

FINAL REPORT

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Disparity Study Joint Powers Board

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CHAPTER 1

INTRODUCTION

Pursuant to a contract between the Disparity Study Joint Powers Board and the Institute on Race and Poverty (IRP), IRP designed and structured public hearings regarding marketplace discrimination for the Board. Members of the Board and the Institute on Race and Poverty served as the hearing panel, and members of IRP's staff attended these public hearings that occurred on January 11, 1996, and January 22, 1996.

Institute on Race and Poverty analyzed the testimony of the witnesses who testified at the public hearings and the written testimony of witnesses whose testimony IRP staff entered into the public record during the public hearings. Institute on Race and Poverty analyzed this information under the strictures of the United States Supreme Court's ruling in *City of Richmond v. J.A. Croson Company*¹ and subsequent lower court decisions interpreting the requirements of *Croson*. The following represents IRP's final analysis of this testimony.

¹488 U.S. 469 (1989).

CHAPTER 2

CROSON AND ITS PROGENY

Introduction

In 1989, the United States Supreme Court examined “the tension between the Fourteenth Amendment’s guarantee of equal treatment to all citizens, and the use of race-based measures to ameliorate the effect of past discrimination on the opportunities enjoyed by members of minority groups in our society.”² In *City of Richmond v. J.A. Croson Company*, the Court struck down a municipal minority business enterprise (MBE) program that had required the city of Richmond, Virginia to compel its prime contractors to subcontract at least 30 percent of their construction contract dollars to minority business enterprises. Then in *Adarand v. Peña*,³ the United States Supreme Court struck down a federal MBE program extending the *Croson* analysis of state ameliorative efforts to the federal government. This section will analyze the United States Supreme Court's MBE jurisprudence, including both the *Croson* and *Adarand* decisions. While the Court has in recent years enacted a more exacting standard in analyzing MBE programs, it is

² 488 U.S. at 476.

³ *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2111 (1995).

clear that where a governmental body establishes an MBE program in response to documented instances of discrimination, that program can withstand judicial scrutiny.

Standards of Review

The most common challenge to an affirmative action program or an MBE plan would be to argue that such legislation violates the equal protection guarantees of the Constitution; that is to say, the program denies equal protection of the laws by the government favoring one class of citizens over another. Yet since nearly all conceivable legislation distinguishes between citizens (*e.g.*, drunk driving statutes affect drunk drivers and non-drunk drivers differently), courts employ varying standards of *scrutiny* in determining whether the legislation violates the Constitution's equal protection guarantees.⁴ Courts generally apply one of three *standards of review* in analyzing the constitutionality of legislation: rational basis review, intermediate scrutiny, and strict scrutiny.⁵

Rational Basis Review

The primary siphoning tool used by courts in equal protection analysis is the Constitution's demand of reasonableness. Statutes generally do not violate the equal protection guarantees of the Constitution if the legislation "rationally furthers a legitimate state purpose."⁶

⁴*See, e.g.*, U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws"); U.S. CONST. amend. V; U.S. CONST. amend. XIII; U.S. CONST. amend. XV; U.S. CONST. art. I, § 2.

⁵*See generally* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 16-1 to 16 -59 (2d ed. 1988).

⁶*Zobel v. Williams*, 457 U.S. 55, 60 (1982).

For example, if state legislation permits only the acquisition of in-state banks by out-of-state banks from other states with reciprocal privileges, this would merit and pass rational basis review as the statute would be a rational law related to a legitimate state interest.⁷ This is the easiest standard by which courts analyze legislation under equal protection analysis, and most legislation analyzed under this standard survives legal challenge.⁸

Intermediate Scrutiny

A more difficult burden to overcome exists for statutes classifying on the basis of gender or illegitimacy. Laws subjecting women to different treatment than men, and illegitimate children from legitimate children are analyzed under equal protection review with an intermediate level of scrutiny. For example, if a state enacts a law allowing women to drink beer at the age of eighteen, but does not allow men to drink beer until they reach the age of twenty-one, a court would only uphold the statute on an equal protection claim if the legislation fulfills an “important government interest and [is] substantially related to achievement of those objectives.”⁹ Therefore, gender-based legislation is more likely to wither in the face of litigation than economic regulations, as the government must have an important, not just legitimate, interest in the regulated subject, and the legislation must be substantially, not just rationally, related to that interest.

Strict Scrutiny

⁷See *Northeast Bancorp, Inc. v. Governors of the Federal Reserve Sys.*, 472 U.S. 159 (1985).

⁸See, e.g., *Kotch v. Board of River Port Pilot Comm'rs*, 330 U.S. 552 (1947). *But see City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985).

⁹See *Craig v. Boren*, 429 U.S. 190, 197 (1976).

Statutes that impinge upon fundamental rights or that suggest impermissible prejudice is afoot are subject to the most stringent type of scrutiny used by courts. Equal protection review of legislation surrounding national origin, race, and alienage generally occurs under the auspices of strict scrutiny. For example, if the government seeks to redraw congressional districts along racial lines, courts would only uphold this legislation if the statute was “narrowly tailored to achieving a compelling state interest.”¹⁰ With such a difficult burden to overcome, it should be no large surprise that relatively little legislation analyzed with strict scrutiny is upheld.

Legal Analysis

Before the Court's ruling in *Croson*, affirmative action programs, or benevolent race-based ameliorative efforts, enjoyed a more relaxed level of judicial scrutiny than did other race-based legislation.¹¹ If a legislature passed legislation that differentiated on the basis of race and if the intent behind the statute was eleemosynary, or more exactly, was designed to benefit racial minorities, the judiciary would subject the statute to intermediate scrutiny. Courts using this standard of review for benevolent differentiating legislation made it more likely that the statute would be constitutional; whereas invidious racially discriminatory legislation that burdened racial minorities would most certainly violate the equal protection guarantees of the United States Constitution.

The Court, however, in *Croson*, eviscerated the distinction between benevolent and malevolent race-based legislation for state or local governments, admonishing: "the standard of

¹⁰*See, e.g.*, *Miller v. Johnson*, 115 S.Ct. 2475, 2482 (1995).

¹¹*See, e.g.*, *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification."¹² Thus in the *Croson* decision a majority for the first time held that race-conscious classifications by a state or local government designed to further remedial goals, like other race-based legislation by a state or local government, are subject to the rigors of strict scrutiny.

Shortly after the *Croson* decision, the Court again revisited the issue of race-based legislation. In *Metro Broadcasting, Inc. v. FCC*¹³ the Court held that section five of the Fourteenth Amendment conferred special powers to Congress to enforce the guarantee of equal protection under the laws. Therefore, when analyzing benign federal racial classifications, the courts should utilize only an intermediate level of scrutiny.¹⁴ The Court in *Metro Broadcasting* upheld a federal race-based program designed to increase minority ownership of radio and television stations. Thus, the *Metro Broadcasting* decision made it less likely a court would strike down a federal affirmative action program.

In 1995, however, the Court overruled *Metro Broadcasting* in *Adarand v. Peña*,¹⁵ holding that the analysis of equal protection under the Fourteenth Amendment (as applied to states or local governments) and under the Fifth Amendment (as applied to the federal government) is the same.¹⁶ At issue in *Adarand* was the constitutionality of a race-based

¹²City of Richmond v. J.A. Croson Co., 488 U.S. 469, 494 (1989).

