).

[45] Coral Construction Co. v. King County 941 F.2d 910,920 (9th Cir. 1991).

[46] Eisenberg, 197 F.3d at 128.

[47] Adarand, 515 U.S at 238, 115 S. Ct. at 2118.

(4) the impact of the relief on the rights of innocent third parties.[48]

b) ***Intermediate Scrutiny***

The Croson decision failed to evaluate women owned business ("WBE") programs. Subsequently, federal appellate courts addressed and set forth guidelines for evaluating gender-based affirmative action programs. Most of these courts have adopted an intermediate level of scrutiny, rather than the strict scrutiny analysis applicable to race-conscious programs. However, as demonstrated by the analysis below, it remains unclear how the review of evidence of discrimination for an intermediate level of scrutiny differs from strict scrutiny in application.

In Coral Construction Company v. King County[49] the Ninth Circuit Court of Appeals applied an intermediate scrutiny standard in reviewing the WBE section of the county's ordinance. In addition, the Third Circuit U.S. Court of Appeals applied an intermediate level of review in its ruling in Contractors Association of Eastern Pennsylvania, Inc. v. City of Philadelphia.[50] However, the Court opined that it is unclear whether statistical evidence as well as anecdotal evidence is required to establish the standard of discrimination necessary to satisfy the intermediate scrutiny standard; and if so, how much statistical evidence is necessary. Nonetheless, the Court struck down the WBE portion of Philadelphia's programs, finding that the City had no statistical evidence and insufficient anecdotal evidence regarding women owned construction firms and gender discrimination. Courts in Maryland have determined that "an affirmative action program survives intermediate scrutiny if the proponent can show it was 'a product of analysis rather than a stereotypical reaction based on habit.'"[51]

The Eleventh Circuit Court of Appeals in Ensley Branch NAACP v. Seibels, addressed the issue in a Title VII action.[52] In this decision, the Eleventh Circuit rejected the argument that, based on

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[48] Alexander, 901 F. Supp. 986, at 995-96. (affirmed in part, reversed in part; Alexander v. Estepp, 95 F. 3d 312 (4th Cir. 1996); Ensley Branch, 31 F.3d 1548, 1569 (11th Cir. 1994); Webster v. Fulton County, Ga., 51 F. Supp.2d at 1362.

[49] Coral Constr. Co. v. King County, 941 F.2d 910, (9th Cir. 1991), cert. denied. 502 U.S. 1033, 122 S.Ct. 875 (1992).

[50] Contractors Association of E. Pa. v. City of Phila., 6 F.3d 990, (3rd Cir. 1993); United States v. N.Y. City Bd. of Educ., 448 F. Supp. 2d 397

[51] Associated Utility Contractors, 83 F. Supp.2d at 620 (citing Metro Broadcasting, Inc. v. F.C.C, 497 U.S. 547, 582-83 (1990)).

[52] Ensley Branch, 31 F.3d at 1548, 1579 (11th Cir. 1994).

Croson, the Supreme Court intended strict scrutiny to apply to gender-conscious programs challenged under the Equal Protection Clause. Since Ensley, the Supreme Court decided United States v. Virginia,[53] thereby invalidating Virginia's maintenance of the single sex Virginia Military Institute (VMI). Rather than deciding the constitutionality of the VMI program under intermediate scrutiny, the Court held that "parties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action."[54] The Court then applied this "exceedingly persuasive justification" standard in invalidating the VMI program. Justice Rehnquist concurred only in the judgment, noting that "the Court . . . introduces an element of uncertainty respecting the appropriate test."[55] Justice Scalia dissented, suggesting that the majority had effectively adopted a strict scrutiny standard to judge the constitutionality of classifications that deny individuals opportunity on the basis of sex.[56] The majority however, neither rejected nor affirmed Justice Scalia's analysis.

It is not certain whether the Supreme Court intended the VMI decision to signal a heightening in scrutiny of gender-based classifications. However, it may be that the VMI case stands as unique because – like key, recent Supreme Court rulings - it involves an institution of higher learning. Nevertheless, recent federal district court cases, as in Engineering Contractors Assn. of South Florida, Inc. v. Metropolitan Dade County[57], continue to confine their analysis of WBE programs to traditional intermediate scrutiny.[58] Here the Court noted, however, that the measure of evidence required for a gender classification is ambiguous. The Eleventh Circuit agreed with the Third Circuit's holding that intermediate scrutiny requires that evidence be probative, but added that "probative" must be "sufficient as well."[59] Closer to home, Maryland's federal bench has maintained that the intermediate standard of review is less stringent than strict scrutiny.

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[53] United States v. Virginia, 518 U.S. 515. (1996).

[54] Id. at 518.

[55] Id. at 559.

[56] Id. at 571.

[57] Engineering Contractors Ass'n of South Florida, 122 F.3d 895(11th Cir. 1997).

[58] Id. at 907-908.

[59] Id. at 895.

In Maryland Minority Contractors Association, Inc., et al. v. Maryland Stadium Authority[60], an advocacy group for African American and Hispanic American contractors (the "MMCA") filed a lawsuit regarding what it considered to be the inequitable distribution of contracts for the construction of the new football stadium for the Baltimore Ravens. The MMCA argued, *inter alia*, that the manner in which the state agency used the Maryland MWBE statute to award contracts to firms owned by white women simply was a pretext to discriminating against its members. Consequently, the MMCA asserted that the state's use of a gender-specific remedy should be evaluated under the strict scrutiny standard. The Trial Court disagreed, holding that "[c]lassification according to gender is subject to the standard explained in United States v. Virginia...(expressly disclaiming 'equating gender classifications, for all purposes, to classifications based on race or national origin')."[61]

c) ***Passive Participation***

Strict scrutiny requires a strong basis in evidence of either active participation by the government in prior discrimination or passive participation by the government in discrimination by the local industry.[62] In Dade County, the Court noted again that the measure of evidence required for a gender classification is less clear. The Court agreed with the Third Circuit's holding that intermediate scrutiny requires that evidence be probative but here the Court added that probative must be "sufficient as well."[63] The Supreme Court in Croson opined that municipalities have a compelling interest in ensuring that public funds do not serve to finance private discrimination. Local governments may be able to take remedial action when they possess evidence that their own spending practices exacerbate a pattern of private discrimination.[64]

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[60] Maryland Minority Contractor's Ass'n v. Maryland Stadium Auth, 70 F. Supp.2d 580 (D. Md. 1998).

