

# AFFIRMATIVE ACTION FOR THE FEMALE ENTREPRENEUR:

## GENDER AS A PRESUMED SOCIALLY DISADVANTAGED GROUP FOR 8(a) PROGRAM PURPOSES

ATHENA S. CHENG\*

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\* J.D. Candidate, May 2002, *American University, Washington College of Law*; BA, 1999, *Rutgers University*. I wish to thank my mentors at the U.S. Small Business Administration.

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## INTRODUCTION

Female entrepreneurs are a formidable force in the American economy, their growth rate from 1997 estimated at 6.2 million majority-owned, privately-held women-owned businesses by 2002.<sup>1</sup> However, the participation of women entrepreneurs in the procurement market remains far below the expectations of the Executive Branch, Congress, and coalitions of women business owners.<sup>2</sup> The Small Business Administration (“SBA”) focuses on

1. See CENTER FOR WOMEN’S BUSINESS RESEARCH, NUMBER OF WOMEN-OWNED BUSINESSES EXPECTED TO REACH 6.2 MILLION IN 2002 (Dec. 4, 2001) (projecting women-owned firms will employ approximately 9.2 million workers and yield sales of an estimated \$1.15 trillion), at <http://www.nfwbo.org/Research/12-4-2001/12-4-2001.htm>; see generally Candida Brush & Robert D. Hisrich, Women-Owned Businesses: Why Do They Matter?, in ARE SMALL FIRMS IMPORTANT? THEIR ROLE AND IMPACT 111, 111 (Zoltan J. Acs ed., 1999) (noting that women-owned businesses over the past two decades earned \$2.3 trillion in sales while employing one of every four workers, for a total of 18.5 million employees in 1996); see also OFFICE OF ADVOCACY, SBA, THIRD MILLENIUM: SMALL BUSINESS & ENTREPRENEURSHIP IN THE 21<sup>ST</sup> CENTURY: A SPECIAL PUBLICATION PREPARED FOR DELEGATES TO THE 1995 WHITE HOUSE CONFERENCE ON SMALL BUSINESS 68 (1995) (noting that not only has the trend for women’s shares of sole proprietorships increased since 1977 while men’s shares have decreased, women-owned businesses also employ thirty-five percent more Americans than all Fortune five hundred companies worldwide).

2. See *infra* Part I (providing a historical account of legislative efforts and Executive Orders to stimulate business development growth among women); see also OFFICE OF ADVOCACY, SBA, WOMEN IN BUSINESS 12 (1998) (noting the disparity in women’s participation in procurement as seen in the fact that, although their

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business development through two avenues, the Small Disadvantaged Business (“SDB”) and 8(a) Business Development (“8(a)”) programs.<sup>3</sup> Within the eligibility criteria, the classification of presumptively socially disadvantaged groups is based on identification as a racial minority for the 8(a) program, but not upon gender.<sup>4</sup> The controversy in designating women as presumptively socially disadvantaged for the 8(a) program is evident in recent political election rhetoric that echoes the current American consensus: “Affirmative action” is a dirty word.<sup>5</sup> Meanwhile, the lack of universal

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businesses account for nearly one-third of all businesses, women-owned businesses received only 1.7% of federal prime contract dollars in fiscal year 1996). While the number of contracts awarded increased, the dollar share of procurement for women decreased in fiscal year 1996, which implies contract sizes are relatively smaller than those awarded to others. *Id.*

3. See *infra* Part II (outlining the business development programs constituting the primary focus of this Comment).

4. See SBA Eligibility Requirements for Participation in the 8(a) Business Development Program, 13 C.F.R. § 124.103 (2001) (enumerating groups presumed socially disadvantaged).

5. See Mark Silva, Key Figure in Race Debate Sets His Sights at Federal Level, Ward Connerly Seeks to Make Affirmative Action a Presidential Campaign Issue, PORTLAND OREGONIAN, July 2, 1999, at A5 (discussing how Ward Connerly, a national civil rights advocate for equal opportunity for all Americans regardless of race, sex, or ethnic background, introduced two amendments eliminating state-sponsored racial preference in California, Washington, and Florida); Joyce Howard Price, Gore Says Nominees Would Be Pro-Choice, WASH. TIMES, Nov. 1, 1999, at A3 (noting Vice President Al Gore declared affirmative action as a major controversy for the election year); Vanessa Bauza, Contract Issue Splits Leaders: Our Minority Policies Will Stay, County Says, SUN-SENTINEL, Nov. 19, 1999, at 1B (quoting Jim Kane, who edits a nonpartisan political journal, on how the positive local response to Governor Jeb Bush’s “One Florida Initiative,” which eliminates affirmative action in state agencies, indicates affirmative action to be a dirty word). See generally Roger Pilon, Discrimination, Affirmative Action, and Freedom: Sorting out the Issues, 45 AM. U. L. REV. 775, 790 n.1 (1996) (discussing the 1996 election year debate over affirmative action); Karen M. Berberich, Note, *Strict in Theory, Not Fatal in Fact: An Analysis of Federal Affirmative Action Programs in the Wake of Adarand v. Peña*, 11 ST. JOHN’S J. LEGAL COMMENT. 101, 135 n.16 (1995) (documenting the widespread belief that Americans are no longer interested in using affirmative action to correct the errors of past generations); Robert Perloff & Fred B. Bryant, *Identifying and Measuring Diversity’s Payoffs, Light at the End of the Affirmative Action Tunnel*, 6 PSYCHOL. PUB. POL’Y & L. 101, 104 (2000) (summarizing “six principal positions” of the public’s opinion on affirmative action). Affirmative action is considered to be:

- beneficial when the goal is to create intellectual diversity but wrong when the goal is to redistribute from Whites to people of color;
- wrong if based on race but desirable if based on class;
- generally improper but appropriate to remedy past discrimination against racial minorities in narrow context;
- such as a construction industry or a police department in a particular city;
- beneficial if limited to African Americans, omitting other minority groups;
- undesirable but constitutionally permissible even when initiated by government;
- permissible in private business but unconstitutional when sponsored by government.

support among women's business groups for a presumptively socially disadvantaged group designation illustrates the disparate viewpoints of how to achieve gender equality.<sup>6</sup>

Gender should be included as a presumed socially disadvantaged group for 8(a) program eligibility purposes. Part I provides a historical context of the 8(a) program and outlines the statutory framework, program functions, eligibility requirements, and SBA authority to designate a group as presumed socially disadvantaged. Part II examines procurement-related case law, including the latest 2001 Supreme Court decision, *Adarand*, permitting racial preferencing in federal procurement.<sup>7</sup> Part III evaluates whether women meet the requisite three-pronged statutory test to acquire group designation as presumed socially disadvantaged, and examines plausible consequences of judicial review of the 8(a) program. Without a doubt, the 8(a) program provides a substantial growth opportunity for small businesses, and women-owned businesses in particular would benefit from such group designation.

## I. GOVERNMENT CONTRACTING: THE PHENOMENON OF THE WOMAN-OWNED BUSINESS AND THE 8(A) PROGRAM

### A. *The Rise of the Woman Entrepreneur*

Longstanding prejudice, cultural bias, and discriminatory practices have placed women at a comparative disadvantage to men.<sup>8</sup> During the nineteenth century, the legal treatment of women was similar to that of African Americans under pre-Civil War slave codes.<sup>9</sup> The social position of women slowly improved with the passage of several laws, beginning with the Nineteenth Amendment, which gave women the right to vote.<sup>10</sup> Women also benefited from Fair Labor Standards

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*Id.*

6. See *infra* note 84 (listing groups that support a petition to include women as a presumed socially disadvantaged group; however, the list does not include a well-known national women's advocacy group).

7. See *infra* Part III (providing a broad framework of the federal business development program provided by SBA as well as the reforms to the program after significant Supreme Court rulings).

8. See generally LAURA A. OTTEN, *WOMEN'S RIGHTS AND THE LAW*, 129-71 (1993) (providing a survey of the cases which have shaped the present legal status of women).

9. See *Frontiero v. Richardson*, 411 U.S. 677, 685 (1973) (stating that "[n]either slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property and to serve as legal guardians of their own children.").

10. U.S. CONST. amend. XIX.

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Act of 1938,<sup>11</sup> which provided certain protections in the workplace such as a minimum wage, overtime pay, record keeping, and child labor laws.<sup>12</sup> Later, the Equal Pay Act of 1963 mandated pay equity regardless of gender.<sup>13</sup> In addition, Title VII of the Civil Rights Act of 1964, later amended in 1991, protects individuals from employment discrimination and allows a victim of sex discrimination to sue for punitive damages.<sup>14</sup>

Throughout the twentieth century, women's participation in the labor force increased steadily.<sup>15</sup> Family structures evolved to include single parenthood or children taking care of the elderly,<sup>16</sup> both phenomena prompted Congress to pass the Family and Medical Leave Act of 1993 to address the concerns of balancing a family and career.<sup>17</sup> A marked shift was seen as women moved from corporate offices into their own office spaces or places of businesses; between 1977 and 1992, women-owned businesses increased dramatically by more than eleven percent with each successive year.<sup>18</sup>

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11. Ch. 676, 52 Stat. 1060 (1938) (codified at 29 U.S.C. § 206 (2001)).

12. 29 U.S.C. § 201 (2001).

13. Pub. L. No. 88-38, 77 Stat. 56 (1963) (codified at 29 U.S.C. § 206 (1998)).

14. See Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified in scattered sections of 42 U.S.C.) (allowing punitive damages for sex discrimination in the employment context per 42 U.S.C. § 1981a(a)(1)).

15. See WOMEN'S BUREAU, U.S. DEP'T OF LABOR, Women at the Millennium, Accomplishments & Challenges Ahead, FACTS ON WORKING WOMEN (Mar. 2000) (tracking the trend in the early 1980s when women no longer chose to leave the work force to care for families and to return to work later in life), available at [http://www.dol.gov/dol/wb/public/wb\\_pubs/millennium52000.htm](http://www.dol.gov/dol/wb/public/wb_pubs/millennium52000.htm). A graph illustrates that the labor force participation of women by age indicates that the "M" shape, which is traditionally associated with women choosing to leave for familial reasons and later returning, gradually disappears and resembles the male "bowl" shape. *Id.* The Women's Bureau also noted that the "Baby Boom" and lengthening life span contributed to an elderly worker population. *Id.*

16. See *id.* (noting that Census figures in 1995 indicated that 17.5% of women between ages 40-44 were childless, compared to 10.2% in 1976, while single-parenting was an emerging characteristic of the late twentieth century).

17. See Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (codified as amended at 5 U.S.C. §§ 6381-6387 and 29 U.S.C. §§ 2601-2654 (1994 & Supp. III 1997)).

Private sector practices and government policies have failed to adequately respond to recent economic and social changes that have intensified the tensions between work and family. This failure continues to impose a heavy burden on families, employees, employers and the broader society. § 5 provides a sensible response to the growing conflict between work and family by establishing a right to unpaid family and medical leave for all workers covered under the act.

S. REP. NO. 103-3, at 4 (1993).

18. See WOMEN'S BUREAU, U.S. DEP'T OF LABOR, FACTS ON WORKING WOMEN, WOMEN BUSINESS OWNERS (calculating women-owned individual proprietorships, partnerships, and subchapter S corporations that contributed to the increase in women-owned businesses), at [http://www.dol.gov/wb/public/wb\\_pubs/wbo.htm](http://www.dol.gov/wb/public/wb_pubs/wbo.htm)

Women-owned businesses are presently a vital component of the U.S. economy.<sup>19</sup> Based on statistical projections from the 1987 and 1992 Census Bureau Reports, the National Foundation of Women Business Owners estimates that the number of women-owned businesses has doubled in the past twelve years.<sup>20</sup> However, women continue to face substantial hurdles, especially in procuring institutional venture capital financing.<sup>21</sup> Despite the existence of programs tailored to meet their specific demands, women still encounter financing obstacles<sup>22</sup> and continue to receive less bank credit than.<sup>23</sup>

### *B. Fostering Female Entrepreneurship Through Government Contracting*

#### *1. Executive Branch Support*

From late 1977 to mid-1979, President Carter worked to establish women-owned businesses as a priority for the government.<sup>24</sup> The Interagency Task Force on Women Business Owners was established in 1977 to examine how women-owned businesses fared in the American economy.<sup>25</sup> Despite President Carter's Executive Order

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(last modified Apr. 1999).

19. See Brush & Hisrich, *supra* note 1, at 111 (noting that women are highly visible in many industrial sectors, but mostly concentrated in services, retail trade, finance, insurance, and real estate, based on the 1996 statistics of the National Foundation of Women Business Owners); see also OFFICE OF ADVOCACY, SBA, NEW AMERICAN EVOLUTION: THE ROLE AND IMPACT OF SMALL FIRMS 19 (1998) (concluding that since the 1970s, women have created many new businesses as a result of choosing self-employment).

20. See generally CENTER FOR WOMEN'S BUSINESS RESEARCH, *supra* note 1; see also NEW AMERICAN EVOLUTION, *supra* note 19, at 19 (calculating that since the 1970s, women-owned businesses increased their share of small business from five percent to thirty-eight percent).

21. See discussion *infra* Part II.A.3.

22. See Women's Business Enterprises: Hearings before Subcomm. on Gov't Programs and Oversight, 103rd Cong. (1999) (prepared testimony of Colleen M. Anderson, Executive Vice President, Wells Fargo Bank, San Francisco, CA) (highlighting the success of Wells Fargo's Women's Loan Program that offers \$5,000-\$50,000 lines of credit to pre-qualified women business owners nationwide, which was expanded from \$1 billion over three years to \$10 billion over a ten years). As of fall 1998, Wells Fargo lent over \$3.7 billion to women-owned businesses. *Id.*

23. See *id.*

24. See Exec. Order No. 12,138, 44 Fed. Reg. 29,637 (May 18, 1979) (creating an interagency committee on women's business enterprises and a national women's business enterprise policy and prescribing arrangements for developing, coordinating, and implementing a national program for women's business enterprise).

25. H.R. REP. NO. 100-955, at 15 (1988) *reprinted in* 1988 U.S.C.C.A.N. 3530, 3544 (discussing the report issued by the task force, named The Bottom Line: Unequal Enterprise in America).

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12,138, women-owned businesses in the procurement market did not greatly improve.<sup>26</sup> President Reagan signed Executive Order 12,426, which established a President's Advisory Committee on Women's Business Ownership.<sup>27</sup>

On October 13, 1994, President Clinton issued a Memorandum of Continued Commitment to Small, Disadvantaged, and Small Women-Owned Businesses in Federal Procurement, which renewed the commitment of the Clinton-Gore Administration to promoting contracting opportunities for women entrepreneurs.<sup>28</sup> During the Clinton-Gore Administration, \$77 billion was loaned to small businesses; in fiscal year 1999, the government maintained a \$40 billion portfolio of loan guarantees to nearly 486,000 small businesses that otherwise would not have acquired capital.<sup>29</sup> In an Executive Order, President Clinton publicly committed the entire federal government to a goal of five percent of the total value on all prime contract and subcontract awards per fiscal year for women-owned businesses.<sup>30</sup>

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26. *See id.* The Small Business Committee House Report stated:

Unfortunately, the Federal government has done very little to expedite or facilitate the entrepreneurial process for women. Past efforts have been unimaginative and perfunctory, half-hearted at best. However, authority for such effort was granted by Executive Order 12138, signed on May 18, 1979. The Executive Order established a national policy in support of women owned business, and directed Federal agencies to take appropriate action to strengthen women's business enterprise, and to 'ensure full participation by women in the free enterprise system,' support of women owned business and requires agencies to take affirmative action in a variety of activities. The goals and purposes of the Executive Order, while laudable, have not been effectively implemented nor have they been given the attention they deserve. To a very great extent, the powers granted by the Executive Order have remained unexercised, and the status of women owned business has not been materially improved by actions of the Federal government.