¹³497 U.S. 547 (1990).

¹⁴Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 564-65 (1990).

¹⁵Adarand Constructors, Inc. v. Peña, 115 S.Ct. 2097 (1995).

¹⁶*Id.*, 115 S.Ct. at 2111.

Department of Transportation program providing additional compensation to a prime contractor if it hired a disadvantaged business enterprise. As *Croson* did away with the distinction between invidious and remedial discrimination, *Adarand* did away with the distinction between state or local government race-based legislation and federal race-based legislation. This area of the law, if nothing else, is at least now proclaimed consistent: "[a]ny person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest of judicial scrutiny."¹⁷

The Special Case of Native Americans

While the language of *Adarand* above is surely *skeptical*, *consistent*, and *congruent*,¹⁸ this area of law may have an exception. The standard of review for a court analyzing a Minnesota state law granting preferences for Native Americans under an equal protection challenge may be lower than a compelling state interest.¹⁹ In fact, the standard of review may be akin to a rational basis test. While our research has not identified any cases reviewing a state law establishing a set-aside program for Native Americans in response to a disparity study and public hearing process utilizing a low standard of review under an equal protection challenge, several factors suggest that it will occur.

¹⁷*Id.*

¹⁸*Id.*

¹⁹See generally David C. Williams, *The Borders of the Equal Protection Clause: Indians as Peoples*, 38 UCLA L. REV. 759 (1991).

First, under the United States Supreme Court's landmark ruling of *Morton v. Mancari*,²⁰ courts uphold statutes classifying Native Americans by membership in a federally recognized tribe under equal protection challenge if the legislation is "rationally tied to the fulfillment of Congress' unique obligation towards [sic] Indians."²¹ In *Mancari*, the Court held that the Indian Reorganization Act, that granted preferences to members of federally recognized tribes in hiring at the Bureau of Indian Affairs was based on a political classification, not a racial classification. The Court reasoned that while American Indians who belong to a sovereign entity are a race, they also are part of a bona fide political class.²² As a political class, equal protection²³ challenges are only subject to a rational basis test review.

Second, both federal and Minnesota cases have analyzed state classifications of Native Americans belonging to federally recognized tribes under equal protection review, and have reviewed the legislation under a rational basis test. In *Livingston v. Ewing*²⁴ when the City of Sante Fe, New Mexico granted a set-aside program for members of federally recognized tribes to sell crafts in front of a museum, the court held that this was not a racial, but a cultural and political classification.²⁵ A federal circuit court of appeals reasoned that the unique legal status of

²⁰417 U.S. 535 (1974).

²¹*Mancari*, 417 U.S. at 555.

²²*See also* *Queets Band of Indians v. Washington*, 765 F.2d 1399, 1404, *vacated*, 783 F.2d 154 (9th Cir. 1985) ("We disagree . . . that the state's classification here is racial.").

²³The plaintiffs in *Morton* actually leveled a due process claim under the Fifth Amendment, but that does not change the standard of review.

²⁴*Livingston v. Ewing*, 601 F.2d 1110 (10th Cir.), *cert. denied*, 444 U.S. 870 (1979).

²⁵*See Livingston v. Ewing*, 455 F.Supp. 825, 831 (D.N.M. 1978), *aff'd*, 606 F.2d 1110 (10th Cir. 1979), *cert. denied*, 444 U.S. 870 (1979).

Indians, and the strong precedential value of *Mancari* mandated upholding the district court's opinion.²⁶ This district court opinion in granting summary judgment found that the Museum of New Mexico's policy only allowing Indians to sell goods in a specific locale was "reasonably . . . and directly related to [a] racially neutral state interest."²⁷

In a Minnesota case *Krueth v. Independent School District No. 38, Red Lake, Minnesota*,²⁸ the Minnesota Court of Appeals upheld a teacher retention policy favoring less senior American Indian teachers over more senior non-Indian teachers. The court found that the *Mancari* decision discussed above recognizes a substantive difference between American Indians and other races.²⁹ The difference is that American Indians who are members of federally recognized tribes are part of a political group. Therefore, "[a] preference given to American Indians, although falling heavily on those individuals affected, is neither new nor startling in view of the policy that while race, color, and creed cannot be the basis for discrimination, membership in a political entity can be."³⁰

In New Mexico, however, in *Tafoya v. City of Albuquerque*,³¹ a federal district court subjected an equal protection claim involving Native Americans to judicial review utilizing strict scrutiny. *Tafoya* involved a state preference allowing members of federally recognized tribes and

²⁶Livingston v. Ewing, 601 F.2d 1110, 1113-14 (10th Cir.), *cert. denied*, 444 U.S. 870 (1979).

²⁷Livingston v. Ewing, 455 F.Supp. 825, 832 (D.N.M. 1978), *aff'd*, 606 F.2d 1110 (10th Cir. 1979), *cert. denied*, 444 U.S. 870 (1979).

²⁸496 N.W.2d 829 (1993).

²⁹Krueth v. Independent Sch. Dist. No. 38, Red Lake, Minn., 496 N.W.2d at 836 (Minn. 1993).

³⁰*Id.*

³¹Tafoya v. City of Albuquerque, 751 F.Supp. 1527 (D.N.M. 1990).

the Navajo Nation to sell wares in Old Town, Albuquerque.³² The court reasoned that while the federal government had a “unique obligation” towards Indians, the City of Albuquerque had no such comparable power.³³ Therefore this state preference for Native Americans, as opposed to a federal preference as in *Mancari*, was subjected to the rigors of strict scrutiny. The court required a particularized showing of past discrimination against the preferred group, as in *Croson*, and absent such a showing, found the legislation unconstitutional.³⁴

The decision in *Tafoya*, however, besides being of lower precedential value than the Tenth Circuit Court of Appeals decision in *Livingston*, relied on a distinction between *Croson* and *Fullilove* that the Supreme Courts ruling in *Adarand* eviscerated. That distinction was the varying level of review accorded to ameliorative race-based programs depending upon whether the legislation was a state or federal statute. Currently, under *Adarand*, courts treat equal protection claims involving race deriving from federal law and state law identically.³⁵

Additionally, the integral element to the decision in *Mancari* of the special trust relationship between Native Americans and the federal government, that *Tafoya* rejected in its application to New Mexico has been treated differently in Minnesota. In *St. Paul Intertribal Housing Board v. Reynolds*,³⁶ the court held that an urban Indian housing board program open only to Indians did not violate the equal protection clause of the U.S. Constitution. The court

³²*Id.* at 1528.

³³*Id.* at 1530. *See also* *Washington v. Confederated Bands & Tribes of the Yakima Nation*, 439 U.S. 463, 502 (1979) (“States do not enjoy this same unique relationship with Indians”).

³⁴*Tafoya*, 751 F.Supp. at 1531.

³⁵*See* *Adarand Constructors, Inc. v. Peña*, 115 S.Ct. 2097, 2121 n. 3 (1995) (Stevens, J., dissenting).