[61] Id. at 596. See also Williams v. Board of Trustees, 2004 U.S. Dist. LEXIS 203 (D. Md. 2004).

[62] Croson, 488 U.S. at 491-92.

[63] Engineering Contractors, 122 F.3d at 895.

[64] Croson, 488 U.S. at 502.

Subsequent lower court rulings have provided more guidance on passive participation by local governments. In Concrete Works of Colorado Inc. v. The City and County of Denver[65], the Tenth Circuit held that it was sufficient for the local government to demonstrate that it engaged in passive participation in discrimination rather than showing that it actively participated in the discrimination. Thus, the desire for a government entity to prevent the infusion of public funds into a discriminatory industry is enough to satisfy the requirement. Accordingly, if there is evidence that the County government is infusing public funds into a discriminatory industry, Montgomery County has a compelling interest in remedying the effects of such discrimination. However, there must be evidence of exclusion or discriminatory practices by the contractors themselves.

The Court in Concrete Works stated "neither Croson nor its progeny clearly state whether private discrimination that is in no way funded with public tax dollars can, by itself, provide the requisite strong basis in evidence necessary to justify a municipality's affirmative action program...Although we do not read Croson as requiring the municipality to identify an exact linkage between its award of public contracts and private discrimination, such evidence would at least enhance the municipality's factual predicate for a racial gender conscious program."[66] Other courts continue to struggle with this issue.

In Adarand Constructors v. Slater (hereinafter referred to as "Adarand VI")[67], the Tenth Circuit U.S. Court of Appeals addressed the constitutionality of the use in a federal transportation program of a subcontractor compensation clause which employed race-conscious presumptions in favor of minority and disadvantaged business enterprises. In addressing the federal government's evidentiary basis to support its findings of discrimination against minorities in the publicly funded and private construction industry, the Court did not read Croson as requiring that the governmental entity identify the exact linkage between its award of public contracts and private discrimination. The Tenth Circuit noted that the earlier Concrete Works ruling had not demonstrated the necessary finding of discrimination:

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[65] Concrete Works v. City & County of Denver, 36 F. 3d 1513 (10th Cir. 1994).

[66] Id. at 1529.

[67] Adarand Constructors, Inc. v. Slater, 228 F.3d 1147 (10th Cir. 2000).

> Unlike Concrete Works, the evidence presented by the government in the present case demonstrates the existence of two kinds of discriminatory barriers to minority subcontracting enterprises, both of which show a strong link between racial disparities in the federal government's disbursements of public funds for construction contracts and the channeling of those funds due to private discrimination. *The first discriminatory barriers are to the formation of qualified minority subcontracting enterprises due to private discrimination, precluding from the outset competition for public construction contracts by minority enterprises. The second discriminatory barriers are to fair competition between minority and Non-Minority subcontracting enterprises, again due to private discrimination, precluding existing minority firms from effectively competing for public construction contracts.* The government also presents further evidence in the form of local disparity studies of minority subcontracting and studies of local subcontracting markets after the removal of affirmative action programs.[68]

The federal government's evidence consisted of numerous congressional investigations, hearings, local disparity studies and anecdotal evidence demonstrating discrimination by prime contractors, unions and financial lenders in the private market place. The Court of Appeals concluded that the government's evidence had demonstrated as a matter of law that there was a strong basis in evidence for taking remedial action to remedy the effects of prior and present discrimination. The Court found that Adarand had not met its burden of proof to refute the government's evidence.[69]

Since the strict scrutiny standards and evidentiary benchmarks apply to all public entities and agencies, it follows that the questions regarding passive participation in discrimination are relevant to all governmental units. Moving a step further, since the federal government has a compelling interest in not perpetuating the effects of racial discrimination in its own distribution of public funds, cities share the same interest. The Court in Croson stated that "[i]t is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public

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[68] Id. (emphasis added); see also Concrete Works, 36 F.3d at 1529.

[69] Id. at 1147, 1176.

dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice".[70]

3. Evidentiary Requirements.

In Croson, the Supreme Court concluded that state and local governments have a compelling interest to remedy identified past and present discrimination within their jurisdictions. Thus, courts have to assess whether a public entity has the requisite factual support for its MWBE program in order to satisfy the particularized showing of discrimination required by Croson. This factual support can be developed from anecdotal and statistical evidence.

a) *Anecdotal Evidence*

The majority decision in Croson impliedly endorsed the inclusion of personal accounts of discrimination.[71] However, according to the Croson standard, selective anecdotal evidence about MBE experiences alone would not provide an ample basis in evidence to demonstrate public or private discrimination in a municipality's construction industry.[72] Nonetheless, personal accounts of actual discrimination or the effects of discriminatory practices may complement empirical evidence. In addition, anecdotal evidence of a governmental entity's institutional practices that provoke discriminatory market conditions are particularly probative. Thus, courts have required the inclusion of anecdotal evidence of past or present discrimination.[73]

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[70] Croson, 488 U.S. at 492 (citing Norwood v. Harrison, 413 U.S. 455 (1973)); see generally, Maryland Troopers Ass'n, Inc. v. Evans, et al., 993 F.2d 1072, 1074-75 (4th Cir. 1993); Maryland Highways Contractors Ass'n, Inc. v. State of Md., et al., 933 F.2d 1246, 1248 (4th Cir. 1991); Associated Util. Contrs. of Md., Inc. v. Mayor of Baltimore, 83 F. Supp. 2d 613.