*Id.* at 2.

27. *See* Exec. Order No. 12,426, 48 Fed. Reg. 29,463, 29,464 (June 22, 1983) (establishing the President's Advisory Committee on Women's Business Ownership, composed of a maximum of fifteen advisors with adequate knowledge and expertise regarding women-owned businesses).

28. *See* 59 Fed Reg. 52,397 (Oct. 13, 1994) (stating that established federal government policy requires that "a fair proportion of its contracts be placed with . . . small, women-owned businesses.").

29. CLINTON-GORE ADMINISTRATION: A RECORD OF PROGRESS, GROWTH OF SMALL BUSINESS (summarizing the Administration's successes, including the tripling of small firm exporters, whose numbers tripled from 69,354 in 1987 to 209,455 in 1997), at [http://clinton4.nara.gov/WH/Accomplishments/Small\\_Business.html](http://clinton4.nara.gov/WH/Accomplishments/Small_Business.html) (updated July 2000).

30. *See* Increasing Opportunities for Women-Owned Small Businesses, Exec. Order No. 13,157, 65 Fed. Reg. 34,035 (May 23, 2000).

## 2. Congressional Efforts

For the past two decades, Congress has made a concerted effort to address the financial concerns for women entrepreneurs and to ensure that the federal government will make the procurement environment one of equal opportunity for women.<sup>31</sup> Even with the amendments to the Consumer Credit Protection Act of 1976,<sup>32</sup> the Senate Select Committee on Small Business documented problems women experience related to business entry and federal procurement.<sup>33</sup>

Congressional efforts to include women in procurement contracting resulted in legislation such as the Surface Transportation and Uniform Relocation Assistance Act of 1987, which added women as a group presumed to be socially and economically disadvantaged in the transportation construction industry.<sup>34</sup> Later, in the Airport and Airway Safety and Capacity Expansion Act, Congress required at minimum ten percent of federal assistance grants for airport projects to be spent with disadvantaged business enterprises, which included women-owned businesses in its definition.<sup>35</sup> Another example of a legislative change was seen in the 1990 amendment of the Clean Air Act, which required the Environmental Protection Agency to ensure that at least ten percent of federal funding was given to disadvantaged business enterprises, including women-owned businesses.<sup>36</sup> A government-wide five-percent goal was established to

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31. See Response to Comments to Department of Justice Proposed Reforms to Affirmative Action in Federal Procurement, 62 Fed. Reg. 25,648, 25,650 (1997) (not to be codified) (reasoning that federal affirmative action programs are not intended to remedy lost opportunities in the private sector). At a minimum, such programs are to provide "a means for minority-owned firms to secure full and fair treatment, which may well translate into more success for those firms in private commercial efforts." *Id.* The notice was a response to publishing DOJ Proposed Reforms found at 61 Fed. Reg. 26,042, published on May 26, 1996. *Id.* at 25,648.

32. See Equal Credit Opportunity Act, Pub. L. No. 94-239, 90 Stat. 251 (1976) (amending Title VII of the Consumer Credit Protection Act "to include discrimination on the basis of race, color, religion, national origin, and age.").

33. See S. REP. NO. 94-589, at 11 (1976) (recognizing the need to provide antidiscrimination protections to "women and others who encounter problems of discrimination in obtaining credit to establish businesses or conduct normal business operations.").

34. See Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. No. 100-17, Title I, § 106(c), 101 Stat. 132 (codified as amended at 23 U.S.C. § 101 (1994)).

35. Airport and Airway Safety and Capacity Expansion Act, Pub. L. No. 100-223, 101 Stat. 1486 (1987) (amending the Airport and Airway Improvement Act of 1982, Pub. L. No. 97-248, § 505 (1982)) (later replaced by the Transportation Equity Act for the 21st Century with the same provisions for women).

36. See Clean Air Act, Pub. L. No. 101-549, 104 Stat. 2399 (1990) (mandating that under § 1001(a), a minimum of ten percent of research must be devoted by the Administrator of the EPA to small disadvantaged business concerns) (codified at 42

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benefit small businesses owned and controlled by women, as stated in the Federal Acquisition Streamlining Act of 1994.<sup>37</sup> The Information Technology Management Reform Act of 1996 further streamlined the procurement process by transferring the procurement authority from GSA to each individual executive agency with respect to information technology.<sup>38</sup>

On June 22, 2000, the House passed an amendment that provides funding to the National Women's Business Council ("NWBC") and Women's Business Centers ("WBC").<sup>39</sup> The amendment would have increased funding to \$1 million for the NWBC and \$13 million for WBC program, as authorized under the Women's Business Centers Sustainability Act of 1999.<sup>40</sup>

On July 18, 1958, Congress passed the Small Business Act<sup>41</sup> to assist small businesses by ensuring their growth, safeguarding a fair proportion of the procurement market, selling a fair portion of government property to them, and aiding their competition in international markets.<sup>42</sup> In essence, SBA is authorized to enter into contracts with the federal government and its agencies and departments with requisite procurement authority.<sup>43</sup> SBA is also authorized to arrange for socially and economically disadvantaged small business concerns to perform SBA-awarded procurement contracts.<sup>44</sup>

To specifically promote women-owned businesses, SBA engages in

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U.S.C. § 7601 (1995)).

37. Pub. L. No. 103-355, 108 Stat. 3243 (1994) (codified at 10 U.S.C. § 2323 (1998)).

38. See Pub. L. No. 104-106, 110 Stat. 1861 (codified at 40 U.S.C. §§ 1401-1424). See generally SBA, OFFICE OF ADVOCACY, OFFICE OF GOVERNMENT CONTRACTING AND MINORITY ENTERPRISE DEVELOPMENT, PROCUREMENT OPPORTUNITIES: A SMALL BUSINESS GUIDE TO PROCUREMENT REFORM 16 (Sept. 2000) (noting that agencies would establish a chief information officer who would reduce each government contract into smaller, more manageable agreements for potential contractors).

39. See NATIONAL WOMEN'S BUSINESS COUNCIL, LEGISLATIVE VICTORY FOR NATIONAL WOMEN'S BUSINESS COUNCIL AND SBA'S WOMEN'S BUSINESS CENTERS (listing Representatives Jim McGovern, Nancy Johnson, Tom Udall, Mary Bono, Bernie Sanders, Connie Morella, Juanita Millender-McDonald, John Baldacci, and Grace Napolitano as co-sponsors of the bi-partisan amendment), at <http://www.nwbc.gov/release5.html> (last modified Dec. 5, 2001).

40. Women's Business Centers Sustainability Act of 1999, Pub. L. No. 106-165, (codified at 15 U.S.C. § 631).

41. Small Business Act, Pub. L. No. 85-536, 72 Stat. 384 (codified at 15 U.S.C. §§ 631-657(e)).

42. 15 U.S.C. § 631 (a)-(b) (1997).

43. 15 U.S.C. § 637(a)(1)(A).

44. 15 U.S.C. § 637(a)(1)(B).

several procurement initiatives.<sup>45</sup> For example, in 1994, SBA joined eleven other federal agencies in launching the Women's Procurement Pilot Program to educate women on business opportunities with the government.<sup>46</sup> Also, SBA-sponsored Women's Network for Entrepreneurial Training was established as a positive mentor-protégé networking project that allows veteran female entrepreneurs to provide guidance to newcomers.<sup>47</sup>

### C. An Overview of the 8(a) Program

The hallmark of American procurement is full and open competition.<sup>48</sup> The objective of the 8(a) program is "to assist eligible small disadvantaged business concerns [to] compete in the American economy through business development."<sup>49</sup> SBA will enter into contracts with federal agencies, departments, or other authorized

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45. See generally OFFICE OF FEDERAL CONTRACT ASSISTANCE FOR WOMEN BUSINESS OWNERS (CAWBO), SBA, CAWBO FACT SHEET (listing federal initiatives to foster procurement among women-owned businesses which includes HUBZone, 8(a), and Small Disadvantaged Business (SDB) programs, as well as registration in PRO-Net, "an on-line data base that is searched by contracting officers and prime contractors to locate firms in particular industries and locations, often by type of ownership"), at <http://www.sba.gov/GC/cawbofactsheet.html> (last modified Aug. 20, 2001).

46. See EXPANDING BUSINESS OPPORTUNITIES FOR WOMEN: THE 1995 REPORT OF THE INTERAGENCY COMMITTEE ON WOMEN'S BUSINESS ENTERPRISE IN COOPERATION WITH THE NATIONAL WOMEN'S BUSINESS COUNCIL 13 (1996) (recognizing other successful agency initiatives such as GSA efforts to recruit women-owned firms as subcontractors even before prime contractors were identified for a federal courthouse project in Boston, Massachusetts). The U.S. Department of Defense sponsored women-owned business conferences in February 1995, which doubly benefited women entrepreneurs with not only education on Defense procurement practices, but also valuable opportunities to establish networking contacts with Defense purchasing agents. *Id.* In addition to its sixteen prime contractors, the Treasury Department held a joint subcontractor procurement conference, which yielded \$2.4 million in contracts for nearly seven hundred small, women-owned businesses. *Id.*

47. *Id.* at 15.

48. See 41 U.S.C. § 253 (a)(1)(A) (2001); see also 10 U.S.C. § 2304 (a)(1)(A) (2001) (mandating procurement procedures generally and for the Armed Forces in the later statute).

49. 13 C.F.R. § 124.1 (2001). See Small Business and Capital Ownership Development Program, 44 Fed. Reg. 30,672, 30,673 (1979) (codified at 13 C.F.R. pt. 124.1) (noting the purposes of the 8(a) program). These purposes are to:

- foster business ownership by individuals who are both socially and economically disadvantaged;
- promote the competitive viability of such firms by providing such available contract, financial, technical, and management assistance as may be necessary;
- clarify and expand the program for the procurement by the United States of articles, equipment, supplies, services, materials, and construction work from small business concerns owned by socially and economically disadvantaged individuals.

*Id.*

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procurement officers to provide necessary goods or services. Then, SBA will award these contracts to 8(a) program participants.

1. *Benefits of 8(a) Program Participation*

Participating in the SBA's 8(a) program yields several benefits. 8(a) firms may receive sole-source<sup>50</sup> contracts, upwards of \$3 million for goods and services contracts or \$5 million for manufacturing contracts.<sup>51</sup> 8(a) firms also benefit generally from the promotion of federal acquisition policies that encourage procurement by small businesses.<sup>52</sup> Program participants also have the opportunity of joining other 8(a) firms on joint venture projects that increase the competitiveness of their collective bidding efforts on large prime government contracts.<sup>53</sup> Firms that participate in the 8(a) program complete a nine-year term, during which the firm must maintain its program eligibility.<sup>54</sup> The assistance provided to 8(a) firms is divided into two stages: a four-year developmental stage,<sup>55</sup> and a five-year transitional stage.<sup>56</sup>

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50. *Siller Bros., Inc. v. United States*, 655 F.2d 1039, 1045 (Cl. Ct. 1981) (describing how the sole source concept in the procurement context relates to a situation "where the government does not seek bids or invitations from more than one source, but instead decides to negotiate with only one person").

51. See SBA, 8(A) BUSINESS DEVELOPMENT, PROGRAMS TO ASSIST BUSINESS at <http://www.sba.gov.8abd/indexprograms.html> (last modified Aug. 13, 2001).

52. *Id.*

53. *Id.*

54. See 13 C.F.R. § 124.2 (2000).

55. See 13 C.F.R. § 124.404 (b)(1)-(4) (2000) (describing the assistance provided during the developmental stage). Provisions include:

- sole source and competitive 8(a) contract support;
- financial assistance pursuant to 13 C.F.R. § 120.375 (2000);
- transfer of technology or surplus property owned by the United States pursuant to § 124.405;
- training to aid in developing business principles and strategies to enhance their ability to compete successfully for both 8(a) and non-8(a) contracts.

*Id.*

56. See 13 C.F.R. § 124.404 (c)(1)-(3) (2001) (listing the assistance provided during the transitional stage). Forms of assistance include:

- the same assistance as that provided to participants in the developmental stage;
- assistance from procuring agencies (in cooperation with SBA) in forming joint ventures, leader-follower arrangements, and teaming agreements between the concern and other participants or other business concerns with respect to contracting opportunities outside the 8(a) BD program for research, development, or full scale engineering or production of major systems (these arrangements must comply with all relevant statutes and regulations, including applicable size standard requirements);
- training and technical assistance in transitional business planning.

*Id.*

## 2. Eligibility Requirements

One key eligibility requirement is fifty-one-percent unconditional ownership by one or more socially and economically disadvantaged individuals.<sup>57</sup> The applicant must also be “of good character”<sup>58</sup> and a United States citizen.<sup>59</sup> The disadvantaged individual must operate the firm on a full-time basis while also holding the highest officer position.<sup>60</sup> Moreover, the small business concern<sup>61</sup> must have a “reasonable” likelihood for succeeding in the private sector for admission to the 8(a) program.<sup>62</sup>

### a. Economic Disadvantage

An additional prong of eligibility determination requires an applicant to demonstrate economic disadvantage, specifically that the

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57. 15 U.S.C. § 637 (4)(A)(i) (1997). See 13 C.F.R. § 124.105 (2001) (defining unconditional ownership and management control as a minimum of fifty-one percent control by one or more socially and economically disadvantaged individuals). Different ownership standards are used for partnerships and corporations, and restrictions are placed on non-disadvantaged individual ownership. *Id.* SBA evaluates an individual’s control by examining the “strategic policy setting exercised by boards of directors and the day-to-day management and administration of business operations.” 13 C.F.R. § 124.106 (2001).

58. 13 C.F.R. § 124.108(a) (2001) (stating that an applicant may not be involved in criminal conduct). Violating any SBA regulation will cause the Associate Administrator of the 8(a) Business Development Program to make an eligibility determination. *Id.*

59. See 13 C.F.R. § 124.101 (2001).

60. 13 C.F.R. § 124.106(a)(1)-(2) (2001).

61. See 13 C.F.R. § 121.105 (2001) (defining “business concern or concern” as an American small business whose primary operations are in the United States, contributes to the national economy, or pays taxes or utilizes American goods or labor); see also SBA, FREQUENTLY ASKED QUESTIONS [hereinafter SBA FAQs] (stating general size standards, based on the number of employees in the past year or based on revenues averaged over a three-year period), at <http://www.sba.gov/8abd/indexfaqs.html> (last modified Aug. 13, 2001).

62. See 13 C.F.R. § 124.107 (2001) (proving likelihood for success involves submitting a concern’s past two years income tax returns with operating revenues). In addition, the socially and economically disadvantaged individual must possess not only substantial business management experience, but also the requisite technical experience to execute the business plan. *Id.* at § 124.107(b)(1)-(2). SBA also considers the following factors in determining the potential for success:

- the technical and managerial experience of the applicant firm’s managers;
- the firm’s operating history;
- ability of the firm to access credit and capital;
- the firm’s financial capacity;
- the firm’s record of performance;
- whether the applicant firm or individual employed by the firm hold the requisite licenses if the firm is engaged in an industry requiring professional licensing.