³⁶*St. Paul Intertribal Hous. Bd. v. Reynolds*, 564 F. Supp. 1408 (D. Minn. 1983).

recognized that the trust relationship between the federal government and Native Americans is based on statute and treaty, but that “[s]tate action for the benefit of Indians can also fall under the trust doctrine and therefore be protected from challenge under the equal protection clause.”³⁷ Therefore, because the Minnesota Legislature “expressed its clear intention to benefit urban Indians in the Minnesota Urban Indian Housing Act,”³⁸ and the legislation was rationally related to the government's unique obligation, the court upheld the legislation.³⁹

Finally, while the legislation struck down in *Croson* contained a set-aside for “Indians,” this fails to establish that the Supreme Court reviewed this portion of the legislation under the rigors of strict scrutiny. The unconstitutional legislation enacted by the city of Richmond contained set-asides for minority group members, defined as “Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts.”⁴⁰ Certainly not all these classifications are subject to strict scrutiny. While Hispanics are considered a race for equal protection purposes,⁴¹ the status of being bilingual is not subject to the rigors of strict scrutiny.⁴² As the Minnesota Court of Appeals in *Krueth*

³⁷*Reynolds*, 564 F. Supp. at 1410-11 citing *Washington v. Fishing Vessel Ass’n*, 443 U.S. 658 (1979) (holding that fishing regulations protecting Native American treaty rights do not violate the Constitution’s equal protection guarantees). Cf. *Hoohuli v. Ariyoshi*, 631 F.Supp. 1153, 1160 (D. Haw. 1986) (holding the State's police powers allowed the legislature to enact remedial programs for Native Hawaiians).

³⁸*Reynolds*, 564 F. Supp. at 1408.

³⁹*Id.*

⁴⁰*City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 478 (1989).

⁴¹*Hospital San Rafael, Inc., v. Sullivan*, 784 F. Supp. 927 (D.P.R. 1991).

⁴²*See Hernandez v. New York*, 500 U.S. 352 (1990).

pointed out concerning an extremely similar statute at issue in *Wygant*, “[i]f the policy had applied only to American Indians . . . the result likely would have been different.”⁴³

Therefore, because of the holdings in *Mancari*, *Livingston*, *Krueth*, and *Reynolds*, the skeptical, consistent, and congruent words of *Adarand* fail to instill complete consistency in this area of law fully. If a reviewing court would analyze state or local government legislation enacted in response to the disparity studies and public hearings, and such legislation contained a severability clause, it is likely that courts would analyze legislation granting preferences to Native Americans under a rational basis test. Because of the uncertain nature of the standard of review in this area and since legislation that adheres to the strict scrutiny standard also easily meets the rational basis test, Institute on Race and Poverty has analyzed the evidence regarding Native Americans under the strictures of strict scrutiny. Therefore Institute on Race and Poverty will only recommend programming classifying on the basis of being a Native American if the program would be narrowly tailored to achieve a compelling state interest.

A Compelling State Interest

As stated above, in order for race-based legislation, such as an affirmative action plan or MBE program, to meet the standard set out in *Croson* and its progeny, the regulations must serve a compelling interest of the state or local government that passed the legislation. The *Croson* Court held that “any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private

⁴³*Krueth v. Independent Sch. Dist. No. 38, Red Lake, Minn.*, 496 N.W.2d 829, 836 (Minn. 1993).

prejudice."⁴⁴ In *Croson*, the Court rejected both the appellant's argument that the City possessed broad "legislative power to define and attack the effects of prior discrimination," in its jurisdiction, and the appellee's argument that the City was limited in effectuating its race-based efforts to "eradicating the effects of its own prior discrimination."⁴⁵ Instead the Court followed a middle course, requiring the City to have a "strong basis in evidence" of the practice of discrimination within its jurisdiction, before enacting an appropriate remedy.⁴⁶

The strong basis in evidence standard is neither a requirement for "formal findings of discrimination," nor a coded phrase meaning just uttering the words "societal discrimination."⁴⁷ Rather courts require governments, before acting, to identify the practice of discrimination, with some specificity, in which the government at least played a passive role. Thus, *Croson* and its progeny allow a government to correct its own prior discrimination, and to intercede in the parts of the private market that are discriminatory and in which the government played at least a passive role.

During an analysis of disparity, courts have looked to both statistical disparities between the percentage of minority firms available and willing to participate in the industry and the percentage of dollars awarded to those firms, and to anecdotal evidence of the pervasiveness and

⁴⁴City of Richmond v. J.A. Croson Co., 488 U.S. at 492.

⁴⁵*Id.* at 486.

⁴⁶*Id.* at 497.

⁴⁷Compare *Aiken v. City of Memphis*, 37 F.3d 1155 (4th Cir. 1994) and *Ensley Branch NAACP v. Siebels*, 31 F.3d 1548, 1565 (11th Cir. 1994) with *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 ("Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy.").

practice of discrimination.⁴⁸ For courts, the relevant statistical data that governments must gather and assess before implementing an affirmative action plan or an MBE program consists of comparisons between the *availability* of separate minority group contractors in an industry (*e.g.*, goods, professional services) with the *utilization* of those same groups in those industries by the government.⁴⁹ In defining "availability" courts look to the reality of the marketplace, rather than municipal geopolitical boundaries.⁵⁰ Therefore, the appropriate marketplace of available contractors for the City of St. Paul, Ramsey County, and Independent School District #625 includes the eleven-county metropolitan statistical area (MSA).⁵¹ Utilization is determined by analyzing the amount of contract dollars awarded to the available minority business enterprises.⁵²

⁴⁸Coral Constr. Co. v. King County, 941 F.2d 910, 919 (9th Cir. 1991).

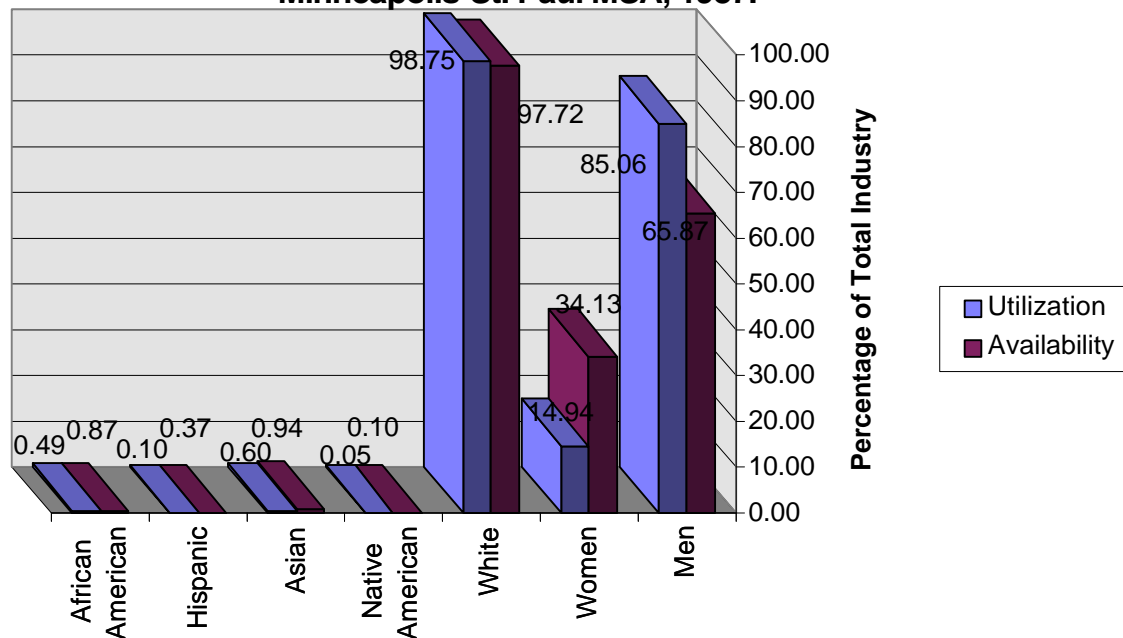
⁴⁹O'Donnell Constr. Co. v. District of Columbia, 762 F. Supp. 354 (D.D.C. 1991), *rev'd*, 963 F.2d 420 (D.C. Cir. 1992). *Cf.* Wards Cove Packing Co. v. Antonio, 490 U.S. 642, 650 (1989) ("The proper comparison is between the racial composition of the at-issue jobs and the racial composition of the qualified population in the relevant labor market.")