[71] Croson, 488 U.S. at 480 (noting as a weakness in the City's case that the Richmond City Council heard "no direct evidence of race conscious discrimination on the part of the city in letting contracts or any evidence that the City's prime contractors had discriminated against minority owned subcontractors").

[72] See Concrete Works, 36 F. 3d.1513 (10th Cir. 1994).

[73] See Contractors Ass'n., 6 F.3d at 990, 1002-03 (3rd Cir. 1993) (weighing Philadelphia's anecdotal evidence); Coral Constr.Co. v. King Cnty, 941 F.2d 910, 919 (9th Cir. 1991) ("[The combination of convincing anecdotal and statistical evidence is potent"); Cone Corp. v. Hillsborough Cnty, 908 F.2d 908, 916 (11th Cir. 1990). (supplementing Hillsborough County's statistical evidence with testimony from MBEs who filed complaints to the County about prime contractors' discriminatory practices), cert. denied, 498 U.S. 983, 111 S.Ct. 516 (1990); Engineering Contractors, 122 F.3d at 925-26.

In Coral Construction Company v. King County, the Ninth Circuit U.S. Court of Appeals concluded that "the combination of convincing anecdotal and statistical evidence" was potent.[74] In a separate case, the Third Circuit suggested that a combination of empirical and anecdotal evidence was necessary for establishing a prima facie case of discrimination.[75] In addition, the Ninth Circuit approved the combination of statistical and anecdotal evidence used by the City of San Francisco in enacting its MWBE ordinances.[76]

On the other hand, neither empirical evidence alone nor selected anecdotal evidence alone provides a strong enough basis in evidence to demonstrate public or private discrimination in a municipality's construction industry to meet the Croson standard.[77] For example, in O'Donnell Construction v. District of Columbia[78], the Court reversed the denial of a preliminary injunction for the plaintiff because the District of Columbia failed to prove a "strong basis in evidence" for its MBE program. The Court held in favor of the plaintiff because much of the evidence the District offered in support of its program was anecdotal. The Court opined that "anecdotal evidence is most useful as a supplement to strong statistical evidence--which the [District]Council did not produce in this case".[79]

The Fourth Circuit Court of Appeals also has addressed this matter. In Podberesky, the plaintiff sued the University of Maryland at College Park regarding its scholarship program designed exclusively for African American students. At the trial level, the U.S District Court upheld the "Banneker scholarship program, which is a merit-based program for which only African American students are eligible." However, at the appellate level, the Fourth Circuit rejected the Trial Court's conclusions and remanded the case for entry of judgment in favor of the plaintiff.[80]

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[74] Coral Constr. Co.,941 F.2d at 919.

[75] Eastern Contractors, 6 F. 3d 990, 1003 (3rd Cir. 1993).

[76] Associated General Contractors of California, Inc. v. Coal. for Economic Equity, et al, 950 F.2d 1401 (9th Cir. 1991), cert. denied, 503 U.S. 985, 112 S.Ct. 1670 (1992).

[77] Concrete Works, 36 F. 3d at 1513.

[78] O'Donnell Constr. Co. v. District of Columbia, 963 F.2d 420 (D.C. Cir. 1992).

[79] Id. at 420, 427.

[80] Podberesky, 38 F.3d at 151-52.

At the district court level, the University averred that it could demonstrate four present effects of past discrimination to justify its compelling interest in maintaining a race-conscious program: "(1) the University has a poor reputation within the African American community; (2) African Americans are underrepresented in the student population; (3) African American students who enroll at the University have low retention and graduation rates; and (4) the atmosphere on campus is perceived as being hostile to African American students."[81] The Appellate Court was concerned with the University's evidence. "To have a present effect of past discrimination sufficient to justify the program, the party seeking to implement the program must, at a minimum, prove that the effect it proffers is caused by the past discrimination and that the effect is of sufficient magnitude to justify the program."[82] In sum, the Fourth Circuit rejected as insufficient the University's "proof" which consisted of, among other things: 1) surveys of student attitudes and results of student focus groups; 2) a reference pool of high school graduates within the State of Maryland; 3) and statistical evidence of high attrition rates for African American students. "There is no doubt that racial tensions still exist in American society, including the campuses of our institutions of higher learning. However, these tensions and attitudes are not a sufficient ground for employing a race-conscious remedy at the University of Maryland."[83] Moreover, the Court determined that the University's reference pool was overly broad. Furthermore, the Court felt that the low retention and graduation rates also could be explained by economic and other factors that did not pertain to race. Accordingly, the Banneker scholarship program was fatally flawed and could not survive strict scrutiny.[84]

Additionally, in Engineering Contractors, the Court held that, "we have found that kind of evidence [anecdotal] to be helpful in the past, but only when it was combined with and reinforced by sufficiently probative statistical evidence."[85]

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[81] Id at 152 (citing Podberesky v. Kirwan, 383 F. Supp. 1075, 1076-77 (D. Md. 1993)).

[82] Id at 153.

[83] Id at 155.

[84] Id at 157.

[85] Engineering Contractors Ass'n, 122 F. 3d at 925.