SBA FAQs, *supra* note 61.

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“ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to other[s]” in a comparable industry who are not socially disadvantaged.<sup>63</sup> Beyond personal financial statements, the applicant must submit a personal narrative detailing how the economic disadvantage affected their business development, as well as a two-year history of the individual’s personal income, personal net worth, and fair market valuation of all assets, regardless of any encumbrance.<sup>64</sup> In addition, SBA examines

the financial condition of the applicant compared to the financial profiles of small businesses in the same primary industry classification, or, if not available, in similar lines of business, which are not owned and controlled by socially and economically disadvantaged individuals in evaluating the individual’s access to credit and capital.<sup>65</sup>

An individual’s net worth should not exceed \$750,000, excluding business equity and the individual’s primary residence.<sup>66</sup> In addition, there are several rules regarding transfers of assets to immediate family members to exclude applicants who are in fact ineligible because their net worth exceeds the threshold \$250,000.<sup>67</sup>

*b. Social Disadvantage*

SBA views socially disadvantaged individuals as those people who have experienced racially or ethnically based “prejudice or cultural bias within American society” as a result of their identification with a group that is beyond the control of the individual.<sup>68</sup> Groups that are designated as socially disadvantaged include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, Subcontinent Asian Americans, and “members of other groups designated from time to time by [the] SBA.”<sup>69</sup> Based on a rebuttable presumption, the individual’s social disadvantage may be refuted by

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63. 13 C.F.R. § 124.104(a)-(b) (2001).

64. See 13 C.F.R. § 124.104 (b) (2001).

65. 13 C.F.R. § 124.104 (c) (2001).

66. See 13 C.F.R. § 124.104 (c)(2) (2001) (stating that initial 8(a) Business Development (“BD”) eligibility does not allow an individual’s net worth to exceed \$250,000 but upon admission their net worth must remain below a threshold of \$750,000).

67. See 13 C.F.R. § 124.104 (c)(1) (2001) (limiting the period for evaluating an individual’s economic status as it relates to assets transferred to immediate family members of designated beneficiaries, to two years prior to the initial application or to within two years of a participant’s annual program review).

68. 13 C.F.R. § 124.103 (2) (2001).

69. 13 C.F.R. § 124.103 (b)(1) (2001).

credible evidence submitted for evaluation by the Associate Administrator for 8(a).<sup>70</sup>

Individuals who are not members of a presumptively socially disadvantaged group are given the opportunity to demonstrate individual social disadvantage by a preponderance of the evidence.<sup>71</sup> Evidence of social disadvantage must include, at minimum, one objective characteristic that contributes to social disadvantage, such as “race, ethnic origin, gender, physical handicap, long-term residence in an environment isolated from the mainstream of American society, or other similar causes not common to individuals who are not socially disadvantaged.”<sup>72</sup> Also, an individual’s experience must occur within American society and must be chronic and substantial.<sup>73</sup> In examining the “totality of the circumstances,” SBA examines evidence related to the applicant’s diminished opportunities in higher education,<sup>74</sup> employment,<sup>75</sup> and business history.<sup>76</sup>

To establish a presumption as a socially disadvantaged group, SBA requires a group to demonstrate the following three criteria. First, the group must suffer from prejudice, bias, or discriminatory practice.<sup>77</sup> Second, these discriminatory conditions must result in similar economic deprivations from which other named groups have suffered.<sup>78</sup> Third, such discriminatory conditions must produce impediments in the business world for members of the group beyond

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70. See 13 C.F.R. § 124.103 (b)(1)-(3) (2001) (providing a process by which someone may protest an applicant’s socially disadvantaged status). Moreover, one must demonstrate past self-identification as a member of the presumed socially disadvantaged group, as well as being identified by others as a member of the group. 13 C.F.R. § 124.103 (b) (2).

71. See 13 C.F.R. § 124.103 (c) (1) (2001).

72. 13 C.F.R. § 124.103 (c) (2) (i) (2001).

73. See 13 C.F.R. § 124.103 (c) (2) (ii) (2001).

74. See 13 C.F.R. § 124.103 (c) (2) (iii) (A) (2001) (naming factors considered under diminished educational opportunities as including equal access to institutions of higher learning, exclusion from social and professional associations, denial of just academic honors, and societal pressures discouraging the individual from pursuing an entrepreneurial education).

75. See 13 C.F.R. § 124.103 (c) (2) (iii) (B) (2001) (noting that SBA will consider unequal hiring practices, promotions, pay, and fringe benefits, employer behavior that is retaliatory or discriminatory, or social patterns that encourage the individual into non-professional or non-business careers, as evidence of bias in employment).

76. See 13 C.F.R. § 124.103 (c) (2) (iii) (C) (2001) (considering as sufficient evidence “unequal access to credit or capital, acquisition of credit or capital under commercially unfavorable circumstances, unequal treatment in opportunities for government contracts or other work, unequal treatment by potential customers and business associates, and exclusion from business or professional organizations”).

77. See 13 C.F.R. § 124.103 (d) (2) (i) (2001).

78. See 13 C.F.R. § 124.103 (d) (2) (ii) (2001).

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their control and beyond the general difficulties faced by a small business owner.<sup>79</sup> Groups who have used this designated SBA practice successfully to acquire presumptive social disadvantage status include Asian Pacific Americans and Subcontinent Asian Americans.<sup>80</sup>

### 3. *Women as a Presumed Socially Disadvantaged Group*

Among its many business development assistance programs, SBA utilizes the same eligibility criteria for two programs at issue in this Comment, namely the Small Disadvantaged Business (“SDB”)<sup>81</sup> and the 8(a) programs.<sup>82</sup> Whereas the 8(a) program offers a wide range of assistance to businesses controlled and owned by socially and economically disadvantaged participants, SDB Certification relates only to benefits in federal contracting.<sup>83</sup>

The need to include women as a presumed socially disadvantaged group remains a prominent issue for women business associations. The Women’s Coalition for Access to Procurement is a united front of seventeen women’s business organizations<sup>84</sup> that are petitioning

79. See 13 C.F.R. § 124.103 (d) (2) (iii) (2001).

80. See Designation of Minority Group Eligibility of Asian Indian Americans, Notice, 47 Fed. Reg. 36,743, 36,743 (Aug. 23, 1982) (codified at 13 C.F.R. pt. 104) (designating Asian Indian Americans as presumptively socially disadvantaged). SBA renamed this group designation as Subcontinent Asian Americans. Minority Small Business and Capital Ownership Development Assistance, 51 Fed. Reg. 36,132, 36,144 (Oct. 8, 1986) (to be codified at 13 C.F.R. pt. 104). Later, SBA interpreted this group to include U.S. citizens whose origins are from Sri Lanka, Nepal, Bhutan, or the Maldives Islands. Minority Small Business and Capital Ownership Development Program, 54 Fed. Reg. 34,692, 34,718 (Aug. 21, 1989) (to be codified at 13 C.F.R. pt. 104).

81. See generally 13 C.F.R. §§ 124.1001-1024 (2001) (explaining the Small Disadvantaged Business program eligibility requirements, which overlap with those requirements for the 8(a) program).

82. See generally 13 C.F.R. §§ 124.1-704 (2001) (explaining the 8(a) program applicability, eligibility requirements, application and exit process, business development, contractual assistance, miscellaneous reporting requirements, and management and technical assistance program).

83. See SBA, SMALL DISADVANTAGED BUSINESS, ABOUT SMALL DISADVANTAGED BUSINESS (SDB) CERTIFICATION AND ELIGIBILITY (distinguishing between the two business development programs), at <http://www.sba.gov/sdb/indexaboutsdb.html> (last modified Aug. 21, 2001). Participating 8(a) firms qualify automatically for SDB Certification. *Id.*

84. The following organizations have signed the petition: Association for Women’s Business Centers; Business and Professional Women/USA; Business Women’s Network, Incorporated; Center for Policy Alternatives; Center for Women & Enterprise, Federation of Women Contractors; Houston Women’s Business Council; MANA; A National Latina Organization; Women’s Yellow Pages; National Federation of Black Women Business Owners; National Council of Negro Women, Incorporated; North Texas Women’s Business Council; Ohio Women’s Business Council; Women Construction Owners and Executives, USA; Women First National Legislative Committee; Women for Affirmative Action; Women Incorporated; Women Presidents Organization; Women’s Business Development Center, Chicago; and the Women’s Business Enterprise National Council. The petition’s author,

SBA to include gender among the “presumptively” socially disadvantaged classes named in the agency’s business development program’s eligibility criteria.<sup>85</sup>

If the petition succeeds, gender-based affirmative action will not alter the level of judicial scrutiny applied since the 8(a) program is a narrowly tailored program that allows the racial or ethnic classification as a presumption of social disadvantage to be rebutted.<sup>86</sup> Critics of any gender-based affirmative action cite the stigma associated with being designated socially disadvantaged.<sup>87</sup> Moreover, critics of the petition see the interests of Caucasian women being advanced at the expense of minority business.<sup>88</sup> Including gender as

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Hope Eastman, Esq. asserted that all other avenues were pursued to get women a larger percentage of the procurement market:

We’ve tried legislative exhortation and executive orders, we created councils and interagency committees and made extensive advisory recommendations for public policy. All of those actions to date haven’t really opened the doors. What we’re seeing through this petition is to move that process one step forward, and that the tools available to assist minority owned businesses will be expanded to all women.

Jeanie M. Barnett, *Turf Battles*, at [http://www.womenconnect.com/LinkTo/oct0599\\_biz.html](http://www.womenconnect.com/LinkTo/oct0599_biz.html) (last visited July 10, 2000).

85. See Women’s Coalition for Access to Procurement (urging SBA to hold public hearings on the petition’s proposal to improve women business owners’ access to procurement), available at <http://www.wommenconnect.com> (last visited July 10, 2000); Barnett, *supra* note 84 (analyzing the division among women business organizations on whether to support the petition).

One hopes that the increase in women-owned businesses will help relegate verbose feminists and their victimhood industry to permanent irrelevance, a quaint footnote to a dwindling movement. The business of American women is business, and the latest figures give new meaning to an old feminist slogan. A woman needs a government program like a fish needs a bicycle.

Sally C. Pipes, *The Business of American Women is Business*, 6 THE CONTRARIAN 1 (Jan. 14, 2002) at [http://www.pacificresearch.org/pub/con/2002/con\\_02-01-14.html](http://www.pacificresearch.org/pub/con/2002/con_02-01-14.html).

86. See *supra* Part I.C.2.b and text accompanying note 73 (discussing how an applicant’s presumptively socially disadvantaged status may be refuted); see generally John Calotto, *Strict Scrutiny for Gender*, via Croson, 93 COLUM. L. REV. 508, 534-44 (1993) (evaluating strict scrutiny analysis for all gender classifications).

87. See Calotto, *supra* note 86, at 539 (evaluating the positions of Justices O’Connor and Scalia on why race should not be used in classification because of “a danger of stigmatic harm”). “Gender-based affirmative action, at bottom, involves classifications based on group characteristics, irrespective of the individual involved. Insofar as it degrades the individual, a WBE [women’s business enterprise] program is just as likely to inflict stigmatic harm.” *Id.*

88. See also Barnett, *supra* note 84 (quoting the petition’s author, Hope Eastman: “None of us intends for this petition to be a white women versus minority issue”). Opponents of the petitions argue that the 8(a) program would become an injustice to white women business owners, who see the opportunity for minorities to employ family members as a key advantage:

Caucasian women are afforded by law the same chance for an equal stab at government contracts as minorities but not by regulations. Regulations do not make the SBA’s 8(a) program available to Caucasian women in construction. They do not allow Caucasian women to have family members

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a presumed socially disadvantaged class to compete with other 8(a) participants would only level the playing field in federal procurement.

*D. SBA Authority to Designate Women as Presumed Socially Disadvantaged for 8(a) Program Purposes*

Three principal portions of the Small Business Act affect SBA's authority to designate a group as socially disadvantaged. The first relevant section outlines who Congress believes is a socially disadvantaged individual.<sup>89</sup> The second relevant section authorizes SBA's Administrator to designate certain groups as being socially disadvantaged: "All determinations made pursuant to paragraph (5) with respect to whether a group has been subjected to prejudice or bias shall be made by the Administrator after consultation with the Associate Administrator for Minority Small Business and Capital Ownership Development."<sup>90</sup> In the third relevant section, Congress declares that the participation of socially and economically disadvantaged individuals in the free enterprise system requires government assistance because of "discriminatory practices or similar invidious circumstances over which they have no control."<sup>91</sup>

In referencing paragraph (5),<sup>92</sup> the statutory language of the 8(a) BD Program does not limit the Administrator, in consultation with the Associate Administrator for Minority Small Business and Capital Ownership Development, to designate only racial or ethnic minorities as socially disadvantaged.<sup>93</sup> The Associate Administrator would make determinations with respect to paragraph (5), which later included others beyond the first groups identified as presumptively socially disadvantaged, namely "Black Americans,

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working for her in construction as they are for minority women. Minorities and women both suffer having one hand held behind their back and not able to operate as contractors the same as the Caucasian men because of the regulations that have been written.

Hearing on IRS Reform: What America's Taxpayers Need Now Before the Senate Committee on Small Bus., 105th Cong. (1998) (testimony of Nancy Workman, Vice President of Workman Construction Company), *available in* 1998 WL 62988 (F.D.C.H.).

89. "Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities." 15 U.S.C. § 637 (a) (5) (2000).

90. 15 U.S.C. § 637 (a) (8) (2001).

91. 15 U.S.C. § 631 (f) (1) (B) (2001).

92. *See id.* (statutory section is commonly referred to as "paragraph (5)").

93. 13 C.F.R. § 124.103(c) (2000) (identifying how non-racial or ethnic minorities may be designated socially disadvantaged).

Hispanic Americans, Native Americans, and other minorities.”<sup>94</sup> Rather, SBA’s promulgated rules indicate procedures for determining a group’s status as socially disadvantaged per requirements outlined in the Small Business and Capital Ownership Development Program.<sup>95</sup> In considering the legislative history of the Small Business Act, there is no indication that the Administrator is prevented from declaring women as a socially disadvantaged class.

### 1. *Views of the House of Representatives*

The original 1978 congressional findings established the basic premise that “many individuals are socially and economically disadvantaged as a result of being identified as members of certain groups, including but not limited to, Black Americans and Hispanic Americans.”<sup>96</sup> The bill reported to the House from the House Permanent Select Committee on Small Business created a rebuttable presumption in the first paragraph that African and Hispanic Americans were socially and economically disadvantaged in the absence of substantial evidence demonstrating that the individual had not experienced business challenges.<sup>97</sup> Moreover, individuals who were not presumed to be socially and economically disadvantaged could use evidence of business impediments not common to all small businesses that resulted in social and economic consequences beyond their control. In addressing non-presumed group members, the House Select Committee on Small Business noted that women business owners should be seriously considered.<sup>98</sup>

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94. Amendments to the Small Business Act, Pub. L. No. 95-507, 92 Stat. 1757 (1978) (codified as amended at 15 U.S.C. § 631).

95. See Small Business and Capital Ownership Development Program, 44 Fed. Reg. 30,672, 30,672-73 (codified at 13 C.F.R. pt. 121) (May 29, 1979) (outlining eligibility and termination procedures, as well as the types of assistance available for the new Small Business and Capital Ownership Development Program).