⁵⁰Concrete Works of Colo. v. City and County of Denver, 823 F. Supp. 821, 835-36 (D.Colo. 1993).

⁵¹The Twin Cities metropolitan statistical area includes the following counties: Anoka, Carver, Chisago, Dakota, Isanti, Hennepin, Ramsey, Scott, St. Croix, Washington, and Wright.

⁵²*See* Associated Gen. Contractors of Cal., Inc. v. Coalition for Economic Equity, 950 F.2d 1401 (9th Cir. 1991).

**Availability and Utilization Comparison.
Minneapolis-St. Paul MSA, 1987.**



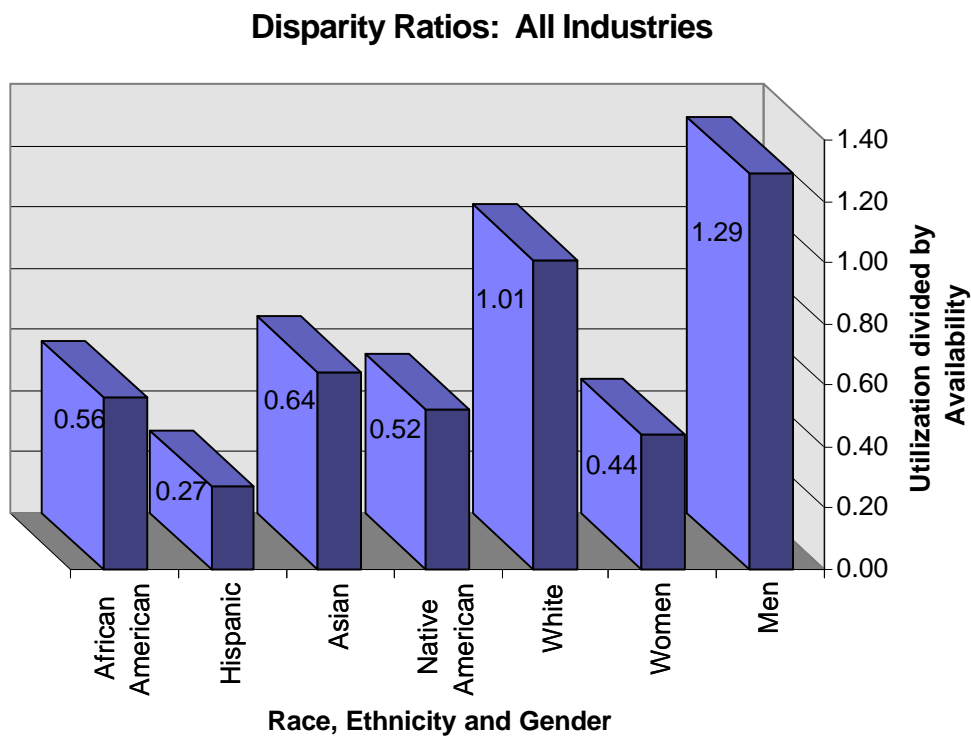
The above chart illustrates the availability and utilization of racial and gender groups in the Twin Cities marketplace as a whole.⁵³ The availability number represents the proportion of all firms in all industries owned by individuals in different racial, gender, and political groups. The utilization number represents the percentage of the market, as measured by contract dollars, accorded to each racial, gender, and political group.

The quotient of the availability and the utilization is known as a "disparity ratio."⁵⁴ When groups are vastly underutilized, the disparity ratio will be close to zero; when groups are overutilized, the disparity ratio will be greater than one. A disparity ratio of one signifies parity

⁵³The Multijurisdictional Disparity Study of Minority/Women Business Enterprises; City of St. Paul, Ramsey County, and Independent School District No. 625; pps. IV-5, IV-7; BBC Research and Consulting (1995).

⁵⁴Contractors Ass'n. of E. Penn. v. City of Philadelphia, 6 F.3d 990, 1010 (3rd Cir. 1993).

between availability and utilization. No single talismanic disparity ratio exists that will trigger a favorable judicial review in analyzing the constitutionality of an MBE program. Rather courts interpret the magnitude of discrimination on a case-by-case basis. In fact, if the number of minority contractors is sufficiently small, anecdotal evidence of discrimination may be the more useful type of evidence sought by a reviewing court.



The above represents the disparity ratios calculated from the data contained in the first chart. The disparity ratios of less than one signal that that group is being underutilized in the Twin Cities marketplace as a whole, whereas disparity ratios of more than one signal that that group is being overutilized in the Twin Cities marketplace as a whole.

As discussed above, courts look to both disparity ratios and anecdotal evidence of the practice of discrimination. The statistical results and the anecdotal evidence combine to form a fluid complement. That is to say, if a jurisdiction presents tremendous statistical disparities between the availability and the utilization of minorities in its contracting, the less glaring the anecdotal evidence presented to the court needs to be. Similarly, if a jurisdiction presents statistical disparities that are not statistically significant, courts would expect to see a greater amount of anecdotal evidence before upholding an M/WBE.

The gathering of statistical information regarding disparate treatment of racial and gender and based groups in contracting, and the collection of anecdotal information of the practice of discrimination in the marketplace, can provide for a compelling state interest in addressing the inequities of government contracting through racial or gender-based legislation. Still, a compelling state interest is not enough for a court. The enacted legislation must also be narrowly tailored to that compelling state interest.

Narrowly Tailored

In order for legislation that classifies on the basis of race to withstand an equal protection challenge, the statute must be enacted due to a compelling state interest, and it must be narrowly tailored to that compelling state interest. For a court to rule that promulgated legislation is narrowly tailored to the government's compelling state interest, the enacting jurisdictions must first complete several necessary steps. First, the government must consider the

efficacy of race or gender neutral alternatives to the race or gender-based legislation.⁵⁵ Ideally, an expert would analyze the sufficiency of the race or gender neutral alternatives, or a jurisdiction could temporarily adopt programs based on social and economic status, not including race or gender. Second, the proffered statute must exhibit a relationship of the numerical goals contained in the legislation to the statistical area labor market, and ethnic groups for which no evidence of discrimination existed must not be beneficiaries of the program.⁵⁶ Third, the legislation must be flexible and meaningfully allow for waivers from noncompliance with the goals set out in the regulations.⁵⁷ Fourth, in determining whether the race or gender-based legislation is narrowly tailored, courts analyze the burden leveled on the nonminority contractors.⁵⁸ And fifth, the duration of the classification must be limited, as the programs should not “take on a life of their own.”⁵⁹ Following these five requirements of the courts will ensure that legislation enacted due to a compelling state interest is narrowly tailored to that interest.

