

# Hanging by Yarns: Deficiencies in Anecdotal Evidence Threaten the Survival of Race-Based Preference Programs for Public Contracting

Jeffrey M. Hanson

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## NOTE

### HANGING BY YARNS?: DEFICIENCIES IN ANECDOTAL EVIDENCE THREATEN THE SURVIVAL OF RACE-BASED PREFERENCE PROGRAMS FOR PUBLIC CONTRACTING†

Jeffrey M. Hanson††

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† The title reflects this Note’s conclusion that many jurisdictions’ minority-based public-contracting preference programs are vulnerable to equal protection challenges because policy makers have not sufficiently scrutinized the anecdotal evidence of discrimination used to support those programs. By not scrutinizing the anecdotal evidence, policy makers have failed to identify which accounts of discrimination may, in fact, have nondiscriminatory explanations. The failure to purge anecdotal evidence of those accounts that improperly perceive discrimination (*i.e.*, the “yarns” referred to in the title) undermines the value of narrations of actual discrimination. The title seeks to convey both the uncertainty surrounding the evidence and the vulnerability of the preference programs.

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*The White project managers for the State feel comfortable in hiring White companies to work for them. That's the only criteri[on]. And they're using experience[,] . . . which will give them comfort, to replace the discomfort they feel because you're a minority.*<sup>1</sup>

#### INTRODUCTION

The above excerpt is a typical example of the anecdotal evidence of discrimination that dozens of state and local governments have collected since the U.S. Supreme Court's 1989 decision in *City of Richmond v. J.A. Croson Co.*<sup>2</sup> When the *Croson* Court struck down

<sup>1</sup> 3 Mason Tillman Assocs., Ltd., State of Washington Disparity Study: An Historical Overview Disparity Study 2-106 (April 1998) (unpublished draft) (on file with author) (quoting an anonymous African-American male contractor (omission in original)).

<sup>2</sup> 488 U.S. 469 (1989); see George R. La Noue, *Standards for the Second Generation of Croson-Inspired Disparity Studies*, 26 *URB. LAW.* 485, 521-28 (1994).

Richmond's public-contracting preference program for minority business enterprises (MBEs),<sup>3</sup> it did so, in part, because the city did not have statistical or anecdotal evidence of discrimination sufficient to withstand constitutional scrutiny under the Equal Protection Clause.<sup>4</sup> Although some state and local governments responded to *Croson* by eliminating preference programs,<sup>5</sup> many jurisdictions responded by commissioning disparity studies to gather statistical and anecdotal evidence of discrimination against minority and women<sup>6</sup> contractors.<sup>7</sup>

It is hardly surprising that many state and local policy makers sought to preserve MBE preference programs despite *Croson*. After all, the issue of racial preferences includes many highly devoted proponents,<sup>8</sup> and the language of *Croson* offered an opening for jurisdictions to defend their MBE programs by collecting adequate evidence of discrimination.<sup>9</sup>

Of course, since *Croson*, race-based preferences have remained a controversial and high-profile public policy issue. In 1996, for example, "sharply divided" California voters approved Proposition 209, which ended government-sponsored race- and gender-based preference programs in the state.<sup>10</sup> The wide-ranging constitutional amendment applies to public employment, public education, and public contracting.<sup>11</sup> Two years later, voters in Washington state approved the nearly identical Initiative 200.<sup>12</sup> Moreover, among the most-

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<sup>3</sup> Throughout this Note, MBE refers to minority business enterprise, WBE to women business enterprise, and MWBE to either minority or women business enterprise (*i.e.*, MWBE is not restricted to businesses owned by minority women).

<sup>4</sup> See discussion *infra* Part I.A.

<sup>5</sup> See Walter H. Ryland, *A Survey and Analysis of Post-Croson Case Law*, in NAT'L LEGAL CTR. FOR THE PUB. INTEREST, *RACIAL PREFERENCES IN GOVERNMENT CONTRACTING* 1, 42 & n.172 (Roger Clegg ed., 1993) (citing eight opinions by various state attorneys general).