96. H.R. CONF. REP. NO. 95-1714, at 20 (1978), reprinted at 1978 U.S.C.C.A.N. 3879.

97. H.R. 11318, 95th Cong. (2nd Sess. 1978).

98. H.R. Rep. No. 103-606(I), 103rd Cong. (2nd Sess. 1994) (discussing the pervasive negative consequences of sex discrimination as a reason to enact H.R. 4263, entitled Small Business and Minority Small Business Procurement Opportunities Act of 1994).

[S]ex discrimination, whether overt or subtle, can and does result in business impediments which are not generally common to all small business owners. Further, sex discrimination, since it involves interpersonal relationships, must be considered as resulting in social disadvantage within the meaning of [the second] subsection. Therefore, in determining whether or not a particular woman is socially disadvantaged within the meaning of the [second] subsection, SBA should seek not only demonstrable signs of sex discrimination, but more important, the cumulative result of subtle discrimination which can and does become manifest in a number of

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## 2. *Views of the Senate*

In its amendments to the Small Business Act, the Senate excluded references to race or ethnicity in its consideration of socially disadvantaged status.<sup>99</sup> Instead, the Senate only wished for SBA to consider incidents where the business owners' opportunities in developing and maintaining competitiveness in their business development were deprived.<sup>100</sup> As such, the Senate allowed SBA to use its discretion in determining 8(a) participation based on the "social and economic context of today's business climate."<sup>101</sup> SBA was directed to develop industry-specific standards that acknowledge past discrimination of minorities in their attempts to enter the business world:

These standards must not deny admission to the 8(a) program to minority applicants merely because they have managed to accumulate savings, acquire a quality education, or have accumulated other assets[,] . . . which they may or may not be able to utilize as collateral to launch or sustain a business operation. Nor shall past or present employment be used as a criteria for denial of a minority applicant admission to the program. Minority applicants who have managed in this manner to prepare themselves to successfully participate in the free enterprise system should not be denied admission to the 8(a) program for business development for having done so. However, the mere fact that the applicant is a member of a racial or ethnic minority will not, by itself, satisfy the eligibility requirement of economic disadvantage.<sup>102</sup>

The Senate Committee further clarified its position that participants in the 8(a) program should include individuals beyond racial and ethnic minorities; namely, any business owner who met the socially and economically disadvantaged test outlined above would qualify.<sup>103</sup>

## 3. *Compromise*

The compromise between the House and Senate versions on the 8(a) program participation standards resulted in a number of

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differing ways.

*Id.* at 9-10 (statement of Hon. Deval Patrick, Ass't Attorney General for Civil Rights, U.S. Dep't of Justice on the government-wide goal for women-owned businesses).

99. See S. REP. NO. 95-1070, at 13-16 (1978), reprinted in 1978 U.S.C.C.A.N. 3835, 3848-51.

100. See *id.*

101. *Id.* at 15, reprinted in 1978 U.S.C.C.A.N. 3835, 3849.

102. *Id.*, reprinted in 1978 U.S.C.C.A.N. 3835, 3850.

103. See *id.* at 16.

changes to the Small Business Act. First, Native Americans were added to the congressional findings of groups that are socially disadvantaged.<sup>104</sup> Second, presumptive economic disadvantaged status was removed.<sup>105</sup> Third, the language of presumptive groups that had been set forth in the House bill was eliminated.<sup>106</sup> Fourth, cultural bias was included as a basis for social disadvantage.<sup>107</sup>

The amendment regarding cultural bias is a strong argument for classifying women as a socially disadvantaged class, since sex discrimination is pervasive in American society.<sup>108</sup> While it is clear that both the Senate and the House of Representatives wish to help women-owned businesses in the procurement market, it is unclear whether they are willing to take the next step in characterizing women as presumptively socially disadvantaged.<sup>109</sup> SBA utilizes a three-pronged analysis to decide whether to designate a group as presumed socially disadvantaged, where SBA examines business challenges and discriminatory effects of one's gender against the larger context of the historical treatment of women.<sup>110</sup>

SBA was created not only to strengthen the economy, but also for the government to remedy past discrimination; thus, it is this affirmative action component of SBA which has fallen under attack in recent years, as evidenced by recent Supreme Court cases.

## II. SUPREME COURT INFLUENCE ON THE 8(A) PROGRAM

Government contracting is a huge business and understanding how

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104. See S. REP. NO. 95-1140, at 21 (1978), *reprinted in* 1978 U.S.C.C.A.N. 3879, 3881-82; see also 13 C.F.R. § 124.103 (2000) (including Native Americans within the group presumed socially disadvantaged).

105. See S. REP. NO. 95-1140, at 22 (1978), *reprinted in* 1978 U.S.C.C.A.N. 3879, 3882-83.

106. See *id.* at 21-22.

107. See *id.*

108. See discussion *infra* Part II (analyzing the challenges faced by women throughout history in achieving equality in legal status, education, and employment).

109. See S. Res. 311, 106th Cong. (2000). The resolution expressed the sense of the Senate with respect to federal procurement opportunities for women-owned small businesses. *Id.* The Senate suggested that the heads of federal departments should be accountable to the President in achieving the five percent goal during fiscal year 2000, pursuant to the Federal Acquisition Streamlining Act of 1994. *Id.* This legislation on procurement for women-owned small business was originally introduced in the House of Representatives, and differs from the later Senate version in suggesting a 'Rule of One' approach where at least one women-owned business would be solicited for competitive acquisitions. H.R. Res. 15, 106th Cong. (1999). Another difference between the House and Senate versions was the suggestion that agencies should electronically announce procurement opportunities, and develop internal mentor programs to teach new business contracting procedures. *Id.*

110. See discussion *infra* Part III (listing the criteria for presumed social disadvantage designation).

procurement dollars are solicited and spent is fundamental to realizing the social agenda of the federal government. The academic scholarship regarding judicial review of affirmative action programs is extensive.<sup>111</sup> In *Adarand Constructors, Inc. v. Pena*,<sup>112</sup> the Court imposed the strict scrutiny judicial standard for all racial-preference contracting programs, federal and state, pursuant to its earlier decision in *City of Richmond v. J.A. Croson Co.*<sup>113</sup>

#### A. *Strict Scrutiny Application to Racial Preference Programs*

In *Croson*, the City of Richmond used a race-based, thirty-percent set-aside program of contracting work for minority-owned businesses.<sup>114</sup> The Court ruled that the set-aside was unconstitutional, and “the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification.”<sup>115</sup> Instead, the rationale behind the application of strict scrutiny to race-based government actions is to ascertain the relationship between the “compelling goal” and the “highly suspect tool” of race.<sup>116</sup> In *Croson*, the city’s set-aside program was not “narrowly tailored” to remedy past discrimination and was held unconstitutional.<sup>117</sup>

In its historic *Adarand* decision, the Court further developed the application of strict judicial scrutiny to the use of racial classification in federal programs.<sup>118</sup> In 1989, a division of the Department of

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111. See generally ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 526-36 (1997) (providing background on the development of the Equal Protection Doctrine and its levels of scrutiny). See also Mary J. Reyburn, Note, *Strict Scrutiny Across the Board: The Effect of Adarand Constructors, Inc. v. Pena on Race-Based Affirmative Action Programs*, 45 CATH. U. L. REV. 1405, 1438-46 (1996) (examining the precedents and effects of *Adarand*).

112. See 515 U.S. 200 (1995).

113. See 488 U.S. 469 (1989).

114. See *id.* at 508 (holding that race-based set-aside programs are unconstitutional); see generally R. Brad Malone, Note, *Marginalizing Adarand: Political Inertia and the SBA 8(a) Program*, 5 TEX. WESLEYAN L. REV. 275, 276-79 (1999) (providing a general overview of Supreme Court affirmative action cases leading up to *Adarand* including Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978), Fullilove v. Klutznick, 448 U.S. 448 (1980), Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986), City of Richmond v. J.A. Croson, 488 U.S. 469 (1989), and Metro Broad., Inc. v. FCC, 497 U.S. 547 (1990)).

115. *Croson*, 488 U.S. at 494.

116. *Id.* at 493-94.

117. *Id.* at 508; *Adarand v. Pena*, 515 U.S. 200, 235-36 (overruling *Fullilove*, 448 U.S. at 492, which applied intermediate scrutiny to a minority business enterprise provision of the Public Works Employment Act of 1977).

118. See *Adarand*, 515 U.S. at 213-28 (analyzing past Supreme Court case law dealing with racially-based programs and overturning *Metro Broad., Inc. v. FCC*, 497 U.S. 547 (1990), which applied intermediate scrutiny for “benign” racial

Transportation (“DOT”) awarded the prime contract for a Colorado highway construction project to Mountain Gravel & Construction Company (hereinafter “Mountain Gravel”), which then solicited subcontract bids for the guardrail portion of the project.<sup>119</sup> Although Adarand Constructors, Inc. (“Adarand”) submitted the lowest bid, Mountain Gravel awarded the subcontract to a minority-owned firm, Gonzales Construction, in order to be eligible for a DOT bonus for using minority subcontractors.<sup>120</sup> Adarand sued DOT, claiming that the financial incentive to hire subcontractors controlled by “socially and economically disadvantaged individuals” was unconstitutional because the federal government’s use of race-based presumptions violated the Equal Protection Clause of the Fifth Amendment.<sup>121</sup> The district court granted summary judgment to DOT,<sup>122</sup> and the Tenth Circuit Court of Appeals affirmed.<sup>123</sup> However, when the Supreme Court heard *Adarand* in 1995, the Court vacated the appellate judgment and remanded the case to the lower court for “strict scrutiny” application.<sup>124</sup>

### B. *Ramifications of Adarand for the 8(a) Program*

The ramifications of the Supreme Court’s 1995 ruling in *Adarand* for federal affirmative action programs are well documented.<sup>125</sup> Critics of the *Adarand* decision argue that the Court provided inadequate guidance to lower courts for future application of strict scrutiny to affirmative action.<sup>126</sup> In 1995, certain Republican

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classifications).

119. See *id.* at 205.

120. See *id.* at 209 (citing the Disadvantaged Business Enterprise (“DBE”) Development and Subcontracting Provision, which provided compensation for using one SBA-certified DBE as ten percent of the final amount of the approved DBE contracts, and for using two SBA-certified DBE as ten percent of the final contracts, not to exceed two percent of the original contract).

121. *Id.* at 204.

122. See *Adarand Constructors, Inc. v. Pena*, 790 F. Supp. 240, 245 (D. Colo. 1992).

123. See *Adarand Constructors, Inc. v. Pena*, 16 F.3d 1537, 1547 (10th Cir. 1994).

124. See *Adarand*, 515 U.S. at 237-38 (noting that the appellate review failed to determine: (1) whether there was a compelling interest in using subcontractor compensation clauses; and (2) whether alternative non-racially based means could have been employed).

125. See Malone, *supra* note 114, at 295-98 (describing the resultant reform proposal issued by the Department of Justice in response to the Executive Branch); see also Charles J. Dykhouse, Note, *Life After Adarand: The Future Is Not So Clear*, 61 MO. L. REV. 970, 990 (1996) (citing *Cornelius v. L.A. County Metro. Transp. Auth.*, No. BC 101913, 1995 WL 499822, at \*3 (Cal. Super. Ct. July 27, 1995), and *Dynalantic Corp. v. U.S. Dep’t of Def.*, 937 F. Supp. 1, 9-11 (D.D.C. 1996), both of which invalidated federal racial preference programs).

126. See Reyburn, *supra* note 111, at 1452-53 (commenting that the Court only provided minimal instruction on how to apply strict scrutiny in determining whether

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members of Congress called for the abolition of all affirmative action set-aside programs, with the proposed Equal Opportunity Act, which would eliminate all “preferential treatment.”<sup>127</sup> The same year, President Clinton ordered the Department of Justice (“DOJ”) to begin a review of all federal affirmative action plans.<sup>128</sup>

1. *The Department of Justice Response*

In May 1996, in response to the *Adarand* decision, DOJ proposed a comprehensive model for reforming government affirmative action in direct procurement: the Federal Acquisition Regulation and the Defense Federal Acquisition Regulation Supplement.<sup>129</sup> The proposed model was structured around five topics: certification and eligibility; benchmark limitations; mechanisms for increasing minority opportunity; interaction of benchmark limitations and mechanisms; and outreach and technical assistance.<sup>130</sup> The appendix of the DOJ’s proposed model outlined the Clinton Administration’s stance on why the government had a compelling interest in retaining contracting set-asides on the basis of race.<sup>131</sup> It stated that affirmative action programs would be retained because discriminatory barriers continued to exist for small business owners.<sup>132</sup> The Clinton

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there existed a compelling government interest by using race-based financial incentives, and whether the federal affirmative action program was narrowly tailored for the specific interest). Rebyrn projected that lower courts will freely interpret the constitutionality of federal affirmative action programs, leading to a disparity in rulings on which programs will survive strict scrutiny. *Id.* at 1454.

127. See Malone, *supra* note 114, at 295 (describing how the Republican Congress made clear its intent to significantly alter or terminate all affirmative action even though the Equal Opportunity Act did not pass).

128. See Proposed Reforms to Affirmative Action in Federal Procurement, 61 Fed. Reg. 26,042, 26,050 n.3 (proposed May 23, 1996) (discussing the collected evidence and report in response to President Clinton’s request for an agency-wide review of all federal affirmative action programs).

129. See *id.* at 26,042.

130. See *id.* at 26,043.

131. See *id.* at 26,050 n.3 (explaining that evidence collected by DOJ “indicates that racially discriminatory barriers hamper the ability of minority-owned businesses to compete with other firms on an equal footing in our nation’s contracting markets. In short there is today a compelling interest to take remedial action in federal procurement”).

132. See Malone, *supra* note 114, at 298 (commenting that discriminatory barriers are separated into two categories). First, employers, unions, and lenders discriminate against minority entrepreneurs, thereby hindering their initial entry into an industry. *Id.* Second, prime contractors, private sector clients, business networks, suppliers and bonding companies all increase the costs for minority entrepreneurs and prevent fair competition with non-minority firms. *Id.* See also In the Matter of Sierra Envtl. Servs., S.B.A. No. 550 (1996) (noting the applicant’s assertion that her firm’s costs exceeded those of a male-owned firm because “she had to spend more time proving her qualifications rather than spending her time developing business for SES [Sierra Environmental Services]).

Administration fully endorsed the 8(a) program:

The 8(a) program merits special attention at the outset . . . . The 8(a) program is designed to assist the development of businesses owned by socially and economically disadvantaged individuals. . . . Participants in the program are required to establish business development plans and are eligible for technical, financial, and practical assistance, and may compete in a sheltered market for a limited time before graduating from the program.<sup>133</sup>

Essentially, President Clinton's comment on post-*Adarand* affirmative action was, "Mend it, don't end it."<sup>134</sup>

## 2. *Change in Standard: "Preponderance of the Evidence" to "Clear and Convincing"*

The critical consequence of *Adarand* was a change in the standard for demonstrating one's socially disadvantaged or economically disadvantaged status, from the "clear and convincing evidence" standard to a "preponderance of the evidence" standard in 1997.<sup>135</sup> DOJ asserted that the change would not alter the careful scrutiny of applications; it is ultimately the responsibility of SBA to determine which candidates qualify as small, disadvantaged businesses.<sup>136</sup> The change in evidentiary standard contributed to the increased number of firms approved for 8(a) program eligibility, from 533 in fiscal year 1997 to 1,034 in fiscal year 1999.<sup>137</sup> Women who claimed gender discrimination were frequently unable to be admitted based on

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133. Proposed Reforms to Affirmative Action in Federal Procurement, 61 Fed. Reg. at 26,043; see also Malone, *supra* note 114, at 300 ("The approach taken was that 8(a) should be looked upon as an example of a narrowly tailored set-aside and that other programs such as 8(d) would be changed . . . requires stricter certification standards and less restrictive eligibility standards . . .").