Summary

A public employer, like the City of St. Paul, Ramsey County, and Independent School District #625, "must ensure that, before it embarks on an affirmative-action program, it has convincing evidence that remedial action is warranted." The statistical disparities between African-American, Asian, Hispanic, Native American, Women, and majority contractors in the

⁵⁵Sheet Metal Workers v. EEOC, 478 U.S. 421, 481 (1986).

⁵⁶*Id.*

⁵⁷*Id.*

⁵⁸Associated Gen. Contractors of Cal., Inc., v. City and County of San Francisco, 813 F.2d 922 (9th Cir. 1987).

⁵⁹Hayes v. North State Law Enforcement Officers Ass’n, 10 F.3d 207 (4th Cir. 1993).

construction, goods, professional services, and other services industries, in conjunction with the testimony supplied in public hearings regarding marketplace discrimination, and other relevant information may supply the type of convincing evidence for the City, County, and School District to act "in response to it."⁶⁰ If the City, County, or School District chooses to implement a race or gender-based program, and someone challenges it in court, it would likely occur under the auspices of an equal protection challenge. In recent years, some courts around the country have struck down affirmative action programs. Simultaneously, however, these same courts have clearly stated and reiterated that if the situation warrants it, and the government follows the proper procedure, courts will uphold those race or gender-based programs.⁶¹

⁶⁰Adarand Constructors, Inc. v. Peña, 115 S.Ct. 2097, 2117 (1995) ("The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it.").

⁶¹*Id.* ("We wish to dispel the notion that strict scrutiny is "strict in theory, but fatal in fact."").

CHAPTER 3

EVIDENCE

Introduction

The multijurisdictional disparity studies of minority/women business enterprises conducted by BBC Research and Consulting for the City of St. Paul, Ramsey County, and Independent School District No. 625 contain findings of racial and gender disparities in the Twin Cities metropolitan statistical area in the construction, goods, professional services, and other services industries, and findings of disparities within each jurisdiction's contract procurement process. BBC Research and Consulting concluded that because of the market conditions and each jurisdiction's procurement process, each jurisdiction had met the standard of scrutiny required by courts for a race or gender-based program in several well-defined areas.

The following charts summarize the areas in which statistically significant disparities exist for African-American, Asian, Hispanic, Native American, and Women owned construction, goods, professional services, and other services businesses in the Twin Cities metropolitan area as a whole, and the disparities that exist within each jurisdiction's procurement process. These charts also classify the racial, gender, and political groups in a specific industry for which BBC Research and Consulting already concluded met the *Crosby* standard.

Twin Cities Metropolitan Statistical Area

Twin Cities MSA					
	African-American	Asian	Hispanic	Native American	Women
Construction	SQED	SQED	SQED		SQED
Goods	SQED	SQED	SQED		SQED
Professional Services					SQED
Other Services					SQED

BBC Research and Consulting found that in each of the above shaded areas, there existed strong quantitative evidence of disparity.⁶² Institute on Race and Poverty then utilized this information in conjunction with the entity specific information, the determination whether each jurisdiction has been a passive participant in a discriminatory marketplace, and the information gathered in the public hearings in IRP's conclusions of whether each jurisdiction has met the appropriate standard of scrutiny under equal protection review.

⁶²The Multijurisdictional Disparity Study of Minority/Women Business Enterprises; City of St. Paul, Ramsey County, and Independent School District No. 625; p. ES-6; BBC Research and Consulting (1995).

City of St. Paul

City of St. Paul, 1990-94								
	African-American	Hispanic	Asian	Native American	White	Women	Men	Majority
Construction, XI-7								
Census Availability-Industry Total	0.33	0.05	3.52		1.00	1.01	1.00	1.00
Census Availability-Subsectors	0.46	0.09	6.00		1.00	0.79	1.02	1.01
Telephone Survey Availability-interested	0.14	0.07	1.74	0.48	1.01	0.39	1.10	1.12
Telephone Survey Availability-attempted	0.14	0.13	0.82	0.34	1.02	0.42	1.09	1.14
Bidders List Availability	0.06	0.03	0.36	0.67	1.04	0.72	1.02	1.07
Goods, XI-11								
Census Availability-Industry Total	0.52	0.29	1.01		1.00	0.12	1.17	1.17
Census Availability-Subsectors	1.39	1.53	3.38		0.99	0.44	1.03	1.02
Telephone Survey Availability-interested	0.32	0.13	0.38	0.23	1.02	0.18	1.10	1.14
Telephone Survey Availability-attempted	0.28	0.13	0.41	0.19	1.03	0.19	1.09	1.13
Bidders List Availability	0.16	0.20	0.62	0.15	1.03	0.31	1.05	1.08
Professional Services, XI-17								
Census Availability-Industry Total								
Census Availability-Subsectors	0.33	0.28	15.55		0.99	1.24	0.99	0.98
Telephone Survey Availability-interested	0.06	0.05	0.61	0.67	1.03	0.44	1.10	1.14
Telephone Survey Availability-attempted	0.04	0.03	0.51	0.98	1.03	0.41	1.10	1.16
Bidders List Availability	0.16	0.08	0.24	1.21	1.03	1.18	1.11	1.02
Other Services, XI-20								
Census Availability-Industry Total								
Census Availability-Subsectors	0.44	0.04	2.50		1.00	0.31	1.08	1.08
Telephone Survey Availability-interested	0.28	0.10	0.58	1.47	1.02	0.19	1.15	1.18
Telephone Survey Availability-attempted	0.16	0.03	0.42	0.69	1.03	0.22	1.13	1.17
Bidders List Availability	0.08	0.02	0.38	0.93	1.07	0.27	1.10	1.18

The above chart displays the disparity ratios for each racial, gender, and political group for the city of St. Paul, Minnesota.⁶³ The shaded areas indicate that BBC Research and Consulting rejected the hypothesis (at the 95 percent confidence interval) that chance in procurement could explain the difference. Institute on Race and Poverty derived the disparity ratios for whites using the availability and utilization figures for other the total MBE figures,

⁶³The Multijurisdictional Disparity Study of Minority/Women Business Enterprises; City of St. Paul, Minnesota; charts. XI-7, XI-11, XI-17, and XI-20; BBC Research and Consulting (1995).

subtracting from one hundred, and then dividing the two numbers. A similar process occurred for the numbers for men.