<sup>6</sup> Although there is some reference throughout this Note to gender-based preferences, the Note focuses on race-based preferences because the constitutional standards are stricter and more fully developed. Gender-based preferences are subject to intermediate scrutiny—or, after *United States v. Virginia*, at least subject to a less rigorous standard than strict scrutiny. See 518 U.S. 515, 531 (1996) (requiring the state to provide an "exceedingly persuasive justification" for single-sex education at the Virginia Military Institute (quoting *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 136 (1994))). But see *Eng'g Contractors Ass'n of S. Fla., Inc. v. Metro. Dade County*, 122 F.3d 895, 907–08 (11th Cir. 1997) (concluding that intermediate scrutiny remains the standard for gender-based preferences, even after *United States v. Virginia*).

<sup>7</sup> See discussion *infra* Part II.A.

<sup>8</sup> See, e.g., Elizabeth S. Anderson, *Integration, Affirmative Action, and Strict Scrutiny*, 77 N.Y.U. L. REV. 1195 (2002); Ian Ayres & Fredrick E. Vars, *When Does Private Discrimination Justify Public Affirmative Action?*, 98 COLUM. L. REV. 1577 (1998).

<sup>9</sup> See discussion *infra* Part I.A.3.

<sup>10</sup> Bill Stall & Dan Morain, *Prop. 209 Wins, Bars Affirmative Action*, L.A. TIMES, Nov. 6, 1996, at A1.

<sup>11</sup> CAL. CONST. art. 1, § 31.

<sup>12</sup> Heath Foster, *Affirmative Action Rules Tossed Out by State Voters*, SEATTLE POST-INTELLIGENCER, Nov. 4, 1998, at A1.

watched cases of the Supreme Court's 2002 term are two University of Michigan cases dealing with race-based preferences in undergraduate<sup>13</sup> and law school<sup>14</sup> admissions. Given the issue's complex policy and political implications, the Bush Administration's decision to submit carefully crafted amicus briefs opposing the University's programs was much anticipated and thoroughly analyzed by legal and political reporters.<sup>15</sup>

Of more direct relevance to this Note, the issue of race-based preferences in public contracting continues to interest the U.S. Supreme Court, as indicated by the procedural history of *Adarand Constructors, Inc. v. Mineta*.<sup>16</sup> When the Court granted certiorari on March 26, 2001,<sup>17</sup> it meant that the Court would review for a *third* time Adarand Constructors' challenge to race-based preferences in federal contracts.<sup>18</sup> The Court granted certiorari despite the government's argument that "the case ha[d] become somewhat divorced from the concrete context of an actual application" in light of the discontinuation of the program evaluated by the court of appeals below.<sup>19</sup> Eight months after granting certiorari, the Court dismissed the writ of certiorari as improvidently granted, concluding that the posture of the case precluded review of the same "relevant program" addressed by the court of appeals.<sup>20</sup> The Court's decision to grant certiorari, despite the government's warning that the question on which Adarand sought review was "not well presented by th[e] case,"<sup>21</sup> suggests that the Court was eager to establish further precedent on race-based preferences in public contracting.<sup>22</sup>

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<sup>13</sup> *Gratz v. Bollinger*, 277 F.3d 803 (6th Cir. 2001), *cert. granted*, 123 S. Ct. 602 (2002).

<sup>14</sup> *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002), *cert. granted*, 123 S. Ct. 617 (2002).

<sup>15</sup> See, e.g., Linda Greenhouse, *Bush and Affirmative Action: Muted Call in Race Case*, N.Y. TIMES, Jan. 17, 2003, at A1.

<sup>16</sup> 228 F.3d 1147 (10th Cir. 2000), *cert. granted*, 532 U.S. 941 (2001), *cert. dismissed*, 534 U.S. 103 (2001) (per curiam); see also *infra* Part I.B (discussing *Adarand*).

<sup>17</sup> 532 U.S. 941.

<sup>18</sup> In *Adarand I*, the Court held that strict scrutiny governs racial classifications under the Due Process Clause of the Fifth Amendment. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 226 (1995). *Adarand II* reversed the Tenth Circuit's decision that Adarand's cause of action had been mooted, remanding for a decision on the merits. *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 224 (2000).

<sup>19</sup> Brief for the Respondents in Opposition at 13, *Adarand Constructors, Inc. v. Slater*, 532 U.S. 941 (2001) (No. 00-730). The government also argued for denial of certiorari because "a number" of pending lawsuits challenged the current version of the program at issue in *Adarand*. *Id.* at 16 & n.2.

<sup>20</sup> 534 U.S. at 107.