134. John F. Harris, *Clinton Avows Support for Affirmative Action: 'Mend It, But Don't End It'*, WASH. POST, July 20, 1995, at A1 (quoting President Clinton from a speech he gave July 19, 1995, at the National Archives, "We should reaffirm the principle of affirmative action and fix the practices. We should have a simple slogan: Mend it, but don't end it.").

135. Proposed Reforms to Affirmative Action in Federal Procurement, 61 Fed. Reg. at 26,044 n.7.

136. See Response to Comments to Department of Justice Proposed Reforms to Affirmative Action in Federal Procurement, 62 Fed. Reg. 25,648, 25,649 (May 9, 1997) (responding to negative comments that the proposed change to an easier evidentiary standard would result in contracts being awarded to ineligible small disadvantaged businesses). The legal support for the change in standard was cited as *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252-55, 261 (1989), and *Herman & MacLean v. Huddleston*, 459 U.S. 375, 389-90 (1983), which indicated that cases involving civil questions required only a preponderance of the evidence standard when not related to important interests or rights on the level of "termination of parental rights, involuntary civil commitment, and deportation." *Id.*

137. See *infra* Appendix, Table 1 (providing statistics on 8(a) program portfolio changes for fiscal years 1987 through 1989).

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“subjective statements” of past sex discrimination unrelated to their present business development.<sup>138</sup> In *Sierra*, the dearth of procurement awards to women-owned firms in the petitioner’s particular industry did not provide conclusive evidence of gender discrimination.<sup>139</sup>

### C. Recent Litigation: 8(a) Program Survives

#### 1. The Federal Circuit Affirms the Department of Defense and Air Force Procurement Programs

The controversy over affirmative action in the discrete arena of federal contract law is not exclusive to *Adarand* and its upcoming third appearance before the Supreme Court. In *Rothe Development Corp. v. United States Department of Defense*,<sup>140</sup> an unsuccessful bidder challenged the constitutionality of the race-based preference bidding process outlined in § 1207 of the National Defense Authorization Act of 1987,<sup>141</sup> claiming a violation of the Equal Protection Clause of the Fourteenth Amendment.<sup>142</sup> Owned by a Caucasian woman, the Rothe Development Corporation (“Rothe”) submitted one of five bids, but the Korean-American owned and operated International Computer and Telecommunications, Incorporated was the successful bidder with \$5.75 million because the price-evaluation adjustment increased Rothe’s bid of \$5.57 million to \$6.1 million for the switchboard operations, maintenance and repairs project at Columbus Air Force Base in Mississippi.<sup>143</sup> The Federal Circuit vacated and remanded the district court’s judgment upholding the constitutionality of the 1207 program, citing the lower court’s failure to apply a strict scrutiny standard and reliance upon

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138. See *Sierra*, S.B.A. No. 550 (holding that a client’s skepticism towards women entrepreneurs reflects stereotypical gender discrimination, but does not constitute sufficient evidence of a negative impact upon the female applicant’s business development efforts). Although the applicant provided that wage disparity and blatant discrimination in the field propelled the applicant to begin her own business, SBA determined that the firm’s present difficulties in securing funding for start-up costs were not based on gender discrimination. *Id.* “Statements such as ‘disparaging remarks,’ ‘harassment,’ ‘verbally abusive,’ ‘blatant discrimination,’ ‘substantial chronic and discriminatory practices,’ and ‘derogatory remarks’ do not, standing alone, establish or even allege employment-based gender discrimination.” *Id.*

139. *Id.*

140. See 194 F.3d 622 (5th Cir. 1999).

141. Pub. L. No. 99-661, 100 Stat. 3816, 3973 (1986), (codified at 10 U.S.C. § 2323 (1994)).

142. 262 F.3d 1306, 1312 (Fed. Cir. 2001).

143. *Id.* at 1315 (explaining that the competitive bidding process under the 1207 program awards the contract to the “fictionally” lowest bidder”).

evidence concerning the statute's post-reauthorization.<sup>144</sup>

The district court required Rothe to bear the burden of proving the price-evaluation adjustment was unconstitutional.<sup>145</sup> However, in reviewing race-based classification employed by the Defense and Air Force program, the district court erred in applying a deferential analysis rather than strict scrutiny.<sup>146</sup> The district court enumerated several congressional documents relating to the original and reauthorized versions of the federal program, which the Federal Circuit declined to credit as a "strong basis in evidence" for congressional justification of race-based criteria. Specifically, the court relied upon *Croson's* prohibition of generalized assertions as justification to enact race-conscious measures.<sup>147</sup>

## 2. *The United States Court of Appeals for the Tenth Circuit Affirms DOT Program's Constitutionality*

Applying the strict scrutiny standard in *Adarand Constructors, Inc. v. Slater*, the United States Court of Appeals for the Tenth Circuit held that race-conscious DOT programs were constitutional because the federal government had a compelling interest in preventing racial discrimination in its procurement practices as well as ameliorating past discriminatory government contracting practices.<sup>148</sup> Further, the current programs feature 1996 revisions drafted in response to *Adarand*. These revisions are narrowly tailored because the programs utilize 8(a) criteria for certification as socially and economically disadvantaged, which limits the number of years a business can retain certification prior to "graduation."<sup>149</sup> The panel relied on the evidence provided in Appendix A, which included hearings and testimony before congressional committees and subcommittees outlining qualitatively the struggles of minorities to acquire

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144. *Id.* at 1332.

145. *Id.* at 1317 (noting that prior to evaluating whether Rothe successfully carried the burden of proof, the court must determine whether a "strong basis in evidence" existed to demonstrate that race-based remedial action was necessary).

146. *Id.* at 1322-23 (emphasizing the need for a consistency in safeguarding equal protection rights in evaluating state and federal race classifications).

147. *Id.* at 1323. Aside from acknowledging the common reliance of other courts of appeals upon statistical evidence to justify race-based measures, the court criticized the outdated statistics and the lack of correlative data between the number of minorities attempting to begin a small business in the particular contracted industry and the number of qualified minority-owned businesses able to compete in the industry. *Id.* at 1323-24.

148. 228 F.3d 1147, 1176 (10th Cir. 2000).

149. *Id.* at 1180. The Tenth Circuit also considered four additional factors that indicate narrow tailoring, which include flexibility, numerical proportionality, burden on third parties, and over- or under-inclusiveness. *Id.* at 1180-87.

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government contracts.<sup>150</sup> The Tenth Circuit acknowledged that the government's evidence demonstrated racially based discrimination in minority subcontracting, either from past or ongoing residual effects of discrimination.<sup>151</sup> Further, the panel emphasized that Congress can proactively use appropriations to alter "an industry so shaped by the effect of discrimination."<sup>152</sup>

### 3. *Two Discrete Issues Before the Supreme Court in 2001*

On April 13, 2001, the Supreme Court granted certiorari to *Adarand* to decide two discrete issues.<sup>153</sup> First, whether the Tenth Circuit erroneously applied the strict scrutiny standard in determining if Congress had a compelling interest to enact legislation designed to remedy the effects of racial discrimination.<sup>154</sup> Second, whether DOT's current Disadvantaged Business Enterprise ("DBE") program is narrowly tailored to serve such a compelling governmental interest.<sup>155</sup>

#### a. *Arguments Presented in Brief of Respondent Department of Justice*

In its brief, DOJ argued that *Adarand* will not succeed in its facial challenge of the DBE program as unconstitutional because of its use of the SBA's presumed socially disadvantaged group designations under Section 8(d)(3).<sup>156</sup> DOJ questioned whether a real and substantial controversy remains, since the 1995 *Adarand* decision declared the federal procurement program under which *Adarand* originally sued to be unconstitutional, and the program was

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150. See *id.* at 1175 (discounting *Adarand*'s rebuttal to the government's initial demonstration of a compelling interest to remedy current and past nationwide discrimination). The panel rejected *Adarand*'s two criticisms of the government's disparity studies as being conclusory and flawed in methodology. *Id.*

151. *Id.* at 1176.

152. See *id.* at 1176 n.18 (noting that Congress' findings do not need to be tailored to each subcategory of racial and ethnic groups, such as an Asian-American of Bhutanese descent). "Rather, it is evidence of specific barriers to market entry and fair competition facing actual and potential minority participants in the market for public construction contracts." *Id.* (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986) (Powell, J.)).

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

154. *Id.* at 967.

155. *Id.*

156. Brief for the Petitioner at 20, *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000), *cert. granted sub nom.*, *Adarand Constructors, Inc. v. Mineta*, 532 U.S. 967 (2001) [hereinafter Brief for Petitioner] (noting that the "socially and economically disadvantaged" definitions in Section 8(d)(3) of the Small Business Act were incorporated into the Transportation Equity Act for the 21st Century ("TEA-21")), available at <http://www.usdoj.gov/osg/briefs/2001/3mer/2mer/2000-0730.mer.aa.pdf>.

subsequently discontinued.<sup>157</sup> Also, DOJ discounted Adarand's challenge of Section 8(d)(4) through (6) of the Small Business Act because Adarand failed to mount such a challenge in the courts below. Thus, Adarand is precluded from prospective relief, since the program was terminated and the Department of Commerce's benchmark study did not consider race-conscious criteria.

In response to the second issue before the Supreme Court, DOJ argued that the Transportation Equity Act of the 21st Century ("TEA-21")<sup>158</sup> and DOT's DBE regulations<sup>159</sup> were narrowly tailored to serve a compelling government interest. DOJ asserted that the two lower courts correctly applied the compelling interest test by examining thirty years of evidence of congressional intent to reauthorize the DBE program. Extensive evidence of discrimination in the industry sector of highway contracting led to the federal government's authorization of aspirational goals for DBE participation.<sup>160</sup> Evidence also documented lack of access to capital, inability of minorities and women to obtain bonding, discriminatory bid-shopping behavior of prime contractors, as well as underutilization of minority-owned businesses in procurement contracting.<sup>161</sup> DOJ rejected Adarand's claim that the Tenth Circuit failed to recognize the inaccuracies of the congressional findings and methodologies by underlining that Adarand failed to submit countering evidence that racial discrimination does not exist in the highway construction industry.<sup>162</sup> In fact, absolute scientific certainty or regression analysis is unnecessary to demonstrate discrimination exists; rather, strict scrutiny requires "a strong basis in evidence" that was readily achieved through the conclusions based in social

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157. *Id.* at 2.

158. Transportation Equity Act for the 21st Century (TEA-21), Pub. L. No. 105-178, 112 Stat. 107 (1998) (codified as amended in scattered sections of 23, 49 U.S.C.).

159. Brief for Petitioner, *supra* note 156, at 3 (TEA-21, Tit. I, § 1101(b)(2)(B) employs the same definitions of "economic" and "social" disadvantage as seen in the Small Business Act).

160. *Id.* at 27 (noting that in 1982, Congress declared a nationwide aspirational goal of ten percent for highway construction and mass transit projects).

161. *See id.* at 32 (describing the vicious cycle of excluding minorities from federal contracting and underscoring that even opponents of the DBE program agreed that discrimination occurred). DOJ also cited evidence of suppliers' higher prices affecting costs for minorities to do business, thereby rendering them less competitive. *Id.* at 15.

162. *Id.* at 33 (arguing that petitioner Adarand insists that the pool studies should exclude members who do not meet bonding and capitalization requirements, which are precisely the eligibility components that preclude minorities from competing fairly).

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science.<sup>163</sup> Further, federal appropriations may condition the procurement market through narrowly tailored legislation. In this instance, Congress used TEA-21 to allocate funds so as not to reinforce discrimination, through its Commerce Clause authority.<sup>164</sup>

Regarding the DBE program as narrowly tailored, DOJ cited that the race-conscious measures were in fact a last option.<sup>165</sup> The DBE program's certification process sufficiently identifies victims of discrimination and uses criteria beyond race, including a notarized statement that the applicant is socially and economically disadvantaged—personal net worth cannot exceed \$750,000—as well as annual affidavits of continued qualifying status.<sup>166</sup> Lastly, the DBE program requires the Secretary of Transportation to ascertain the level of DBE participation in the absence of discrimination, so as to adjust the figures for the effect of other factors limiting DBE participation.<sup>167</sup> DOJ emphasized that the DBE program is flexible, proportional and of limited duration to qualify as narrowly tailored; thus the program will expire once race-conscious remedies are no longer needed.<sup>168</sup> Further, the certification process via notarized statements demonstrating one's socially and economically disadvantaged status was the basis of DOJ's rebuttal of Adarand's claim that the DBE program is fatally over-inclusive.<sup>169</sup>

*b. Arguments Presented in Brief of Petitioner Adarand*

In its Supreme Court brief, Petitioner Adarand Constructors (“Adarand”) prefaced its arguments on the two issues by advocating for the application of the Harlan Doctrine,<sup>170</sup> which states that the

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163. *Id.* at 34 (relying on the standard of proof established for strict scrutiny in *Bazemore v. Friday*, 478 U.S. 385, 399-400 (1986)).

164. Brief for Petitioner, *supra* note 156, at 36 (discounting Adarand's reliance on *United States v. Morrison*, 529 U.S. 598 (2000), where the provision of a federal remedy for gender-based violence was unconstitutional because the Violence Against Women Act was beyond the scope of the Commerce Clause and Section 5 of the Fourteenth Amendment).

165. *Id.* at 38 (citing 49 C.F.R. § 26.51(a)).

166. *Id.* at 39-40, 48 (outlining the certification process). Also, DOJ emphasizes that the presumption of being socially and economically disadvantaged is rebuttable. *Id.* at 40 (citing 49 C.F.R. § 26.87, which states that third parties may meet the eligibility of a DBE participant).

167. *Id.* at 40 (citing 49 C.F.R. § 26.45(d)).

168. *Id.* at 2 (noting that the reauthorization of the DBE program and the Secretary's own regulations create limits on this race-conscious remedy).

169. *Id.* at 5 (emphasizing that applicants are warned of the serious consequences of abusing the DBE program's certification process).

170. See *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) (arguing that a “color-blind” Constitution exists, and that civil rights should not be affected by one's race).

government lacks a compelling interest for racial preferencing in government contracting.<sup>171</sup> Adarand then argued that the Tenth Circuit erroneously applied the compelling interest test when the panel found that DOT had produced “a strong basis in evidence” that racial discrimination was the cause of racial disparity in highway construction in a majority of states. Adarand argued that the panel erred in relying upon the contents of Appendix A rather than conducting its own inquiry into whether the national DOT program was in fact supported by statistical evidence that racial discrimination caused the national under-utilization of minority contractors.