From the above information, and other quantitative and qualitative evidence, BBC Research and Consulting concluded that the city of St. Paul met the strict scrutiny standard for the groups and illustrated industries below.⁶⁴

City of St. Paul					
	African-American	Asian	Hispanic	Native American	Women
Construction		SS	SS		SS
Goods	SS	SS	SS		SS
Professional Services					
Other Services					SS

⁶⁴The Multijurisdictional Disparity Study of Minority/Women Business Enterprises; City of St. Paul, Minnesota; p. XV-1; BBC Research and Consulting (1995).

Ramsey County

County of Ramsey, 1990-94								
	African-American	Hispanic	Asian	Native American	White	Women	Men	Majority
Construction, XI-7								
Census Availability-Industry Total	0.18	0.22	1.68		1.00	0.59	1.02	1.03
Census Availability-Subsectors	0.26	0.36	2.86		1.00	0.46	1.04	1.04
Telephone Survey Availability-interested	0.08	0.27	0.28		0.41	1.02	0.23	1.13
Telephone Survey Availability-attempted	0.08	0.51	0.13		0.29	1.02	0.25	1.12
Bidders List Availability	0.03	0.14	0.06		0.58	1.04	0.42	1.05
Goods, XI-11								
Census Availability-Industry Total	0.45	1.12	0.94		1.00	0.05	1.18	1.19
Census Availability-Subsectors	1.23	5.87	3.15		0.99	0.17	1.16	1.03
Telephone Survey Availability-interested	0.28	0.50	0.41		0.01	1.03	0.07	1.11
Telephone Survey Availability-attempted	0.25	0.51	0.44		0.01	1.03	0.07	1.11
Bidders List Availability	0.14	0.75	0.66		0.01	1.03	0.12	1.06
Professional Services, XI-17								
Census Availability-Industry Total								
Census Availability-Subsectors	0.00	8.04	0.03		1.00	0.36	1.04	1.03
Telephone Survey Availability-interested	0.00	1.46	0.00		0.00	1.03	0.13	1.16
Telephone Survey Availability-attempted	0.00	0.92	0.00		0.00	1.04	0.12	1.17
Bidders List Availability	0.00	2.27	0.00		0.00	1.03	0.34	1.04
Other Services, XI-20								
Census Availability-Industry Total								
Census Availability-Subsectors	1.16	0.04	1.24		1.00	0.10	1.10	1.10
Telephone Survey Availability-interested	0.73	0.12	0.45		0.19	1.02	0.06	1.18
Telephone Survey Availability-attempted	0.44	0.04	0.32		0.09	1.04	0.07	1.15
Bidders List Availability	0.20	0.03	0.30		0.12	1.04	0.08	1.12

The above chart displays the disparity ratios for each racial, gender, and political group for Ramsey County, Minnesota.⁶⁵ The shaded areas indicate that BBC Research and Consulting rejected the hypothesis (at the 95 percent confidence interval) that chance in procurement could explain the difference. Institute on Race and Poverty derived the disparity ratios for whites using the availability and utilization figures for other the total MBE figures, subtracting from one hundred, and then dividing the two numbers. A similar process occurred for the numbers for men.

⁶⁵The Multijurisdictional Disparity Study of Minority/Women Business Enterprises; Ramsey County, Minnesota; charts. XI-7, XI-11, XI-17, and XI-20; BBC Research and Consulting (1995).

From the above information, and other quantitative and qualitative evidence, BBC Research and Consulting concluded that Ramsey County met the strict scrutiny standard for the groups and illustrated industries below.⁶⁶

Ramsey County					
	African-American	Asian	Hispanic	Native American	Women
Construction	SS	SS	SS		
Goods	SS	SS	SS		SS
Professional Services					SS
Other Services					SS

⁶⁶The Multijurisdictional Disparity Study of Minority/Women Business Enterprises; Ramsey County, Minnesota; p. XV-1; BBC Research and Consulting (1995).

The above chart displays the disparity ratios for each racial, gender, and political group for the St. Paul public schools, in St. Paul, Minnesota.⁶⁷ The shaded areas indicate that BBC Research and Consulting rejected the hypothesis (at the 95 percent confidence interval) that chance in procurement could explain the difference. Institute on Race and Poverty derived the disparity ratios for whites using the availability and utilization figures for other the total MBE figures, subtracting from one hundred, and then dividing the two numbers. A similar process occurred for the numbers for men.

From the above information, and other quantitative and qualitative evidence, BBC Research and Consulting concluded that the school district met the strict scrutiny standard for the groups and illustrated industries below.⁶⁸

Ind. Sch. Dst. No. 625					
	African-American	Asian	Hispanic	Native American	Women
Construction					
Goods	SS	SS	SS		SS
Professional Services					SS
Other Services					SS

Government Participation

The BBC Research and Consulting multijurisdictional disparity studies of minority/women business enterprises conducted for the City of St. Paul, Ramsey County, and

⁶⁷The Multijurisdictional Disparity Study of Minority/Women Business Enterprises; Independent School District No. 625, St. Paul, Minnesota; charts. XI-7, XI-11, XI-18, and XI-21; BBC Research and Consulting (1995).

⁶⁸The Multijurisdictional Disparity Study of Minority/Women Business Enterprises; Independent School District No. 625, St. Paul, Minnesota; p. XV-1; BBC Research and Consulting (1995).

Independent School District Number 625 all similarly conclude a sufficient linkage exists between each government and a discriminatory marketplace to establish passive government participation. In making this determination, BBC Research and Consulting analyzed the amount of purchases each government makes within the Twin Cities marketplace, and the various destinations of those dollars. BBC Research and Consulting determined that each government's procurement process fortifies the inequities specified within the Twin Cities market.

The Institute on Race and Poverty accepts and adopts BBC Research and Consulting's analysis regarding each government's passive participation. Testimony was also received in public hearings discussing the government's active and passive participation in a discriminatory marketplace. After analyzing both BBC Research and Consulting's reports and the additional testimony, Institute on Race and Poverty concludes that such a nexus exists between each government and a discriminatory marketplace as to warrant the conclusion that the City of St. Paul, Ramsey County, and Independent School District, No. 625 are all at least passive participants in a discriminatory marketplace.

CHAPTER 4

SUMMARY OF PUBLIC HEARINGS

The Process

The City of St. Paul, Ramsey County, and Independent School District #625 conducted joint public hearings on the subject of market conditions for minority and women-owned business enterprises (M/WBEs). The hearings convened Thursday, January 11, 1996, in the St. Paul Public Schools Board Building, St. Paul, Minnesota, and Monday, January 22, 1996, in the Mt. Olivet Baptist Church, St. Paul, Minnesota. Staff from the Institute on Race and Poverty attended and heard testimony along with a panel consisting of the following persons:

- Hal Norgard, Ramsey County Board of Commissioners
- Raphael Ortega, Ramsey County Board of Commissioners
- Dr. Mary Thornton-Phillips, St. Paul Public Schools Board of Education (1/11 only)
- Martin J. Sweet, Institute on Race and Poverty (1/22 only)
- William Wilson, Center for Urban and Regional Affairs

Due to her term of office terminating, Choua Lee, formerly of the St. Paul Public Schools Board of Education, did not serve on the panel. Dave Thune and Janice Rettman, of the St. Paul City Council, and City alternate, Jerry Blakey, did not appear at either hearing.