Accordingly, a combination of statistical disparities in the utilization of MWBEs and particularized anecdotal accounts of discrimination are required to satisfy the factual predicate. Thus, this Study has included anecdotal evidence of past and present discrimination in order to establish the factual predicate by these guidelines.

b) *Statistical Data*

The Court in Croson explained that an inference of discrimination may be made with empirical evidence that demonstrates "a significant statistical disparity between the number of qualified minority contractors . . . and the number of such contractors actually engaged by the locality or the locality's prime contractors."[86] A predicate to governmental action is a demonstration that gross statistical disparities exist between the proportion of MBEs awarded government contracts and the proportion of MBEs in the local industry "willing and able to do the work," in order to justify its use of race conscious contract measures.[87]

c) *Prime and Subcontractor Analysis*

Croson infers that disparity analyses should include both prime and subcontractor data, stating that "where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors [emphasis added], an inference of discriminatory exclusion could arise.[88] Similarly, Adarand found that both prime and subcontractor data were relevant with regard to determining barriers to business formation in the private sector[89] At least one court has determined that without the analysis of subcontractor data the "relevant statistical pool" would be insufficient (See W.H. Scott Construction Co., Inc. v. City of Jackson, 199 F.3d 206 (5th Cir. 1999).

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[86] Croson, 488 U.S. at 509, 109 S.Ct. at 730.

[87] Ensley Branch, 31 F.3d at 1548, 1565.

[88] Croson, 488 U.S. at 503.

[89] Adarand VII, 228 F.3d at 1168-1172

d) ***Availability***

In order to adequately assess statistical evidence, there must be evidence identifying the basic qualifications of minority contractors "willing and able to do the job" and the Court must determine, based upon these qualifications, the relevant statistical pool with which to make the appropriate statistical comparisons.[90] Subsequent lower court decisions have provided considerable guidelines for statistical analyses sufficient for satisfying the Croson factual predicate. "Qualified," "willing," and "able" are the three pillars of the Croson case. "The relevant question is how to determine who are qualified, willing and able." A lack of the requisite specificity doomed race-specific remedies in two Maryland cases.

Concrete General, Inc. v. Washington Suburban Sanitary Commission, et al.[91] resolved a dispute regarding the viability of a state agency's Minority Procurement Program (the "MPP"). The Washington Suburban Sanitary Commission (the "WSSC") is an agency created by state law, which operates and maintains the water, sewage, and drainage systems in Prince George's and Montgomery counties. When the WSSC created its race-conscious policy, it linked its numerical goals for minority participation to the size of the minority population in the two counties. The Trial Court ruled that the program was unconstitutional because "[s]uch overbreadth contributes to the Court's conclusion that the goal of the MPP, like the minority set-aside provision in [Croson], is designed to achieve the award of contracts to minority owned firms in proportion to the percentage of minorities in the general population, rather than to remedy past discrimination within the specified workplace."[92] Years later, in Associated Utility Contractors, the Court ruled that the City of Baltimore's MWBE ordinance was unconstitutional because the City had no statistical foundation to determine availability when it established its set-aside goals.[93]

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[90] Engineering Contractors Ass'n, 122 F. 3d. at 925 (11th Cir. 1997).

[91] Concrete General, Inc. v. Washington Suburban Sanitary Com., 779 F. Supp. 370(D. Md. 1990).

[92] Id. at 382.

[93] Associated Util. Contrs. of Md., Inc. v. Mayor of Baltimore, 83 F. Supp. 2d 613, 614, 620(D. Md.2000).

On the other hand, Webster v. Fulton County[94] presented a different method in terms of the statistical pool from which quantitative data is collected. In this case, white male and female plaintiffs, owners of a landscaping and tree removal service, the Webster Greenthumb Company, brought suit against the Fulton County's 1994 MFBE Program. The Georgia Court analyzed the statistical factual predicate which was developed by Fulton County relying heavily on Croson, and a more recent Eleventh Circuit opinion, Engineering Contractors Association v. Metropolitan Dade County.[95] In Webster, the Court indicated that it favored census availability data; however, other courts have made it clear that they believe that the most relevant data is bidder data, that is, data which determines availability based on the number of minority bidders in contrast to the number of Non-MFD bidders. The Court also suggested that bid data be included in determining availability estimates. There is no universal consensus on exactly how availability has to be determined, but instead more decisions which determine what is not acceptable for determining availability. This Study includes bidder data, along with other relevant data to establish availability and also to determine the relevant market, because by bidding and expending the resources required to submit a bid, companies demonstrate that they are ready and willing to perform and that they consider themselves able to perform. The inference being that firms would not expend the resources necessary to bid if they did not believe themselves capable of performance.

The method of calculating MWBE availability has varied from case to case. In Contractors Association of Eastern Pennsylvania v. City of Philadelphia[96], the Third Circuit stated that available and qualified minority owned businesses comprise the "relevant statistical pool" for purposes of determining availability. The Court permitted availability to be based on the metropolitan statistical area ("MSA") and local list of the Office of Minority Opportunity; for non-MWBEs, it was based on census data. In Associated General Contractors of America v. City of Columbus[97], the City's consultants collected data on the number of MWBE firms in the Columbus MSA in order to calculate the percentage of available MWBE firms. This is referred to as the rate of availability. Three sources were considered to determine the number of MWBEs "ready, willing

[94] Webster v. Fulton County, 51 F. Supp. 2d 1354 (N.D. Ga. 1999).

[95] Engineering Contrs. Ass'n v. Metropolitan Dade County, 122 F.3d 895(11th Cir. 1997).

[96] Contractors Ass'n of E. Pa. v. City of Phila., 6 F.3d 990 (3rd Cir. 1993).

[97] Associated Gen. Contrs. of Am. v. City of Columbus, 936 F. Supp. 1363 (1996).

and able" to perform construction work for the city. None of the measures of availability purported to measure the number of MWBEs who were qualified and willing to bid as a prime contractor on city construction projects.