In response to the second issue before the Supreme Court, whether the Tenth Circuit misapplied the narrowly tailored test, Adarand argued that the DBE program was not narrowly tailored, and that there was insufficient evidence to support such a finding. Rather, Adarand asserted that no actual inquiry was made into whether a program applicant was socially and economically disadvantaged. Without individual inquiry, Adarand argued that the program would have a limitless duration, thereby creating a safe harbor for discrimination.<sup>172</sup> In the alternative, Adarand argued that using a rebuttable presumption of social disadvantage is not the equivalent of “actual inquiry.” Thus, the presumption obviates the need for an individual applicant to be subject to any kind of program eligibility determination. Second, Adarand argued that the DBE program was over-inclusive because there was no inquiry into the applicant’s truly disadvantaged status.

*c. The Supreme Court’s Final Word on Adarand*

On November 27, 2001, the Supreme Court upheld the Tenth Circuit’s finding that petitioner Adarand lacked standing to reach a consideration of the merits of its case, regardless of the “fundamental national importance” of the racial preferencing issue.<sup>173</sup> The Court declined to engage in a threshold inquiry into issues already determined by the Tenth Circuit, and conceded that the writ of certiorari was “improvidently granted.”<sup>174</sup>

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171. Brief for the Petitioner at Part I, *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000), *cert. granted in part sub nom.*, *Adarand Constructors, Inc. v. Mineta*, 532 U.S. 967 (2001) (No. 30), *available at* [http://www.mountainstateslegal.org/binder\\_article.cfm?BinderArticleID=5](http://www.mountainstateslegal.org/binder_article.cfm?BinderArticleID=5).

172. *Id.* at Part III (alleging that the program does not take into account the provision of an equal opportunity in subcontracting for all racial groups, where a prime contractor could submit a proposal that favors only certain minorities to the detriment of another minority group).

173. *Adarand Constructors, Inc. v. Mineta*, 122 S. Ct. 511, 514-15 (2001).

174. *Id.* at 511-12.

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In its petition for certiorari, Adarand elected to not pursue arguments based on DOT state and local procurement program, and instead focused on DOT funding of federal highway construction, which is governed by TEA-21.<sup>175</sup> The dismissal of the writ of certiorari was granted for two reasons. First, the Tenth Circuit did not consider whether *federal* race-based programs would survive strict scrutiny. Second, the Court upheld the Tenth Circuit's finding that petitioner Adarand simply lacked standing, despite its concerted efforts to establish standing three weeks prior to oral argument.<sup>176</sup>

While the 8(a) program was not directly discussed by the Tenth Circuit, it remains a viable vehicle for eligible entrepreneurs. The following section outlines how women meet the statutory requirements for inclusion alongside minority groups as presumed socially and economically disadvantaged within the 8(a) program, and examines the present challenges faced by the female entrepreneur in the procurement arena.

III. THREE STATUTORY REQUIREMENTS: WOMEN SHOULD RECEIVE GROUP DESIGNATION AS PRESUMED SOCIALLY DISADVANTAGED FOR 8(A) PROGRAM ELIGIBILITY PURPOSES

A. *Women as a Group Have Suffered Prejudice, Bias, or Discriminatory Practices.*

For a woman to demonstrate her social disadvantage based on gender discrimination, she must provide evidence that demonstrates discrimination in education, employment, and business history.<sup>177</sup> Particularly when her application for 8(a) membership is reviewed, the nexus between gender discrimination's negative impact on her entry into the business world and evidence of discrimination in education, employment, and business history will result in a finding of social disadvantage.<sup>178</sup>

1. *Education*

Gender equity in the classroom is a well-debated topic.<sup>179</sup> Despite

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175. *Id.* at 513.

176. *Id.* at 514.

177. See 13 C.F.R. § 124.103(c)(2) (2001).

178. See Skyview Excavating and Grading, Inc., S.B.A. No. MSB-590 (1997), available at 1997 WL 729488, (explaining the criteria necessary to determine one's social disadvantage, and finding that all of the three emphasized criteria are not necessary).

179. See generally Nancy Levit, *Separating Equals: Educational Research and The Long-Term Consequences of Sex Segregation*, 67 GEO. WASH. L. REV. 451, 526 n.126 (1999) (providing a background list of resources on gender inequity in classrooms); N.Y.

the improvements in classroom environments for women, educators continue to be concerned about the impact of the classroom on how young girls' self-esteem and confidence evolve through adolescence.<sup>180</sup> A fundamental component of self-esteem for youths is rooted in physical appearance, and adolescent girls perceive these changes in their appearance as negative, which reinforces gender stereotypes and spurs a decline in self-esteem.<sup>181</sup> Low self-esteem in girls translates into lower career aspirations, compounded by reduced confidence in their abilities, compared to boys, who are not constrained by gender rules.<sup>182</sup> Gender stereotypes continue to influence young girls, who are thirty-two percent more likely to want to be homemakers, thirty-three percent more likely to want to be teachers, and thirty-five percent more likely to want to be nurses.<sup>183</sup> In the past two decades, the common assumption among young people has been that a woman will work outside the home in addition to being a homemaker.<sup>184</sup>

As a result of the downward trend for female learning in math and science, educators have entered a heated debate over all-female math and science instruction.<sup>185</sup> Researchers David and Myra Sadker

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Times, *In Chicago, Girls Get a Public School of their Own*, N.Y. TIMES, Aug. 27, 2000, § 4 (National Report) at 12 (discussing the growth of urban, all-girl schools which focus on mathematics, science, and technology).

180. See AMERICAN ASS'N OF UNIV. WOMEN (AAUW), EXECUTIVE SUMMARY OF HOW SCHOOLS SHORTCHANGE GIRLS: A STUDY OF MAJOR FINDINGS ON GIRLS IN EDUCATION 14 (1994) [hereinafter HOW SCHOOLS SHORTCHANGE GIRLS] (reporting the results of a nationwide survey which connects decreases in self-esteem of pre-adolescent and adolescent American girls to classrooms).

Schools transmit gender bias in the thousand and one signals they send girls and boys about what's expected of them. These expectations determine how girls and boys are treated, how they're taught, and ultimately how they're tracked onto different paths through their schooling and into their careers. In dozens of separate studies, researchers have found that girls receive less attention, less praise, less effective feedback, and less detailed instruction from teachers than do boys.

*Id.* Gender equity in classrooms is now on the nation's education reform platform. *Id.* at 4.

181. See *id.* at 8 (remarking that society informs girls "more strongly that their value is based on appearance, whereas boys in adolescence are less affected by physical changes because boys tend to focus instead on confidence in their talents and abilities").

182. See *id.* at 9 (noting that boys are also more likely than girls to have career aspirations that are "glamorous occupations," such as rock stars, professional athletes, etc.).

183. See *id.* at 13 (examining occupations generally recognized as being dominated by women).

184. See *id.*

185. See Carolyn B. Ramsey, *Subtracting Sexism from the Classroom: Law and Policy in the Debate over All-Female Math and Science Classes in Public Schools*, 8 TEX. J. WOMEN & L. 1, 7-13 (1998) (summarizing research results on gender disparities in math and

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conclude that adolescent male behavior that intimidates and demeans young girls is sexual harassment in the school environment.<sup>186</sup> Studies on sexual harassment in schools indicate not only its pervasiveness, but also the extent of verbal harassment and “physical manifestations, such as whistles, howling, lip-licking and crotch-grabbing as well as grabbing and pinching.”<sup>187</sup>

In the past twenty years, the gender gap in education levels has progressively declined, as seen in women being awarded the majority of associate’s, bachelor’s, and master’s degrees.<sup>188</sup> However, recent female graduates with bachelor’s degrees in science and engineering were less likely to be employed than recent male graduates.<sup>189</sup> A nationwide survey of undergraduate students pursuing engineering degrees concluded that women tend to leave the engineering field not because of low academic performance, but rather academic dissatisfaction.<sup>190</sup> The survey identified low self-confidence and being in the minority, as contributing to women’s tendency not to take the risk of speaking in class.<sup>191</sup> This is disappointing, considering that “in 1997, 55.9% of all students in degree-granting institutions were women.”<sup>192</sup>

Even in Silicon Valley, women continue to encounter sexism that prompted the founding of Babes in Boyland, an organization of

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science learning, and projecting that gender parity in engineering will not occur until the year 2020). However, women have made progress in traditionally male-dominated fields, such as law. *Id.* at 8.

186. *See id.* at 8 (commenting that girls who are unaware of the sexual harassment “still suffer in profound ways from peer pressures to be pretty rather than smart”).

187. Maureen O. Nash, *Student on Student Sexual Harassment: If Schools are Liable, What About the Parents?*, 31 CREIGHTON L. REV. 1131, 1139 (1998).

188. *See* OFFICE OF EDUCATIONAL RESEARCH & IMPROVEMENT, U.S. DEP’T OF EDUCATION, *CONDITION OF EDUCATION 1997, WOMEN IN MATHEMATICS AND SCIENCE 20* (1997) (finding young girls and boys have similar proficiency levels in math and science up to age thirteen, when a substantial disparity emerges and continues to exist even until age seventeen). Based on the survey, women entering college tend to demonstrate less interest in majoring in mathematics or science. *Id.* at 21.

189. *See id.* at 18 (noting that salary differences based on the scientific field were highest in mathematics, computer science and engineering, but not necessarily in their starting salaries).

190. *See* Suzanne G. Brainard, Ph.D., Susan Staffin Metz, Gerald M. Gillmore, Ph.D., WEPAN PILOT CLIMATE SURVEY, *EXPLORING THE ENVIRONMENT FOR UNDERGRADUATE ENGINEERING STUDENTS 11* (2000) (providing survey results on classroom climate of over 8,000 male and female undergraduate engineering students from twenty-nine American universities and colleges), available at <http://www.wepan.org/climate.html>.

191. *Id.*

192. Samuel Barbett, *Fall Enrollment in Postsecondary Institutions: 1997*, EDUCATION STATISTICS Q., available at <http://nces.ed.gov/pubs2000/quarterly/spring/5post/q5-4.html>.

female technology executives.<sup>193</sup> In an industry where gender should not be an issue, it appears that Internet site developers are reinforcing common gender stereotypes in marketing strategies.<sup>194</sup> Ironically, the very tool that allowed women to build their small businesses from home, namely the personal computer, is also a tool to create chat room forums on procurement problems.<sup>195</sup>

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193. See Steve Hamm, *Why Women Are so Invisible* (commenting on the low numbers of women leading technology companies, which is changing as more women leave for start-ups of their own but encounter difficulty in acquiring venture financing), available at <http://www.businessweek.com/1997/34/b354184.htm> (last modified Aug. 7, 1997); Lisa Hamm-Greenawalt, *Babes in Boyland, Think There's No Glass Ceiling on the Net? Think Again.*, (noting a need for mentoring women into technical careers through outreach to female high school students and internship opportunities), available at <http://www.internetworld.com/031500/>

3.15cover1.html (last modified Mar. 15, 2000). According to Ellen Hancock, head of Exodus Communications,

Women need to make sure the positions they accept will put them in line for advancement to the top and give them increasing responsibility for a company's products. Too often, women are encouraged to accept staff jobs or positions that are not on the path of ascension to the company's top jobs. They accept second-best because women are generally more risk-averse than men, a conservatism that also steers them away from shaky Internet startups, some successful women say.

*Id.* See also WOMEN'S BUREAU/NASA COLLABORATION TO ENCOURAGE GIRLS IN HIGH-TECH CAREERS (promoting federal programs that encourage mentoring of young women and minorities to pursue degrees in science and technology with the ultimate objective of improving women's pay and career opportunities), at <http://www.dol.gov/dol/wb/public/programs/nasa.htm> (last visited Nov. 7, 2000) [hereinafter NASA COLLABORATION]. Technical associations and workforce development professionals worked with the Women's Bureau of the Department of Labor and NASA to sponsor panel discussions or conferences to expose young girls to high-tech careers. *Id.*

194. See Donna Ladd, *Stalk and Hawk: Women Find the Status Quo Awaits Them Online*, SILICON ALLEY REP., Issue 38, at 88 (summarizing a 1998 report by Professor Donna Hoffman at the Owen Graduate School of Management of Vanderbilt University on the beliefs of online advertising, which are then used by marketing teams who target women as their demographic). The report noted that "online advertising is driven by erroneous beliefs: that women want relationships, are uncomfortable with technology, love to shop, go online to buy cosmetics and clothing, and don't use financial services or products; also, that the Internet is dominated by young people." *Id.*

195. See Women Connect, Sales and Procurement (posting messages from various women on federal supplier diversity programs, and specifically the 8(a) program), at <http://boards.womenconnect.com> (last visited July 10, 2000). A message posted by Jane Allen on August 19, 1999 discussed programs that require endless paperwork for participation, but then upon contacting the decision maker who would provide purchasing opportunities did not lead to any results. *Id.* A response to Jane Allen from Dee Wilke noted that her experiences with federal procurement were similar, and even noted that at a government seminar the representatives admitted being behind in contracting with small woman-owned businesses. *Id.* Of particular note, one comment from Karen Center, on November 4, 1999, inquired of the other chat board participants whether others had difficulty as well sustaining an assertion of social disadvantage based on gender discrimination. *Id.* On November 19, 1999, a woman who owns a small construction/consulting firm in Washington, D.C., declared that she was looking for women with similar stories regarding rejected 8(a) applications, and she further expressed an interest in working on the petition efforts to include women as a presumed socially disadvantaged group. *Id.*

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Women are also absent in the upper echelons of physics, where the participation level decreases with each ascension on the academic ladder.<sup>196</sup> Among members of the American Institute of Physics Member Societies, the figures for 1998 indicate that women's salaries still lag behind that of their male counterparts.<sup>197</sup> Further, women in the sciences tend to experience discrimination, from sexual harassment to gender discrimination.<sup>198</sup> Regardless of these obstacles, the presence of women in technology-driven fields requires special attention from the federal government to encourage mentoring of young high school and college women.<sup>199</sup>

## 2. *Employment: A Glass Ceiling*

The "glass ceiling" is only one of the many reasons why women and minorities choose to start their own businesses.<sup>200</sup> Frequently, women and minorities face employment hurdles because of their exclusion from line function positions, including sales and

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196. See Rachel Ivie & Katie Stowe, *Women in Physics*, 2000, AMERICAN INSTITUTE OF PHYSICS REPORT, at 2 (June 2000) (noting that "in 1998, women earned less than one-fifth of bachelor's degrees . . . and only one-eighth of PhDs in physics").

197. See *id.* at 11.

198. See *id.* at 13 (commenting that women's contributions to science classrooms may be discounted, interrupted, or ignored, and may even receive open hostility from peers and faculty).

199. See NASA COLLABORATION, *supra* note 193 (listing the federal programs that partner federal agency personnel and women's organizations with local youths to encourage their entry into technology fields, such as engineering, physics, computer science, or aeronautics).