Each public hearing consisted of receiving oral and written testimony from members of the public. Some individuals that could not attend the hearings sent written testimony to the Institute on Race and Poverty. Staff from IRP entered this testimony into the public record upon the behalf of the requesting individuals. At the inception of each hearing, one of the hearing panel members that functioned as the hearing examiner made an opening statement regarding the purpose and ground rules of each hearing. The hearing examiner then introduced the hearing panel, court reporter, and interpreters in the following Languages: American Sign Language, Hmong, Spanish, Thai, and Vietnamese. Each proceeding was additionally video and audio taped.

Over thirty individuals testified either in oral or written form. These individuals consisted of African-Americans, Asians, Hispanics, Native Americans, and Whites; men and women; contractors in the construction, goods, professional services, and other services industries; representatives from the National Minority Contractor's Association and from the Associated General Contractors; and leaders of the unions and of chambers of commerce. Each individual had been directed to focus their testimony on two issues: whether their race, gender, or political classification had affected their ability to contract in the private and public sector, and if there had been an effect, what type of remedies should be undertaken by each jurisdiction in response.

All witnesses who came before the hearing panel to testify swore that the information they would be providing, both oral and written, would be truthful to the best of their knowledge. Each witness told their own story, and many individuals, who represented other individuals through their organization, relayed the experiences of those people. All of this testimony, beyond other information, provided the members of the Disparity Study Joint Powers Board with accounts of how the local construction, goods, professional services, and other services industries actually work.

The Testimony

1) The hearing panel officially received the complete studies conducted by BBC Research and Consulting for Independent School District #625, the City of St. Paul, and Ramsey County. Approximately ten individuals also submitted additional written testimonials. Institute on Race and Poverty has included a full accounting of witnesses and exhibits in an appendix to this report.

2) Approximately thirty individuals, including African-Americans, Asians, Hispanics, Native Americans, Whites, Women, and Men testified regarding the Twin Cities marketplace and discrimination. Witnesses specified various experiences in the Twin Cities marketplace related to racial, gender, and political classification discrimination, and representatives from trade, commerce, and resource organizations testified regarding the experiences of their members, and

regular business practices. No one testified that discrimination did not exist in the construction, goods, professional services, and other services industries in the Twin Cities marketplace.

3) Witnesses testified regarding the existence of, and exclusion from, a “good old boy” network in the Twin Cities market. This network operates to exclude minority and women owned businesses from having the opportunity to learn about and/or win contracts. Several witnesses suggested that it was “who you know” that really determines the success of a company. Speakers advanced the notion that three or four particular companies generally control the Twin Cities market in a particular industry.

4) Many witnesses gave accounts of being stereotyped as unable to perform quality work as a contractor. This feeling was especially prevalent by minorities and women in the professional services industry. While at least one white male in the professional services industry expressed a similar charge related to the size and relative inexperience of his firm, many witnesses of color and women suspected that the attitudes regarding their firms were due to race and gender.

5) Numerous witnesses cited unequal access to bonding due to racial discrimination as affecting their ability to contract. Most witnesses even treated the issue as a given, that is to say that they felt “of course they denied us bonding because of our race.” Others also questioned the usefulness of bonding on some services contracts.

- 6) Minority contractors recalled instances of being denied the opportunity to bid.

One witness was told he could not bid since so many minority contractors had already bid on that project.

7) Witnesses also referred to the unions and union members as a source of racial discrimination. Some testifiants charged the unions with practicing a systematic exclusion of people of color from their ranks, and others suggested that these unions are by and for white people. Particularly noteworthy was the practice of majority contractors in the union denying the opportunity to work to minorities. This denied those minorities union cards, and in turn denying those minorities the opportunity to join the union and after that work on union only jobs.

8) Many speakers cited evidence of unequal access to financing and loans as a common business practice affecting the ability of minorities and women to contract in the Twin Cities market. Witnesses also put forth instances of less qualified and less reliable white men receiving large loans or unsecured loans while banks and other financial institutions denied smaller loans or forced more qualified and more reliable black men to use larger amounts of collateral.

9) A multitude of the witnesses cited the practice of bid shopping, including representatives of trade and commerce organizations, as an extremely prevalent business practice. This not only lessened the frequency of minorities winning contracts, but also decreased the profit margin of winning minority contractors.

10) Witnesses also testified to unequal access to fair pricing and supplies. Testifiants cited instances where certain products (*e.g.*, traffic lights, heavy gear products, large furnaces) are unavailable to minority suppliers. The manufacturers will not sell some products or brands to minority suppliers, and when that product or brand is requested in a bid specification, minorities and women are unable to conform to the bid specifications. When manufacturers do sell to minority and women owned businesses, often the price minorities must pay exceeds that which the majority contractors pay for the identical product.

11) Testimony was heard charging that double standards exist in the evaluation of performance for minority and majority contractors. One witness testified that she far exceeded all aspects of a business plan normally required (in the other services industry), and was turned down due to her race.

12) Many witnesses expressed that they felt governmental resistance to M/WBE participation. Some witnesses charged that the government workers actually responsible for programming were only interested in satisfying their employers and not in actually assisting minority and women contractors. Others charged that the government routinely gave “the run-around” to people of color and women contractors, and at least two witnesses testified that government inspectors harassed them due to their race.

13) A large amount of testimony in public hearings focused on the issue of fronts. Many testifiants claimed that majority contractors either personally approached them to serve as an M/WBE front, or that they explicitly knew of front companies in the Twin Cities market. This

testimony seriously questions the statistical studies' numbers surrounding utilization. Given the apparent amount of fronts existing in the Twin Cities market, the utilization of non-front companies is likely to be much lower than that reported by BBC Research and Consulting.

14) Witnesses testified that often government and private sector contracts contain unnecessarily restrictive contract specifications. Contract specifications often lack clauses under which a contractor could use comparable quality substitute materials or products. Some witnesses charged that the contract specifications were specifically designed to fence out minority contractors.

15) Testimony was presented that charged that harassment and predatory business practices against minority contractors are a pervasive course of business in the Twin Cities, especially in the distribution business (good industry). One witness testified that he was subjected to racially harrasing continuous change of work orders calling for various amounts of trucks on different days that substantially burdened his businesses. Another witness testified that he has faced work slowdowns due to his race subjecting his business to incur massive financial loss.

16) At least one minority witness related an instance of majority employees threatening to refuse to work. The witness reported that the majority employees threatened to walk off the work-site if the person of color fired a particular individual who was not effectively working on the job.

17) Stories of minority and women contractors being subjected to discrimination by customers or end-users were common in the public hearings. They cited racial slurs and epithets being uttered, and racist graffiti on the worksite, as a common business impediment to minority contractors.

18) Witnesses in the profession services industry often testified that double standards exist in the division of labor for people of color, under which people of color are relegated to non-skill positions. This has the effect of not only segregating the work force, but likely diminishes the money flowing into communities of color.

19) Many people testified that discrimination in previous related employment and education had ramifications for the ability of minority and women contractors to succeed in the Twin Cities marketplace. Barriers in educational quality and opportunities, impediments in receiving adequate vocational training, and obstacles in obtaining suitable employment were all mentioned as hurdles that affected the ability of minorities to contract in the Twin Cities marketplace.