The issue of availability also was examined by the Eleventh Circuit in Contractors Association of South Florida, Inc., et al v. Metropolitan Dade County, et al.[98] Here, the Court opined that when reliance is made upon statistical disparity, and special qualifications are necessary to undertake a particular task, the relevant statistical pool must include only those minority owned firms qualified to provide the requested services. Moreover, these minority firms must be qualified, willing and able to provide the requested services. If the statistical analysis includes the proper pool of eligible minorities, any resulting disparity, in a proper case, may constitute prima facie proof of a pattern or practice of discrimination.

In an opinion by the Sixth Circuit in Associated General Contractors v. Drabik[99], the Court of Appeals ruled that the State of Ohio failed to satisfy the strict scrutiny standard to justify the state's minority business enterprise act, by relying on statistical evidence that did not account for which firms were qualified, willing and able to perform on construction contracts. The Court stated that "although Ohio's most compelling statistical evidence compares the percentage of contracts awarded to minorities to the percentage of minority owned businesses...the problem is that the percentage of minority owned businesses in Ohio (7% of 1978) did not take into account which were construction firms and those who were qualified, willing and able to perform on state construction contracts."[100] Although this was more data than was submitted in Croson, it was still insufficient under strict scrutiny, according to the Court.[101] Drabik, then determines that availability, and in particular the ability or capability for firms to perform must at least be in broad work categories i.e. the Courts reference to construction as a category.

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[98] Engineering Contrs. Ass'n v. Metropolitan Dade County, 122 F.3d 895 (11th Cir. 1997).

[99] Associated Gen. Contrs. of Ohio, Inc. v. Drabik, 214 F.3d 730(6th Cir. 2000); Rutherford v. City of Cleveland, 179 Fed. Appx. 366.

[100] Id. at 736.

[101] Id.

e) ***Utilization***

Utilization is a natural corollary of availability, in terms of statistical calculation. In City of Columbus, the City's consultants calculated the percentage of City contracting dollars that were paid to MWBE construction firms. This is referred to as the rate of utilization. From this point, one can determine if a disparity exists and, if so, to what extent.

f) ***Disparity Index and Croson***

To demonstrate the under-utilization of MWBEs in a particular area, parties can employ a statistical device known as the "disparity index".[102] The disparity index is calculated by dividing the percentage of utilization in each race/gender/ethnicity category by the percentage of available firms in the same race/gender/ethnicity category. A disparity index of one (1) demonstrates full MWBE participation or "parity", whereas the closer the index is to zero, the greater the underutilization. Some courts multiply the disparity index by 100, thereby creating a scale between 0 and 100, with 100 representing full utilization.

Courts have used these disparity indices to apply the "strong basis in evidence" standard in Croson. For instance, the Eleventh Circuit held that a 0.11 disparity "clearly constitutes a prima facie case of discrimination indicating that the racial classifications in the County plan were necessary" under Croson.[103] Based on a disparity index of 0.22, the Ninth Circuit upheld the denial of a preliminary injunction to a challenger of the City of San Francisco's MBE plan based upon an equal protection claim.[104] Accordingly, the Third Circuit held that a disparity of 0.04 was "probative of discrimination in City contracting in the Philadelphia construction industry."[105]

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[102] See Contractors Assn. 6 F.3d at 1005 (Third Circuit joining the First, Ninth, and Eleventh Circuits in relying on disparity indices to determine whether a municipality satisfies Croson's evidentiary burden).

[101] Cone Corp., 908 F.2d at916.

[104] AGC v. Coal. for Economic Equity, 950 F.2d 1401, 1414 (9th Cir. 1991).

[105] Contractors Ass'n., 6 F.3d at 1005.

g) *Standard Deviation*

The number calculated via the disparity index is then tested for its validity through the application of a standard deviation analysis. Standard deviation analysis measures the probability that a result is a random deviation from the predicted result (the more standard deviations, the lower the probability the result is a random one.) Social scientists consider a finding of two standard deviations significant, meaning that there is about one chance in 20 that the explanation for the deviation could be random and the deviation must be accounted for by some factor. The Eleventh Circuit has directed that " 'where the difference between the expected value and the observed number is greater than two or three standard deviations', then the hypothesis that [employees] were hired without regard to race would be suspect."[106]

h) *Statistical Regression Analysis*

The statistical significance of certain quantitative analyses was another issue that arose in the Webster case. The District Court indicated that the appropriate test should resemble the one employed in the Engineering Contractors case, wherein two standard deviations or any disparity ratio that was higher than .80 (which is insignificant), should be used. The Webster Court criticized the Fulton County expert for failing to use a regression analysis to determine the cause of the disparity. The Court likewise discredited the post-disparity study for failing to use regression analysis to determine if underutilization was due to firm size or inability to obtain bonding and financing.

The Webster Court noted that the Court of Appeals in Engineering Contractors affirmed the District Court's conclusion that the disparities offered by Dade County's experts in that case were better explained by firm size than by discrimination.[107] Dade County had conducted a regression analysis to control for firm size after calculating disparity indices with regard to the utilization of BBEs, HBEs and WBEs in the Dade County market, by comparing the amount of contracts awarded to the amount each group would be expected to receive based on the group's bidding activity and the awardee success rate. Although there were a few unexplained disparities that

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[106] Peightal , 26 F.3d at 1556 (quoting Hazelwood, 433 U.S.at 308 n.13, 97 S.Ct. 2742 n.13, quoting Castaneda v. Partida, 430 U.S. 482, 497 n.17, 97 S.Ct. 1272, 1281 n.17, (1977)).