<sup>21</sup> Brief for the Respondents in Opposition at 14, *Adarand Constructors, Inc.* (No. 00-730).

<sup>22</sup> The decision to grant certiorari seems to have been seriously disputed among the Justices. The Justices considered the petition for certiorari in four consecutive weekly conferences, and during that time, the Court requested the full record from the Tenth Circuit.

As noted above, it is unsurprising that many state and local elected officials resolved to defend their MBE programs after *Croson*.<sup>23</sup> The collection of statistical and anecdotal evidence of discrimination presumably has convinced many state and local policy makers that their jurisdiction's public-contracting preference programs comply with *Croson*. What would surprise many officials, however, is that the typical anecdotal evidence collected is not likely to withstand serious court challenges. Based on the analysis that follows, this Note concludes that the continued vitality of most MBE preference programs is suspect.<sup>24</sup>

Part I of this Note examines the constitutional requirements for race-based public-contracting preference programs. To satisfy strict scrutiny review, a government must present a "strong basis in evidence" that a preference program is "narrowly tailored" to serve a "compelling interest."<sup>25</sup> Part II describes how jurisdictions intent on preserving their MBE programs responded to *Croson's* call for evidentiary support by commissioning disparity studies, which analyze data to determine whether minority contractors are significantly underutilized. Part II also discusses the increasing scrutiny to which courts have subjected the statistical evidence in disparity studies. In Part III, the Note explains the essential, corroborating role for anecdotal evidence in MBE challenges. Though not sufficient by itself, anecdotal evidence of discrimination must supplement statistical evidence of disparity for an MBE program to satisfy the compelling-interest and narrow-tailoring prongs of strict scrutiny. Part IV examines how courts have treated the anecdotal evidence offered in support of MBE programs. Based on increasing judicial scrutiny of anecdotal evidence, Part IV concludes that MBE programs are unlikely to survive serious court challenges unless government officials insist on fundamental changes in consultants' methodologies for collecting and analyzing anecdotal evidence. Rather than reporting a large quantity of unverified anecdotal evidence of discrimination, a valid study likely will require serious attempts by impartial research firms to verify anecdotal claims of discrimination.

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Linda Greenhouse, *Supreme Court Dismisses Challenge in Its Main Affirmative Action Case*, N.Y. TIMES, Nov. 28, 2001, at A23.

<sup>23</sup> See *supra* text accompanying notes 8–9.

<sup>24</sup> See discussion *infra* Parts III–IV.

<sup>25</sup> *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500–06 (1989).

## I

CONSTITUTIONALITY OF RACE-BASED PREFERENCES FOR  
PUBLIC CONTRACTS

This Part briefly reviews the constitutional standards to which race-based preference programs are subject. Specifically, a government defending a race-based preference program must present a “strong basis in evidence” that the program is “narrowly tailored” to serve a “compelling interest.”<sup>26</sup>

## A. Strict Scrutiny for “Benign” Race-Based Preferences

In its 1989 decision in *City of Richmond v. J.A. Croson Co.*, the U.S. Supreme Court struck down the city’s contract set-aside program for minority-owned businesses.<sup>27</sup> Under the plan, the city required non-MBE prime contractors to subcontract at least thirty percent of the dollar amount of each city construction contract to minority-owned businesses.<sup>28</sup> The Court invalidated the city’s plan for violating the Equal Protection Clause of the Fourteenth Amendment<sup>29</sup> under a strict scrutiny analysis.<sup>30</sup> More specifically, the Court held that the city’s set-aside program was not “narrowly tailored” to serve a “compelling interest,” and it thus violated equal protection principles.<sup>31</sup> By applying strict scrutiny to the City of Richmond’s set-aside program, *Croson* reaffirmed an earlier view<sup>32</sup> that the standard for equal protection review does not change if a government classification benefits, rather than burdens, members of a traditionally disadvantaged race.<sup>33</sup>

1. *Compelling Interest*

Because race rarely provides a legitimate basis for “disparate treatment,” and because racial classification can greatly harm the “body politic,” a government’s “reasons for any such classification

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<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 511.

<sup>28</sup> *Id.* at 477.

<sup>29</sup> “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1.