200. See FEDERAL GLASS CEILING COMMISSION, *A Solid Investment: Making Full Use of the Nation's Human Capital* (explaining how minorities and women are highly underrepresented at the higher levels of corporate management, because of perceptions and popular stereotypes), available at [http://www50.pcepd.gov/dol/\\_sec/public/media/reports/ceiling2.htm](http://www50.pcepd.gov/dol/_sec/public/media/reports/ceiling2.htm) (last visited July 6, 2000); see also EXECUTIVE SUMMARY OF THE FEDERAL GLASS CEILING COMMISSION FINAL RECOMMENDATIONS, 8 (identifying three barriers to minority and women corporate advancement), available at [http://www50.pcepd.gov/dol/\\_sec/public/media/reports/ceiling1.pdf](http://www50.pcepd.gov/dol/_sec/public/media/reports/ceiling1.pdf) (last visited July 6, 2000). These barriers include: (1) societal barriers beyond a business's direct control such as educational opportunity and stereotypes, prejudice, or bias; (2) internal structural barriers within control of business, such as outreach and recruitment, office environment, lack of mentoring and management training; and (3) governmental barriers such as lax monitoring and law enforcement, lack of collecting employment data and inadequate dissemination of information on glass ceiling issues. *Id.* See also Mary Williams Walsh, *Where G.E. Falls Short: Diversity at the Top, Can Only White Men Run a Model Company?*, N.Y. TIMES, Sept. 3, 2000, at § 3, at 1 (illustrating the lack of minorities (with the exception of one African-American) and women in the upper leadership echelons of General Electric). *But see* Letter from Dan R. Dalton, Dean of Kelly School of Business at Indiana University, to the Editor of the NEW YORK TIMES 18 (Sept. 8, 2000) (printed Sept. 24, 2000 in the paper) (noting that the G.E. Fund finances a program entitled Faculty for the Future, which seeks to increase the number of minorities in educational faculty positions in business, engineering and science).

production, which are typical fast-track positions for upper management.<sup>201</sup> Upper-level management continues to be elusive for women.<sup>202</sup> In addition, a substantial wage disparity continues to exist today, where women earn 74.2 cents for each dollar earned by men.<sup>203</sup> Pay inequity harms not only women, but also men who work in occupations that are traditionally viewed as “women’s work.”<sup>204</sup> Meanwhile, women continue to face obstacles in obtaining career-track positions, namely line jobs.<sup>205</sup>

In addition, some studies point to the socialized differences between the sexes as reasons why men and women make different employment choices.<sup>206</sup> First, women may choose a position with

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201. See AAUW, HOW SCHOOLS SHORTCHANGE GIRLS, *supra* note 180, 17 (commenting that without access to important functions that assign responsibility as well as recognition for success, women can not excel in the business world as rapidly as their male counterparts).

202. See *generally* WOMEN ENTREPRENEURS STUDY: A JOINT RESEARCH PROJECT BY CHESKIN RESEARCH, SANTA CLARA UNIVERSITY CENTER FOR INNOVATION & ENTREPRENEURSHIP, AND THE CENTER FOR NEW FUTURES (Jan. 2000) (analyzing how business challenges and experiences differ for female and male entrepreneurs based on networking skills, flexibility and openness to opportunities, and how women may lack experiences that men are more likely to possess that make men more likely to receive venture capital). “The 1999 Catalyst Census of Women Board Directors of the Fortune 1000 found that women hold only 11.2% of board seats at the 500 largest publicly traded U.S. companies and that this year women hold only 5.1% of ‘clout’ titles (Chairman, Chief Executive Officer, Vice Chairman, Presidents, etc.).” *Id.* at 2 (summarizing the 1999 report provided by Catalyst, a non-profit New-York based research company seeking to advance women in business). See also Catalyst Fact Sheet: 1999 Catalyst Census of Women Corporate Officers and Top Earners (highlighting the statistic that women hold only 6.8% of line jobs, which concern profit-and-loss or direct client duties), at <http://www.catalystwomen.org/press/factsote99.html> (last visited July 27, 2000). “Of all women corporate officers, only 27.5% hold line jobs, compared to 50% of men corporate officers.” *Id.*

203. WOMEN’S BUREAU, U.S. DEP’T OF LABOR, MEDIAN ANNUAL EARNINGS IN CURRENT AND 1999 DOLLARS FOR YEAR-ROUND FULL-TIME WORKERS BY SEX, 1951-99, (Oct. 2000), available at [http://www.dol.gov/dol/wb/public/wb\\_pubd/achart.htm](http://www.dol.gov/dol/wb/public/wb_pubd/achart.htm).

204. See AFL-CIO, WORKING WOMEN: EQUAL PAY FOR WORKING FAMILIES – NATIONAL AND STATE DATA (finding males who work as cashiers, librarians, child care givers, or as clerical workers tend to earn less than males employed in either male-dominated positions or industries that integrate both genders), at <http://www.aflcio.org/women/exec99.htm> (last visited Aug. 2, 2000).

205. See Catalyst Census Finds Significant Gap Between Two Tiers of America’s Largest Companies in Number of Women Board of Directors (noting that the presence of women on the boards of Fortune 500 firms increased by only 0.1% since 1998 to 11.2% in 1999), at <http://www.catalystwomen.org/press/release121599.html> (last modified Dec. 15, 1999); Catalyst Census Posts Solid Gains in Percentage of Women Corporate Officers in America’s Largest 500 Corporations, Women Continue to Lag Far Behind Men in Line Officer Positions (quoting Catalyst President Sheila Wellington, “Women’s lack of access to line jobs is the final obstacle to advancement”), at <http://www.catalystwomen.org/press/release111199.html> (last modified Nov. 11, 1999).

206. See OFFICE OF EDUCATIONAL RESEARCH & IMPROVEMENT, *supra* note 188, at 45 (citing two possible factors that may explain why women earn less).

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fewer demands and less pay in the early part of their careers.<sup>207</sup> Second, socialization patterns from an early age teach girls to be more passive than boys, which translates to men being more aggressive in business, which is an “asset” that allows them to earn more money in better positions.<sup>208</sup>

*B. Prejudice, Cultural Bias, or Discrimination Resulted in Economic Deprivation for Women of the Type That Congress Has Found Exists for the Groups Named in the Small Business Act*

*1. Acquiring Venture Capital: An Uphill Battle*

Women face substantial challenges in finding sufficient capital to launch their businesses. Consequently, they resort to three primary sources for funding: personal savings, credit cards, family and friends; banks, conditioned upon adequate collateral and/or sufficient personal guarantee of the loan; and equity or debt investments from individual or institutional venture capital funding.<sup>209</sup>

In 1999, women entrepreneurs received only five percent of the \$48 billion of venture capital investment, which is an increase from two percent in previous years.<sup>210</sup> A concerted effort to match investors with women-owned businesses was undertaken at Springboard 2000

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207. *See id.*

208. *See id.*

209. *See* PATTY ABRAMSON ET AL., NEW SOURCES OF PRIVATE EQUITY CAPITAL FOR WOMEN ENTREPRENEURS, A CASE STUDY: THE WOMEN'S GROWTH CAPITAL FUND 13 (SBA, Office of Women's Business Ownership, Office of Advocacy, Washington, D.C.) (Mar. 1999) (observing that these sources are available to all beginning small businesses, but women entrepreneurs frequently rely on personal savings and financial funding from family and friends rather than venture capital funding); *see also* Rita Koselka, Follow the Money/Venture Capital: Eve Shakes the Money Tree, FORBES, Aug. 24, 1998, at 80B (noting the licensure of the Women's Growth Capital Fund as a Small Business Investment Corporation, which qualifies the fund for two to one matching from the government); Kristina Stefanova, *In Small Steps, Women Break into 'Old Boys Club' of Venture Capital Funds*, WASH. TIMES, Aug. 7, 2000, at D10 (quoting Amy Millman, executive director of the National Women's Business Council, who speculates that access and ease of gaining financing will increase as more women become venture capitalists). “Investors look for people they feel comfortable investing in. It's also an access issue, a matter of familiarity.” *Id.*

210. *See* Paulette Thomas, *Deals & Deal Makers: At This 'Camp,' Women Learn How to Pitch To Investors*, WALL ST. J., July 18, 2000, at C1 (describing a “boot camp,” sponsored by Springboard 2000, where forty-four women were coached and groomed on their presentations); *see also* Springboard2000, About Springboard (providing background information on Springboard 2000, “a national initiative designed to increase the investment channels for women entrepreneurs and facilitate investments in women-led firms by corporate, angel and venture investors across the United States.”), at <http://www.springboard2000.org/pages/About.asp?PageID=1&SID=1> (last visited Feb. 16, 2002).

Silicon Valley, a unique forum held in January 2000 in Redwoods Shores, California, where companies led by women pitched their presentations before venture capitalists, yielding a total of \$16.5 million.<sup>211</sup> According to the Office of Women's Business Ownership of the SBA's Office of Advocacy, women entrepreneurs historically lack equity financing for the following reasons:

- the size of the business was too small to meet the criteria of most venture capital funds;
- women-owned businesses tended to be service-oriented, and/or lacked the growth potential that was attractive to venture capitalists;
- women business owners lacked access to the relatively closed world of venture capital fund managers;
- there have been very few individual women "angel" investors and an extremely limited number of women venture fund managers.<sup>212</sup>

Beyond the historical barriers enumerated above, additional reasons for why women do not have access to equity financing were also suggested:

- some women entrepreneurs may communicate their visions or strategic plans in ways that do not inspire conventional venture capitalists to make an investment;
- some women may, in fact, be more averse to risk than their male counterparts;
- some women may be reluctant to "share power" with equity investors;
- some conventional venture funds may still view women entrepreneurs differently, or less favorably, and therefore be reluctant to invest in women-owned business.<sup>213</sup>

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211. See Jeffrey A. Tannenbaum, *Update on Small Business: Forum Helps Firms Headed by Women Raise Capital*, WALL ST. J., June 13, 2000, at B4 (discussing how \$165 million was raised for women through a venture capital forum, called Forum for Women Entrepreneurs, where twenty-six presenters were women-run firms). Women generally number less than one percent of presenters at such venture-capital conferences. *Id.* Denise Brousseau, President of the Form for Women Entrepreneurs, stated: "Women are not in the networks of people who refer deals to venture forums." *Id.*

212. ABRAMSON ET AL., *supra* note 209, at 14. See WOMEN ENTREPRENEURS STUDY, *supra* note 202, at 13 (commenting that of the institutional investor survey respondents, only fourteen percent were women, but that women in positions with the responsibility to decide where firms should invest were influential for women business owners). According to Nina McLemore, National Foundation for Women Business Owners Chair and President of Regent Capital, "Two-thirds of the women investors (67%) say they have made an investment in women-owned firms in the past three years, compared with only 40% of men investors." *Id.*

213. ABRAMSON ET AL., *supra* note 209, at 14. See Jennifer Basye Sander, *Women on the Verge of Funding*, (Mar. 20, 2000) (providing supporting commentary for why female entrepreneurs may reluctantly seek financing) at

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However, based on July 2000 study, women are bringing more proposals than ever before equity investors.<sup>214</sup> For example, networks of business advisors are part of the reason behind the success of women business owners in finding the appropriate institutional investors for their business.<sup>215</sup> Elements for success in the equity capital markets for women include sacrificing management control, retaining a strong management team, demonstrating marketing knowledge, and persevering.<sup>216</sup>

*C. Certain Conditions Produced Impediments in the Business World for Women Over Which They Have No Control and Which Are Not Common to Small Business Owners Generally*

The third statutory prong for group designation as presumed socially disadvantaged is that women must demonstrate certain conditions produced impediments in the business world for women over which they have no control and which are not common to small business owners generally. In 1991, the Women's Business Development Act ("WBDA")<sup>217</sup> was passed to address the concern

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<http://societypolitics.chickclick.com/articles/2898.html>. The venture capital world appears "seductive and made to look relatively accessible" but women entrepreneurs may be reluctant to engage in venture capital because "[i]t is a business decision about giving up control. And once you take that money, you have to make huge compromises to satisfy [your] funders." *Id.* See Paulette Thomas, *When Venus Seeks Funding From Mars*, WALL ST. J., Feb. 24, 1999, at B1 (commenting on the tenuous relationship between a venture capitalist and business owner, wherein the balance of power may cause the female entrepreneur to hesitate relinquishing big equity stakes to venture capitalists, and that hesitancy in turn disinterests venture capitalists).

214. See CENTER FOR WOMEN'S BUSINESS RESEARCH, WOMEN-OWNED FIRMS ATTRACT INVESTORS FOR BUSINESS GROWTH (July 18, 2000) (noting that a new generation of women entrepreneurs are now using new sources of capital, such as venture capital and private investments, according to a study entitled, *Women Entrepreneurs in the Equity Capital Markets: The New Frontier*) at <http://www.womensbusinessresearch.org/Research/7-18-2000/7-18-2000.htm>.

215. See ABRAMSON ET AL., *supra* note 209, at 115 (reasoning that women's access has increased due to the greater numbers of women in the financial services industry); see also Hamm-Greenawalt, *supra* note 195 (remarking that the need for more women venture capitalists will be realized over time as the number of women earning master's degrees in business or marketing are increasing).

216. See CENTER FOR WOMEN'S BUSINESS RESEARCH, *supra* note 214 (defining the elements for succeeding in the equity market). Of the women with equity capital surveyed, seventy-three percent were willing to relinquish day-to-day control of their firms, as compared to fifty-eight percent of women who were seeking equity. *Id.* The management's history and understanding of the market are crucial for investors, in addition to presentation of clear business proposals accompanied by realistic marketing plans. *Id.* "Perseverance is important. Women entrepreneurs who have equity financing contacted an average of more than fifteen funding entities, while women who are still seeking equity financing have contacted fewer than eleven funding entities." *Id.*

217. Women's Business Development Act of 1991, Pub. L. No. 102-191, 105 Stat. 1589 (codified at scattered sections of 15 U.S.C. § 631).

that “women entrepreneurs must too often overcome not only predictable business challenges such as competition, credit availability, and market trends but also arbitrary challenges such as discrimination and stereotyping based on sex.”<sup>218</sup> The following statement appeared in the WBDA’s legislative history regarding women’s access to capital:

Access to credit, even in small amounts has been a chronic problem for women business owners. While the small loan program is not solely for women entrepreneurs—any qualified borrower may apply—this program is intended to make available another avenue of financing to the small business owner who might not fit the description of the “traditional” or “safe” borrower, but who is nonetheless legitimate and creditworthy. For example, owners of businesses in the service industry—where many women-owned businesses can be found—often do not have the “hard” collateral a lender looks for.<sup>219</sup>

Similarly, in 1995, the Center for Policy Alternatives submitted to Congress a report detailing how women are excluded from business opportunities:

For a variety of reasons, women do not enjoy the same access to loans from financial institutions as men . . . . Women continue to find themselves disproportionately excluded from established business circles, where important knowledge is shared. Business networks, both formal and informal, share valuable information about business opportunities, problem solving, contacts and business-generating activities.<sup>220</sup>

With respect to acquiring venture capital for one’s small business, the age-old gender issue may not be the obstacle. Instead, women either find themselves directed to women venture capitalists, who are few in number,<sup>221</sup> or male venture capitalists who demonstrate a lack of interest in financing an unfamiliar small business.<sup>222</sup>

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218. H.R. REP. NO. 102-1089, at 26 (1992) (illustrating the need for passage of the Women’s Business Development Act of 1991 based on census data and hearings from 1988 and 1991).

219. *Id.*

220. CENTER FOR POLICY ALTERNATIVES, WOMEN ENTREPRENEURS: THE NEW ECONOMIC CHAMPIONS 1 (1995).

221. See WOMEN ENTREPRENEURS STUDY, *supra* note 202, at 13 (discussing the shortage of women in investment institutions with the requisite authority to make invest in women-owned businesses, where only fourteen percent of survey respondents were women).

222. See Sander, *supra* note 213 (providing commentary from women who have had business dealings with venture capitalists, who “like to fund the kinds of things they already know will work. They are a bit like lemmings, jumping one after the other into the same kind of deal. But how do we get the first lemming to jump for a woman’s ideas?!”).