[107] Webster, 51 F. Supp. 2d at 1365.

remained after controlling for firm size, the District Court concluded (and the Court of Appeals affirmed) that there was no strong basis in evidence for discrimination for BBEs and HBEs and that the quantitative analysis did not sufficiently demonstrate the existence of discrimination against WBEs in the relevant economic sector.[108] Specifically, the Court noted that finding a single unexplained negative disparity against BBEs for the years 1989-1991 for a single SIC code was not enough to show discrimination.

The Fourth Circuit Court of Appeals has signaled its agreement with this position. As mentioned in Podberesky, *infra*, the Court of Appeals determined that the University of Maryland's merit-based scholarship program designed exclusively for African American students was unconstitutional. In its opinion, the three-judge panel rejected UMCP's evidence about its reference pool of high school graduates as overly broad. Additionally, the Court voiced its concerns that the University's "collection of arbitrary figures" failed to account for economic or other explanations for the high attrition rates among African American students at UMCP. "We can say with certainty...that the failure to account for these, and possibly other, nontrivial variables cannot withstand strict scrutiny...In more practical terms, the reference pool must factor out, to the extent practicable, all nontrivial, non-race based disparities in order to permit an inference that such, if any, racial considerations contributed to the remaining disparity."[109]

i) ***Geographic Scope of the Data***

The Croson Court observed that because discrimination varies across market areas, state and local governments cannot rely on national statistics of discrimination in the disputed industry to draw conclusions about prevailing market conditions in their respective regions.[110] However, to confine the permissible data to a governmental entity's strict geographical borders would ignore the economic reality that contracts are often awarded to firms located in adjacent areas. Thus, courts closely scrutinize pertinent data related to the jurisdictional area of the state or municipality.

Generally, the scope of the statistical analyses pertains to the geographic market area from which the governmental entity makes most of its purchases. In addition, disparities concerning

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[108] Engineering Contractors, 122 F.3d at 917.

[109] Podberesky v. Kirwan, 38 F.3d at 160.

[110] Croson, 488 U.S. at 504, 109 S.Ct. at 727.

utilization, employment size, and formation are also relevant in determining discrimination in a marketplace. It has been deemed appropriate to examine the existence of discrimination against MWBEs even when these areas go beyond the geographical boundaries of the local jurisdictions.

Court decisions have allowed jurisdictions to utilize evidence of discrimination from nearby public entities and from within the relevant private marketplace. Nevertheless, extra-jurisdictional evidence must still pertain to the operation of an industry within geographic boundaries of the jurisdiction. As the Court wrote in Tennessee Asphalt v. Farris, "[s]tates and lesser units of local government are limited to remedying sufficiently identified past and present discrimination within their own spheres of authority."[111]

j) *Post-Enactment Evidence*

In Croson, the Court stated that a state or local government "must identify that discrimination...with some specificity before they may use race-conscious relief."[112] However, the Court declined to require that all relevant evidence of such discrimination be gathered prior to the enactment of the program. Pre-enactment evidence refers to evidence developed prior to the enactment of a MWBE program by a governmental entity. Such evidence is critical to any affirmative action program because, absent any pre-enactment evidence of discrimination, a state or local government would be unable to satisfy the standards established in Croson. On the other hand, post-enactment evidence is that which has been developed since the affirmative action program was enacted and therefore was not specifically relied upon as a rationale for the government's race and gender conscious efforts. As such, post-enactment evidence has been another source of controversy in contemporary litigation, though most subsequent rulings have interpreted Croson's evidentiary requirement to include post-enactment evidence. Significantly, crucial exceptions exist in rulings from the federal district courts.

In West Tennessee Chapter of Associated Builders and Contractors v. Board of Education of the Memphis City Schools[113], the District Court faced the issue of whether "post enactment evidence"

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[111] Tennessee Asphalt Co. v. Farris, 942 F.2d 969 974 (6th Cir. 1991).

[112] Croson, 488 U.S at 504, 109 S.Ct. at 727.

[113] West Tenn. Chapter of Associated Builders & Contrs., Inc. v. Board of Education of the Memphis City Schools, 64 F. Supp. 2d 714 (W.D. Tenn 1999)

was sufficient to establish a strong basis upon which a race conscious program can be supported. The Court opined that although the Court in Croson was not faced with the issue of post enactment evidence, much of the language in the opinion suggested that the Court meant to require the governmental entity to develop the evidence before enacting a plan. Furthermore, when evidence of remedial need was not developed until after the enactment of a race-conscious plan, that evidence provided no insight into the motive of the legislative or administrative body.

The Court concluded that admitting post-enactment evidence was contrary to Supreme Court precedent as developed in Wygant, Croson, and Shaw. The Court held that post-enactment evidence may not be used to demonstrate that the government's interest in remedying prior discrimination was compelling. It is important to note that this opinion is not representative of the majority of case law on this issue.

Early post-Croson decisions permitted the use of post-enactment evidence to determine whether an MWBE program complies with Croson.[114] In Ensley, the Eleventh Circuit explicitly held that post-enactment evidence is properly introduced in the record and relied upon by district courts in determining the constitutionality of government race and gender-conscious programs:

> Although Croson requires that a public employer show strong evidence of discrimination when defending an affirmative action plan, the Supreme Court has never required that, before implementing affirmative action, the employer not have proved that it has discriminated. On the contrary, further finding of discrimination need neither precede nor accompany the adoption of affirmative action.[115]

Again, federal cases from Maryland clarify the issue, at least for Montgomery County.

Although the Fourth Circuit invalidated affirmative action plans in Maryland Troopers Association and Podberesky, dicta in the cases suggests that local governments can rely upon post-

[114] See, e.g., Contractors Assn., 6 F.3d 1003-04 (3rd Cir. 1993); Harrison & Burrows Bridge Constructors, Inc. v. Cuomo, 981 F.2d 50, 60 (2d Cir. 1992); Coral Constr., 941 F.2d 921.