20) Some minority witnesses cited that they were unfairly denied contract awards, including when their bids were the lowest bids received by the contracting entity. One witness testified that prime contractors often utilized a currently acceptable excuse in denying low-bid minority and women subcontractors a contract by citing that the two parties could not reach an “acceptable business agreement.”

Some individuals submitted additional testimony to the Institute on Race and Poverty after the conclusion of our analysis. The Institute on Race and Poverty does not include an analysis of this testimony in this report, but IRP includes copies of the submitted testimony in the appendices following this report. This information, as well as other information that may be available or forthcoming after this report should be considered by each jurisdiction in determining a proper course of action.

CHAPTER 5

CONCLUSIONS AND RECOMMENDATIONS

After analyzing the above sworn testimony, the Institute on Race and Poverty concludes that the above business practices are serving barriers and impediments to people of color and women in the Twin Cities metropolitan area construction, goods, professional services, and other services industries. After analyzing the multijurisdictional BBC studies, and the solicited testimony at the public hearings, the Institute on Race and Poverty concludes that the City of St. Paul, Ramsey County, and Independent School District Number 625, each have a strong basis in evidence of the practice of discrimination in the construction, goods, professional services, and other services industries in the Twin City metropolitan statistical area. The Institute also concludes that each jurisdiction at least passively participated in this discrimination, and that each jurisdiction has a compelling state interest in remedying clearly definable areas of its procurement process.

The Institute on Race and Poverty examined all of the above evidence with the following standards in mind: for African-Americans, Hispanics, Asians, and Native Americans, a compelling state interest; and for Women, an important government interest. A different standard of review for Native Americans should, however, at least investigated by your legal representatives.

Entity Specific Conclusions

The Institute concludes that because of disparity in the Twin Cities market for M/WBEs, passive government participation in a discriminatory market, and procurement disparity for M/WBEs in each jurisdiction, that the following government entities have met the appropriate legal standard in the following areas for the following racial, gender, and political classification groups.

City of St. Paul

City of St. Paul					
	African-American	Asian	Hispanic	Native American	Women
	SS	SS	SS	SS	SS
Construction	SS	SS	SS	SS	SS
Goods	SS	SS	SS	SS	SS
Professional Services	SS	SS	SS	SS	SS
Other Services	SS	SS	SS	SS	SS

The Institute on Race and Poverty concludes that the city of St. Paul, Minnesota due to the disparity in the Twin Cities marketplace as a whole in which the City played at least a passive role, and the anecdotal information of discrimination solicited in the January 11, 1996 and January 22, 1996 public hearings, that the City has met the legal standard for a compelling state interest in the areas illustrated above.

Ramsey County

Ramsey County					
	African-American	Asian	Hispanic	Native American	Women
Construction	SS	SS	SS		SS
Goods	SS	SS	SS	SS	SS
Professional Services	SS	SS		SS	SS
Other Services	SS	SS	SS	SS	SS

The Institute on Race and Poverty concludes that Ramsey County, Minnesota due to the disparity in the Twin Cities marketplace as a whole in which the County played at least a passive role, and the anecdotal information of discrimination solicited in the January 11, 1996 and January 22, 1996 public hearings, that the County has met the legal standard for a compelling state interest in the areas illustrated above.

If the standard of review for Native Americans would be a rational basis test, the Institute on Race and Poverty additionally concludes that Ramsey County has a strong basis in evidence of discrimination against Native Americans in the construction industry.

Independent School District Number 625

Ind. Sch. Dst. No. 625					
	African-American	Asian	Hispanic	Native American	Women
Construction	SS	SS	SS		SS
Goods	SS	SS	SS	SS	SS
Professional Services	SS	SS	SS	SS	SS
Other Services	SS	SS	SS	SS	SS

The Institute on Race and Poverty concludes that Independent School District No. 625 due to the disparity in the Twin Cities marketplace as a whole in which the School District played at least a passive role, and the anecdotal information of discrimination solicited in the January 11, 1996 and January 22, 1996 public hearings, that the School District has met the legal standard for a compelling state interest in the areas illustrated above.

If the standard of review for Native Americans would be a rational basis test, the Institute on Race and Poverty additionally concludes that Independent School District has a strong basis in evidence of discrimination against Native Americans in the construction industry.

Recommendations

The Institute recommends that each jurisdiction swiftly enact remedial measures to address the disparity and discrimination that exist in the Twin Cities marketplace. BBC Research and Consulting and the Institute on Race and Poverty have already each recommended to each jurisdiction that each jurisdiction implement race and gender-neutral remedial programs. BBC Research and Consulting have adjudged many of these programs, however, to be insufficient to remedy the extant disparities facing M/WBEs in the Twin Cities market, and the Institute concurs.

The following represents the Institute's recommendations to each jurisdiction in addressing the disparity in the market as a whole and the disparity in each jurisdiction. As a whole, the Institute adopts BBC Research and Consulting's recommendations regarding suggested programs, with some significant differences in some of the Institute's recommendations noted

below. Each jurisdiction remains free to reject the Institute's recommendations and adopt programs of their own choosing.

1) Enact target-goal programs for M/WBEs in each industry. The Institute does not recommend a check-off or similar device on every individual contract. Rather, progress should be measured by whether the percentage of total contract dollars spent by each jurisdiction roughly corresponds to the percentage of each group's availability in the Twin Cities market.

Combining aspects of several programs could accomplish this. Each jurisdiction could divide the previous year's total contract dollar outlay by ten and use that dollar figure as a benchmark for the upcoming year. For example, if the City of St. Paul spent \$1.6 billion on professional services during the previous year, then for every \$160 million spent in the next year, the City could divide the contract dollars in the approximate proportion of each racial, gender, and political group's availability. Establishing goals for contracts over a certain dollar amount, establishing a percentage price preference for M/WBEs, and, if necessary, using a sheltered market for contracts nearing the end of the dollar cycle, could all aid in alleviating the documented disparity and discrimination in the Twin Cities market. Constant review and realigning of these programs are critical to the success of ending racial, gender, and political classification disparity. If it is found that the availability reported by BBC Research and Consulting is an inadequate measure, a new measure of availability should be factored into the new programming.

2) Each participating M/WBE should be certified, and enforcement of these and other programs should occur by either the Disparity Study Joint Powers Board, or a larger multijurisdictional body such as the Metropolitan Council that could encompass the entire Twin

Cities market. Duplicative and sometimes conflicting procedures result from the unnecessary overlap in the current administration and enforcement of programs. Many minorities have reported dissatisfaction, frustration, and confusion, regarding varying certification programs within the same marketplace. Programming efforts should be unified under one administrative and enforcement body to the maximum extent possible.

3) Review and revamp the bidding process to eradicate the practice of bid shopping. Institute on Race and Poverty recommends requiring the names and prices of subcontractors on every contractor's bid.

4) Eradicate the procedure of specific brand preferences. Institute on Race and Poverty encourages your jurisdictions to allow comparable substitute products on every contract that you let.

5) Break up the size of contracts so as to increase the government's direct use of subcontractors.

6) Fund already existing training organizations, and tie the receipt of your funds to the training organizations commitment to alleviating the disparity and discrimination in the Twin Cities market.