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Beyond funding issues, there is also a lack of community or resources for women in business today. One of the rare examples of community is 85 Broads, a women-only network of Goldman Sachs, founded by alumnae in 1997.<sup>223</sup> The network provides women of similar backgrounds and career tracks with opportunities to hear about the lifestyles and professional decisions of others, simulating a “virtual executive coach.” Similar to the need to mentor young women throughout their high school and college years, networking opportunities for women in the business arena could yield significant professional growth and lead to women beginning their own firms.

#### IV. RECOMMENDATIONS TO IMPROVE PROCUREMENT OPPORTUNITIES FOR WOMEN-OWNED BUSINESSES

##### A. *Accountability: Procurement Numbers Remain Low*

Beyond challenges in finding capital, federal procurement data indicate that women-owned businesses receive fewer and smaller government contracts.<sup>224</sup> Introducing accountability into the decision making process within agencies could improve the current numbers. Meanwhile, the number of women-owned businesses continues to rise at a phenomenal rate.<sup>225</sup> For fiscal year 1998, women-owned firms received approximately two percent of all federal procurement, whereas minorities received 5.8 percent, of which the total procurement figure was \$193.5 billion.<sup>226</sup> Despite an increase for fiscal year 1999 indicating a growth of \$578 million in prime contract awards to women-owned businesses, the figure was only 2.5 percent of the federal target.<sup>227</sup>

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223. See Janet Tiebout Hanson, *Broad's Eye View*, WORKING WOMAN, Sept. 2000, at 64, 66-68 (describing the growth of Wall Street veterans relying upon one another for advice, especially upon leaving the industry when women discover “alienation and disconnection” even in some instances when beginning their own businesses).

224. See OFFICE OF ADVOCACY, SBA, WOMEN IN BUSINESS 12 (Oct. 1998) (discussing how women-owned businesses comprise nearly a third of total economic activity but received only 1.7% of federal prime contract dollars in fiscal year 1996).

225. See *id.* at 5 (noting that from 1987 to 1997, women-owned firms increased 89% to 8.5 million in number, based on census data from 1982, 1987, 1992, and 1997).

226. OFFICE OF ADVOCACY, SBA, FACTS ABOUT SMALL BUSINESS 1999, 7-8, <http://www.sba.gov/advoc> (last visited July 5, 2000).

227. See Peter Behr, *Contract Woes or Small Firms, 'Bundling' Found to Undermine Minority-Owned Companies*, WASH. POST, July 20, 2000, at A23 (noting that despite a \$505 million increase in federal prime contracting dollars from 1998 to 1999, small businesses yielded fewer contracts, specifically \$4.9 million in 1999 as compared to \$6.4 million in 1997).

The federal government sets constitutional aspirational goals.<sup>228</sup> However, the actual figures of procurement dollars attributed to women-owned businesses are below the minimum threshold for participation goals set by Congress, namely five percent of the total value on all prime contract and subcontract awards per fiscal year.<sup>229</sup> Current statistics indicate that small women-owned businesses garnered only \$3,671,470 of \$183,119,003 federal procurement dollars for fiscal year 1999, as reported through the fourth quarter.<sup>230</sup> Meanwhile, the percentage value of women-owned business procurement contracts is only 2.42 percent for the same period, far short of the five-percent goal.<sup>231</sup> In response to these low percentages, President Clinton issued a May 23, 2000 Executive Order entitled *Increasing Opportunities for Women-Owned Small Businesses* to develop a cross-agency effort ordering agencies failing to meet the five-percent goal to work on a “long-term comprehensive strategy.”<sup>232</sup>

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228. See *Adarand*, 228 F.3d at 1181-82 (permitting the constitutionality of aspirational goals in statutes, because such goals are not the five-percent or ten-percent set-asides determined unconstitutional under *Fullilove v. Klutznik*, 448 U.S. 448, 513-14 (1980) and *City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469, 510-11 (1989)).

229. See 15 U.S.C.A. § 644 (g)(1) (2000) (declaring that aside from the five percent goal for women-owned small businesses, the overall goal for small businesses is twenty-third percent of the total procurement value of all prime contract awards per fiscal year).

230. FEDERAL PROCUREMENT DATA SYSTEM, TOTAL FEDERAL SNAPSHOT REPORT – SF279, ACTIONS REPORTED INDIVIDUALLY ON SF279, FISCAL YEAR 1999 THROUGH FOURTH QUARTER, available at <http://fpds.gsa.gov/fpds/fpr/snap279.htm> (last visited July 5, 2000).

231. FEDERAL PROCUREMENT DATA SYSTEM, REPORT ON ANNUAL PROCUREMENT PREFERENCE GOALING ACHIEVEMENTS – PART II, ACTIONS REPORTED ON SF279 AND SF281 BY AGENCY, FISCAL YEAR 1999 THROUGH FOURTH QUARTER, available at <http://fpds.gsa.gov/fpds/fpr/goals99b.htm> (last visited July 5, 2000).

232. Exec. Order No. 13,157, 65 Fed. Reg. 34,035 (May 23, 2000). Federal agencies were to undertake the steps provided in Section 4 to maximize participation of women-owned small businesses:

- designating a senior acquisition official who will work with the SBA to identify and promote contracting opportunities for WOSBs;
- requiring contracting officers, to the maximum extent practicable, to include WOSBs in competitive acquisitions;
- prescribing procedures to ensure that acquisition planners, to the maximum extent practicable, structure acquisitions to facilitate competition by and among small businesses, HUBZone small businesses, SDBs, and WOSBs, and providing guidance on structuring acquisitions, including, but not limited to, those expected to result in multiple award contracts, in order to facilitate competition by and among these groups;
- implementing mentor-protégé programs, which include women-owned small business firms; and offering industry-wide as well as industry-specific outreach, training, and technical assistance programs for WOSBs including, where appropriate, the use of Government acquisitions forecasts, in order to assist WOSBs in developing their products, skills, business planning practices, and marketing techniques.

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In the 1998 Annual Report from the National Women's Business Council,<sup>233</sup> the departments with the largest budgets—including the Departments of Defense and Energy, NASA, and the General Services Administration (“GSA”)—have never met the five-percent goal. The Department of Defense, the largest purchaser, awarded \$106 billion in federal prime contracts in fiscal year 1997, but fell far short of the five-percent goal in awarding only \$2 billion to women-owned businesses. However, the \$2 billion received by women-owned businesses from Defense equals sixty-one percent of all federal prime contract dollars, which is a poor reflection upon other federal agencies.<sup>234</sup> The combined figure of \$364 million awarded to women-owned businesses by the Department of Energy, NASA and GSA, in addition to that of Defense, comprise seventy percent of all women-owned businesses' procurement dollars.<sup>235</sup> Meanwhile, in the past several years, various government agencies issued their Memoranda of Understanding detailing a commitment to helping women participate in federal procurement as a result of their failure to meet procurement goals.<sup>236</sup>

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*Id.* at 34,036.

233. See NATIONAL WOMEN'S BUSINESS COUNCIL, FACT SHEET (explaining the four-pronged mission of the Council), at <http://www.nwbc.gov/facts.html> (last modified Jan. 10, 2002). The council's mission is “to promote initiatives, policies and programs designed to support women's business enterprises at all stages of development in the public and private sector marketplaces,” through the following program and policy development objectives:

- increasing access to capital and credit for women entrepreneurs;
- expanding public and private market opportunities for women-owned business;
- promoting the development of a research and data collection to create a comprehensive profile of the women's business sector and public awareness of this profile;
- strengthening the training, technical assistance and networking infrastructure that serves women's business sector.

*Id.* The Council was created as a bi-partisan, federal government advisory panel and was reauthorized on December 2, 1997 as part of the Small Business Reauthorization Act of 1997, Pub. L. No. 100-533, 102 Stat. 2689 (1988). See National Women's Business Council Reauthorization Act of 2000, Pub. L. No. 106-554, 114 Stat. 2763 (codified at 15 U.S.C. § 631).

234. See NATIONAL WOMEN'S BUSINESS COUNCIL, 1998 ANNUAL REPORT INCLUDING RESULTS OF PROCUREMENT RESEARCH CONDUCTED IN ACCORDANCE WITH P.L. 105-135, 18 (evaluating the performance levels of various federal agencies in seeking small businesses, specifically women-owned and minority-owned small businesses for procurement opportunities) (subsequent citations to this source include page number due to its Adobe Acrobat (pdf) format), available at <http://www.nwbc.gov/pdfAnnualReport.html> (last visited July 15, 2000).

235. *Id.* at 19.

236. See SBA, GOVERNMENT CONTRACTING, FEDERAL AGENCY INITIATIVES FOR WOMEN-OWNED SMALL BUSINESSES (listing federal department partnerships to achieve the five percent procurement goal for small businesses), at <http://www.sba.gov/GC/wobmou.html> (last modified Nov. 3, 1999). The agencies

### B. Proposal: Remove Contract Bundling

Within the small-business community, contract bundling has created a large amount of negative anecdotal response.<sup>237</sup> According to a March 2000 General Accounting Office (“GAO”) report, contract bundling<sup>238</sup> or “contract consolidation” is an agency practice that combines existing contracts into fewer contracts, which streamlines and reduces procurement and contract administration costs to the detriment of small businesses’ ability to bid on these bundled contracts.<sup>239</sup> Administrative agencies intending to bundle contracts must document “quantified and substantial” justification.<sup>240</sup> The agency must also conduct market research to determine the necessity and reasoning behind consolidation, and its benefits must equal ten percent of the contract value as a substantial benefit.<sup>241</sup> In a July 2000 Federal Register notice, SBA noted that it “believes that benefits equivalent to at least \$7.5 million or five percent of the

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which have outlined specific initiatives of Memoranda of Understanding with SBA include: Transportation, Health and Human Services, State, Treasury, General Services Administration, Labor, NASA, Energy, Housing and Urban Development, Defense, Agriculture, and Veterans Affairs. *Id.* See also SBA, SBA ANNOUNCES PLANS TO INCREASE CONTRACTING OPPORTUNITIES FOR WOMEN BUSINESS OWNERS (announcing a four-prong strategy to increase women-owned firms’ procurement success), at <http://www.sba.gov/news/current/98-52.html> (last modified June 19, 1999). This strategy includes: requesting cabinet members to issue a Memorandum of Understanding with SBA to develop procurement; signing a memorandum to streamline procurement that also requires agencies to solicit at least five small companies, of which one must be woman-owned, on contracts of \$2500 to \$100,000; recruiting more women-owned firms for the PRO-Net database; and appointing a program manager to boost SBA efforts to increase procurement opportunities for women-owned firms. *Id.*

237. GENERAL ACCOUNTING OFFICE, REPORT TO THE CHAIRMAN OF THE SENATE COMMITTEE ON SMALL BUSINESS, LIMITED INFORMATION AVAILABLE ON CONTRACT BUNDLING’S EXTENT AND EFFECTS 12 (Mar. 2000) [hereinafter GAO REPORT].

238. See *id.* (explaining how a bundled contract is less likely to be awarded to a small business due to any of the following factors: “(1) the diversity, size or specialized nature of the elements of the performance specified, (2) the aggregate dollar value of the anticipated award, (3) the geographic dispersion of contract performance sites”); Government Contracting Programs, 65 Fed. Reg. 45,831, 45,834 (July 26, 2000) (to be codified at 13 C.F.R. pts. 121 and 125) (defining contract bundling as combining “two or more procurement requirements for goods or services previously provided or performed under separate smaller contracts into a solicitation of offers for a single contract that is likely to be unsuitable for small business concern” for the above three reasons).

239. See GAO REPORT, *supra* note 237, at 6 (consolidating several contracts into a bundled contract renders it difficult for small businesses to bid on contracts that are too large, which they may be unable to subcontract).

240. *Id.* at 7; see also 15 U.S.C. § 694 (e) (2) (B) (1994) (listing possible benefits of contract bundling as cost savings, quality improvements, reduction in acquisition cycle times, or better contract terms and conditions).

241. 15 U.S.C. § 694 (e) (2) (A) (1994); see also Government Contracting Programs, *supra* note 238, at 45,832-34 (describing the rules for how an agency is to determine a “measurably substantial benefit” for contracts of \$75 million or less).

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contract value (including options) are a substantial benefit in absolute dollars where the contract value exceeds \$75 million.”<sup>242</sup> However, the GAO report noted that calculation methods differ on whether the federal government achieved its fiscal year 1998 government-wide procurement goal.<sup>243</sup> One alternate reason for why small businesses have lost procurement dollars in the wake of contract bundling is that the government demand for technology has resulted in streamlined, complex contracts with well-known technology providers.<sup>244</sup>

The GAO report concluded that there is limited government-wide data on the effects of contract bundling on procurement for small businesses, which is further complicated by varying definitions for contract bundling. The various definitions affect what is considered “bundled” and what is considered a prime contract.<sup>245</sup> Moreover, the Federal Procurement Data Center was not required to maintain data on contract bundling until SBA issued a final regulation on the matter.<sup>246</sup> In addition, SBA’s own monitoring of contract bundling through procurement activity was hindered by budgetary constraints.<sup>247</sup>

## CONCLUSION

Designation of women as a socially disadvantaged group for 8(a) program purposes would advance the procurement goals set by the legislative and executive branches, and enhance our national economy. Women face well-documented barriers in education, employment, and even in their present entrepreneurial endeavors. While the private sector may continue to under-utilize the services

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242. Government Contracting Programs, *supra* note 238, at 45,833.

243. See GAO REPORT, *supra* note 237, at 9-10 (finding that the Office of Advocacy has discretion in determining how goal achievement will be calculated, but its fiscal year 1998 calculations excluded prime contract awards below \$25,000 in relying upon data from the Federal Procurement Data System).

244. See Behr, *supra* note 227, at A23 (noting the Clinton Administration’s encouragement of outsourcing to private contractors to reduce costs and to make purchasing more efficient).

245. See GAO REPORT, *supra* note 237, at 12 (noting that one study’s use of a definition that was broader than the statutory definition of contract bundling did not demonstrate the effect on small business federal procurement).

246. See *id.*

247. See *id.* at 18 (noting that SBA has become reliant upon agencies to self-report on contract bundling, since travel restrictions do not allow representatives to make site visits to examine the procurement process). Nationwide there were only 45 Procurement Center Representatives available to monitor 238 procurement centers, while none were able to review proposed contracts involving bundling at over 2,000 federal procurement centers. *Id.* at 19.

and goods provided by minority-owned and women-owned businesses,<sup>248</sup> these conditions affecting the female entrepreneur should not preclude them from the market opportunity of a federal procurement system. The 8(a) program offers the potential for equal opportunities in the procurement arena, in light of emergent investment networks for women entrepreneurs and other similar efforts to foster business growth. Participation in the 8(a) program may yield exponential benefits to a small business, whose customer base would increase. The inclusion of women as a presumed socially disadvantaged group in the 8(a) program would foster the result intended by Congress and past presidents, namely fair competition.

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248. See Ian Ayres and Frederick E. Vars, *When Does Private Discrimination Justify Public Affirmative Action?*, 98 COLUM. L. REV. 1577, 1591-92 (1998) (commenting that the private sector's lag behind the government in buying from minority business enterprises is highly detrimental because according to the Gross Domestic Product of the United States, the private sector buying market is twelve times that of the entire federal and state procurement combined).