[115] Ensley Branch, 31 F.3d at 1565.

enactment evidence.[116] In Associated Utility Contractors, the Court explicitly stated its embrace of post-enactment evidence. As in the two earlier cases, the Court in Associated Utility Contractors invalidated the MWBE program of the City of Baltimore, in large part, because the City created its race-specific remedy *before* it had any statistical evidence to support it. In the footnotes of the District Court opinion, the judge noted that the Fourth Circuit has not ruled on whether an affirmative action program must be justified solely on the basis of pre-enactment evidence. Then, the footnote recited a litany of federal circuits that favor post-enactment evidence.[117] Ultimately, the District Court stated that the most beneficial role for post-enactment evidence is for the purpose of ensuring the narrow-tailoring of race-specific remedies. "I commend the City for beginning to collect and analyze the data which the City Council directed it to begin collecting annually back in 1990, when the [MWBE] Ordinance was enacted. Presuming the data this Study produces is reliable and complete, the City could soon have the statistical basis upon which to make the findings Ordinance 610 requires, and which could justify the constitutionally required standards for the promulgation and implementation of narrowly tailored set-aside race- and gender-conscious goals."[118]

In light of the case law and applicable legal principles, a race and gender-conscious program implemented by the government of Montgomery County may be supported by post-enactment evidence of discrimination. Although post-enactment evidence may not suffice to support the original intent of a governmental entity, it can prove helpful in other ways.[119] Specifically, post-enactment evidence seems necessary to determine the program's success for narrow tailoring and continued need after the program's initial term has expired.[120]

k) *Remedies-- Narrowly Tailored*

Under the Croson framework, any race-conscious plan must be narrowly tailored to ameliorate the effects of past discrimination. Croson's progeny provide significant guidance on how remedies

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[116] See, e.g., Maryland Troopers Association, 993 F.2d at 1078 see also Podberesky, 38 F.3d at 154.

[117] Associated Util. Contrs. of Md., Inc. v. Mayor of Baltimore, 83 F. Supp. 2d 613 n.6. (D. Md. 2000).

[118] Id. at 622.

[119] See, e.g., Mark L. Johnson, "Legislate First, Ask Questions Later: Post-Enactment Evidence in Minority Set-Aside Litigation," 2002 U. Chi. Legal F. 303 (2002).

[120] Contractors Ass'n, 91 F. 3d at 606.

should be narrowly tailored. "Generally, while 'goals' are permissible, unyielding preferential 'quotas' will normally doom an affirmative action plan."[121] The Fourth Circuit has set forth four considerations in determining whether a plan is narrowly tailored:

(1) consideration of race neutral alternatives,
(2) flexibility of plan,
(3) relationship of plan's numerical goals to relevant market, and
(4) effect of plan on third parties.[122]

Post-Croson cases articulated the general guidelines listed below in construing the elements of the narrow tailoring prong:

1. Relief is limited to minority groups for which there is identified discrimination;

2. Remedies are limited to redressing the discrimination within the boundaries of the enacting jurisdiction;

3. The goals of the programs should be flexible and provide waiver provisions;

4. Race and/or gender neutral measures should be considered; and

5. The program should include provisions or mechanisms for periodic review and sunset.

As a result, the Fourth Circuit has invalidated race-specific approaches that it found were not narrowly tailored along these lines.[123]

MWBE programs must be designed so that the benefits of the programs are targeted specifically toward those firms that faced discrimination in the local marketplace. To withstand a challenge,

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[121] Stefanovic v. University of Tennessee, 1998 U. S. App. LEXIS 1905 (6th Cir. 1998); see also Tuttle v. Arlington County School Board, 195 F.3d 698 (4th Cir. 1999).

[122] Concrete General, Inc., 779 F. Supp. at 379 (citing United States v. Paradise, 480 U.S. 149, 171 (1987)); see also Peightal , 940 F.2d 1394, 1406 (11th Cir. 1991); Engineering Contractors, 122 F.3d. 895, 927 (citing Ensley Branch,, 31 F.3d at 1569).

[123] See, e.g., Podberesky, 38 F.3d at 158.

relief must extend only to those minority groups for which there is evidence of discrimination.[124] Consequently, MWBE firms from outside the local market must show that they have unsuccessfully attempted to do business within the local marketplace in order to benefit from the program.

The Fourth Circuit Court of Appeals in Tuttle rejected the District Court's finding that a Virginia county's desegregation plan was viable. The Court ruled that the plan was not narrowly tailored to remedy past discrimination. The Court found that the plan was unconstitutional because the school system seemed primarily interested in racial balancing rather than remedying present effects of past abuses.[125] Years earlier, the Fourth Circuit rejected the race-specific relief in a Consent Decree between the Coalition of Black Maryland State Troopers and the Maryland State Police because the statistical basis for the Consent Decree was flawed. Absent a strong nexus between the injury and the proposed relief, the Consent Decree could not withstand strict scrutiny. "All too easily, invidious racial preferences can wear the mask of remedial measures – a risk that only magnifies as the governmental body gets smaller and more susceptible to interest-group capture."[126]

Croson requires that there not only be a strong basis in evidence for a conclusion that there has been discrimination, but also for a conclusion that the particular remedy is made necessary by the discrimination. In other words, there must be a "fit" between past/present harm and the remedy. The Third Circuit, in Contractors Association of Eastern Pennsylvania, approved the District Court's finding that the subcontracting goal program was not narrowly tailored. Much of the evidence found on the discrimination by the City of Philadelphia was against black "prime contractors" who were capable of bidding on City prime contracts. Moreover, there was no firm evidentiary basis for believing that Non-Minority contractors would not hire black subcontractors.[127]

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[124] See Maryland Minority Contractors Association, 70 F. Supp.2d at 593-96.