<sup>30</sup> See *Croson*, 488 U.S. at 493–94. Although only three other Justices signed onto Part III.A of Justice O’Connor’s opinion, see *id.* at 476, which called for strict scrutiny, Justice Scalia, in his concurrence, also agreed that strict scrutiny was the appropriate standard of review, *id.* at 520. See also *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 222 (1995) (“A majority of the Court in *Croson* held that . . . the single standard of review for racial classifications should be ‘strict scrutiny.’”).

<sup>31</sup> See *Croson*, 488 U.S. at 505–08.

<sup>32</sup> See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 279–80 (1986) (plurality opinion).

<sup>33</sup> See *Croson*, 488 U.S. at 494.

[must] be clearly identified and unquestionably legitimate.”<sup>34</sup> By requiring judicial inquiry into legislative goals, the strict scrutiny standard attempts to “smoke out” illegitimate uses of racial classifications.<sup>35</sup> *Croson* requires courts confronted with race-based measures to conduct “searching judicial inquiry” into legislative justifications; otherwise “there is simply no way of determining what classifications are ‘benign’ or ‘remedial’ and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.”<sup>36</sup>

At issue in public-contracting cases is not whether remedying past or present discrimination is a compelling interest—it “is widely accepted as compelling.”<sup>37</sup> Rather, the test is whether evidence of discrimination is strong enough to lend credibility to a government’s stated (or implied) goal of remedying discrimination, or whether evidence is too weak to eliminate the possibility that racial politics or notions of racial inferiority motivated policy makers.<sup>38</sup>

## 2. *Narrow Tailoring*

Strict scrutiny requires courts to examine racial classifications with respect to means as well as ends.<sup>39</sup> If a government has evidence of racial discrimination against minority businesses seeking public-contracting opportunities, it could respond by “taking appropriate measures against those who discriminate.”<sup>40</sup> In an “extreme case,” *Croson* holds, “some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion.”<sup>41</sup>

The following four considerations are among the factors that guide courts in evaluating whether a race-preference program is narrowly tailored: (1) the efficacy of alternative, race-neutral remedies; (2) the flexibility and duration of the race-conscious remedy, including whether waiver provisions are available; (3) the relationship between the remedy’s numerical goals and the relevant labor market; and (4) the effect of the race-conscious remedy on the rights of inno-

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<sup>34</sup> *Fullilove v. Klutznick*, 448 U.S. 448, 533–35 (1980) (Stevens, J., dissenting), *quoted approvingly in Croson*, 488 U.S. at 505.

<sup>35</sup> *Croson*, 488 U.S. at 493.

<sup>36</sup> *Id.*

<sup>37</sup> *Ensley Branch, NAACP v. City of Birmingham*, 31 F.3d 1548, 1565 (11th Cir. 1994).

<sup>38</sup> *See id.* at 1572. For discussion of the quantum of evidence necessary to satisfy strict scrutiny, see *infra* Part I.A.3.

<sup>39</sup> *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 236 (1995) (“We think that requiring strict scrutiny is the best way to ensure that courts will consistently give racial classifications [a] detailed examination, both as to ends and as to means.”).

<sup>40</sup> *Croson*, 488 U.S. at 509.

<sup>41</sup> *Id.*

cent third parties.<sup>42</sup> In *Croson*, the Court criticized the City of Richmond for failing to consider race-neutral means to improve MBE contracting opportunities,<sup>43</sup> for not including a waiver provision when a particular MBE's higher price was not the result of past discrimination,<sup>44</sup> and for establishing a thirty-percent quota that had no relationship to minority-owned businesses' representation in the local construction market.<sup>45</sup>

*Croson* devoted particular attention to the "whole array of race-neutral devices" that could have disproportionately aided new minority firms, but which the city ignored.<sup>46</sup> The Court specifically mentioned a number of steps that the city could have taken to minimize the formal barriers to new contractors, including "[s]implification of bidding procedures, relaxation of bonding requirements, and training and financial aid for disadvantaged entrepreneurs of all races."<sup>47</sup> Similarly, the Ninth Circuit noted that although narrow tailoring "does not require exhaustion of every possible . . . alternative" remedy, "there is no doubt that consideration of race-neutral alternatives is among the most important" requirements.<sup>48</sup>

### 3. *Strong Basis in Evidence*

Because the remedying of past discrimination is widely accepted as a compelling interest, "the true test of an affirmative action program is . . . the adequacy of the evidence of discrimination offered to show that interest."<sup>49</sup> Under strict scrutiny, a government entity must have had a "strong basis in evidence" for it to conclude that race-based

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<sup>42</sup> *United States v. Paradise*, 480 U.S. 149, 171 (1987) (plurality opinion); *see, e.g.*, *United States v. Sec'y of Hous. & Urban Dev.*, 239 F.3d 211, 219 (2d Cir. 2001); *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1177-78 (10th Cir. 2000), *cert. granted*, 532 U.S. 941 (2001), *cert. dismissed*, 534 U.S. 103 (2001) (per curiam); *Walker v. City of Mesquite*, 169 F.3d 973, 982 (5th Cir. 1999); *Ensley Branch, NAACP*, 31 F.3d at 1569; *Hayes v. N. State Law Enforcement Officers Ass'n*, 10 F.3d 207, 216 (4th Cir. 1993).

<sup>43</sup> 488 U.S. at 507.

<sup>44</sup> *Id.* at 508.

<sup>45</sup> *Id.* at 507-08.

<sup>46</sup> *Id.* at 509-10.

<sup>47</sup> *Id.* The Court observed that "[i]f MBE's disproportionately lack capital or cannot meet bonding requirements, a race-neutral program of city financing for small firms would, *a fortiori*, lead to greater minority participation." *Id.* at 507.

<sup>48</sup> *Coral Constr. Co. v. King County*, 941 F.2d 910, 922-23 (9th Cir. 1991). *Compare* *Cone Corp. v. Hillsborough County*, 908 F.2d 908, 916 (11th Cir. 1990) (upholding the county's MBE program, and noting that the plan included all of the *Croson*-recommended race-neutral measures, which added to the program's flexibility), *with* *Eng'g Contractors Ass'n of S. Fla., Inc. v. Metro. Dade County*, 122 F.3d 895, 928 (11th Cir. 1997) ("Despite th[e] clear admonition in *Croson*, the record in this case does not indicate that the County has even seriously considered . . . most of the race[-] and ethnicity-neutral alternatives . . . for increasing [minority] participation in County contracting and for eliminating discrimination that may be occurring in that marketplace.").

<sup>49</sup> *Eng'g Contractors*, 122 F.3d at 906 (quoting *Ensley Branch, NAACP v. City of Birmingham*, 31 F.3d 1548, 1565 (11th Cir. 1994) (internal quotation marks omitted)).

remedial action was necessary.<sup>50</sup> A strong basis in evidence is required for a government to demonstrate both a compelling interest and a narrowly tailored remedy.<sup>51</sup>

The *Croson* Court, of course, recognized that the country's "sorry history" of private and public discrimination "has contributed to a lack of opportunities for black [and other minority] entrepreneurs."<sup>52</sup> Nevertheless, an "amorphous claim" of past discrimination within an industry is insufficient to "justify the use of an unyielding racial quota."<sup>53</sup> With such a generalized assertion of discrimination, policy makers have no guidance as to "the precise scope of the injury [they] seek[ ] to remedy."<sup>54</sup> In *Croson*, the Court rejected as insufficient evidence of discrimination the district court's finding that minority businesses received less than one percent of the city's prime contracts, though minorities constituted one-half of its population.<sup>55</sup> Comparison to the general population is of "little probative value" when "special qualifications are required to fill particular jobs," such as public construction projects.<sup>56</sup> To show discriminatory exclusion in a field requiring special skills, the relevant group for comparison is the number of qualified minorities.<sup>57</sup> Further, it is not enough to demonstrate nationwide discrimination in the construction industry; rather, policy makers must have a strong basis in evidence of discrimination within the relevant *local* industry.<sup>58</sup>

Moreover, to satisfy either the compelling-interest or narrow-tailoring prong of strict scrutiny, a government must have a strong basis in evidence of discrimination against *each* racial group included in the remedial plan.<sup>59</sup> For example, if a government has sufficient evidence of discrimination against only African-American contractors, it may not include other minority groups as beneficiaries in a contract-preference program.<sup>60</sup> Thus, in *Croson*, because there was "*absolutely no*

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<sup>50</sup> *Croson*, 488 U.S. at 500 (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986) (plurality opinion) (internal quotation marks omitted)).

<sup>51</sup> *See id.* at 510 ("Proper findings in this regard are necessary to define both the scope of the injury and the extent of the remedy necessary to cure its effects.").

<sup>52</sup> *Id.* at 499.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 498.