[125] Tuttle by Tuttle v. Arlington County Sch. Bd., 195 F.3d 698,706-07.

[126] Maryland Troopers Association, 993 F.2d at 1074-76.

[127] Contractor's Association of Eastern PA, Inc. v. City of Philadelphia, 91F.3d 586 (3rd Cir. 1996)

Inherent in the above discussion is the notion that MWBE programs and remedies must maintain flexibility with regard to local conditions in the public and private sectors. Courts have suggested project-by-project goal setting and waiver provisions as means of insuring fairness to all vendors. As an example, the Fourth Circuit had little problem rejecting the Banneker scholarship program at the University of Maryland because it had no "sunset" provision. "The program thus could remain in force indefinitely based on arbitrary statistics unrelated to constitutionally permissible purposes."[128] Additionally, some courts have indicated that goals need not directly correspond to current availability if there are findings that availability has been adversely affected by past discrimination. Lastly, "review" or "sunset" provisions are necessary components to guarantee that remedies do not out-live their intended remedial purpose.

4. Burdens of Production and Proof

The Croson Court struck down the City of Richmond's minority set-aside program because the City failed to provide an adequate evidentiary showing of past and present discrimination.[129] Since the Fourteenth Amendment only allows race-conscious programs that narrowly seek to remedy particularized discrimination, the Court held that state and local governments "must identify that discrimination . . . with some specificity before they may use race-conscious relief." The Court's rationale for judging the sufficiency of the City's factual predicate for affirmative action legislation was whether there existed a "strong basis in evidence for its [government's] conclusion that remedial action was necessary."[130]

Croson places the initial burden of production on the state or local governmental actor to demonstrate a "strong basis in evidence" that its race- and gender-conscious contract program is aimed at remedying identified past or present discrimination. A state or local affirmative action program that responds to discrimination is sustainable against an equal protection challenge so long as it is based upon strong evidence of discrimination. A municipality may establish an inference of discrimination by using empirical evidence that proves a significant statistical disparity between the number of qualified MWBEs, the number of MWBE contractors actually contracted by the government, or by the entity's prime contractors. Furthermore, the quantum

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[128] Podberesky, 38 F.3d at 160.

[129] Croson, 488 U.S. at 498-506, 109 S.Ct. at 723-28.

[130] Id. at 500, 725 (quoting Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 277, 106 S.Ct. 1842, 1849(1986)).

of evidence required for the governmental entity must be determined on a case-by-case basis and in the context and breadth of the MWBE program it advanced.[131] If the local government is able to do this, then the burden shifts to the challenging party to rebut the municipality's showing.[132]

> Once the governmental entity has shown acceptable proof of a compelling interest in remedying past discrimination and illustrated that its plan is narrowly tailored to achieve this goal, the party challenging the affirmative action plan bears the ultimate burden of proving that the plan is unconstitutional.[133]

D. The Latest Developments

On April 16, 2013, in a case styled, Associated General Contractors of America, San Diego Chapter v. California DOT, 713 F.3d 1187, the United States Court of Appeals for the 9th Circuit upheld the constitutionality of the California Department of Transportation's (Caltrans) Disadvantaged Business Enterprise (DBE) program. The Caltrans program implements the federal DBE Program. The federal program applies to state and local government recipients of federal funds from the U. S. Department of Transportation (DOT) through the U. S. Federal Aviation Administration (FAA), Federal Transit Administration (FTA), and Federal Highway Administration (FHWA). Caltrans had engaged a consulting firm to conduct a disparity study and significantly the Court found the information in the disparity study probative and ruled that Caltrans met the burden of strict scrutiny.

> The Ninth Circuit stated in pertinent part:
>
> Based on review of public records, interviews, assessments as to whether a firm could be considered available, for Caltrans contracts, as well as numerous other adjustments, the firm concluded that minority- and women owned businesses should be expected to receive 13.5% of contract dollars from Caltrans-administered federally assisted contracts...[The disparity study] accounted for the factors mentioned in *Western*

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[131] See Concrete Works v. City & County of Denver, 36 F.3d 1513.(10th Cir. 1994).

[132] See Contractors v. Philadelphia, 6 F.3d at 1007.

[133] Mazeske v. City of Chicago, 218 F.3d 820 (7th Cir. 2000); Sherbrooke Turf, Inc. v. Minn. DOT, 345 F.3d 964.

> *States Paving*[134], as well as others, adjusting availability data based on capacity to perform work and controlling for previously administered affirmative action programs...The substantial statistical disparities alone would give rise to an inference of discrimination, and certainly Caltrans' statistical evidence combined with anecdotal evidence passes constitutional muster.

This decision is important because it is the most recent validation of the efficacy of a properly conducted disparity study in allowing a governmental actor to survive the constitutional test of strict scrutiny when its narrowly tailored programs are challenged.

E. Conclusion

Montgomery County currently utilizes narrowly-tailored race-conscious remedies to ameliorate the present effects of past discrimination with regard to MWBE utilization. The law requires that such programs be reviewed periodically. This Study seeks to determine whether the current program has achieved its intended goal of eliminating identified discrimination. In this Study, the Griffin & Strong P.C. team analyzed the statistical data as extensively as possible given the types of data maintained by Montgomery County. The data were analyzed using the more conservative interpretations of availability that have been proffered by the most recent court opinions, and the quantitative data has been buttressed with extensive anecdotal evidence. The findings are presented in the pages that follow.

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[134] Western States Paving Co. v. Washington State DOT, 407 F.3d 983 (9th Cir. 2005); Geod Corp. v. N.J. Transit Corp., 746 F. Supp. 2d 642; M.K. Weeden Constr., Inc. v. Mont. Dep't of Transportation, 2013 U.S. Dist. LEXIS 126286.

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