<sup>55</sup> *See id.* at 499–500. The Court observed that "[i]t is sheer speculation how many minority firms there would be in Richmond absent past societal discrimination . . . . Defining these sorts of injuries as 'identified discrimination' would give local governments license to create a patchwork of racial preferences based on statistical generalizations about any particular field of endeavor." *Id.*

<sup>56</sup> *Id.* at 501 (quoting *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 307–08 (1977) (internal quotation marks omitted)).

<sup>57</sup> *Id.* at 501–02.

<sup>58</sup> *See id.* at 504.

<sup>59</sup> *See id.* at 506.

<sup>60</sup> *See id.*; *Builders Ass'n of Greater Chi. v. County of Cook*, 256 F.3d 642, 646 (7th Cir. 2001).

evidence” of discrimination against non-black minority firms, the Court criticized the city’s plan for including “remedial relief” for “Spanish-speaking, Oriental, Indian, Eskimo, or Aleut” construction contractors.<sup>61</sup> The Court concluded that “[t]he gross overinclusiveness of Richmond’s racial preference strongly impugns the city’s claim of remedial motivation.”<sup>62</sup>

An important, unresolved issue is whether a court may consider post-enactment evidence when assessing the constitutionality of an MBE preference program. Given the strict scrutiny requirement that a government have a strong basis in evidence of discrimination before resorting to racial classification, one might expect that a court would evaluate an MBE program based only on evidence available to decision makers at the time of enactment. In an early post-*Croson* case, however, the Ninth Circuit held otherwise. The court in *Coral Construction Co. v. King County* interpreted *Croson* to require a government to have “some concrete evidence of discrimination . . . before it may adopt a remedial program,” but it held that courts should evaluate MBE programs based on *all* evidence presented to the court, including post-enactment evidence.<sup>63</sup> The court was mindful of the “seemingly conflicting demands sometimes placed upon a state or municipality by the Constitution.”<sup>64</sup> For example, a state or municipality with evidence of its own culpability in furthering discrimination might feel compelled to wait for further evidentiary support and thereby risk constitutional culpability for its inaction.<sup>65</sup> In the Tenth Circuit, a district court evaluating a Denver MBE program concluded that “it would make little sense to strike down the Ordinance *solely* because the evidence of discrimination . . . was insufficient without the post-enactment evidence only to watch the City Council reconvene immediately, incorporate the new evidence into a new ordinance, and arrive at a constitutionally adequate factual predicate.”<sup>66</sup>

Several circuits have agreed with the Ninth Circuit, holding that courts may consider post-enactment evidence.<sup>67</sup> This rule is signifi-

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<sup>61</sup> *Croson*, 488 U.S. at 506.

<sup>62</sup> *Id.*

<sup>63</sup> 941 F.2d 910, 920 (9th Cir. 1991).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 921.

<sup>66</sup> *Concrete Works of Colo., Inc. v. City of Denver*, 823 F. Supp. 821, 837 (D. Colo. 1993), *rev'd on other grounds*, 36 F.3d 1513 (10th Cir. 1994).

<sup>67</sup> *See, e.g., Eng'g Contractors Ass'n of S. Fla., Inc. v. Metro. Dade County*, 122 F.3d 895, 911–12 (11th Cir. 1997); *Concrete Works*, 36 F.3d at 1521; *Contractors Ass'n of E. Pa., Inc. v. City of Philadelphia*, 6 F.3d 990, 1004 (3d Cir. 1993); *Harrison & Burrowes Bridge Constructors, Inc. v. Cuomo*, 981 F.2d 50, 60 (2d Cir. 1992). *But see, e.g., Builders Ass'n of Greater Chi. v. County of Cook*, 256 F.3d 642, 645 (7th Cir. 2001) (“A public agency must have a strong evidentiary basis for thinking a discriminatory remedy appropriate *before* it adopts the remedy.”); *Associated Gen. Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730, 738 (6th Cir. 2000) (“[U]nder *Croson*, the state must have had sufficient evidentiary justifi-

cant because it makes challenges to MBE programs more difficult. With post-enactment evidence admissible, a plaintiff may be "forced to attack a moving target of newly developing evidence to support past motivations, rather than to deal with the motivating factors that existed at the time of the government's action."<sup>68</sup> One district court suggested that the rule "discourages non-minorities from protecting their rights" because a government that is sued can "marshal its resources and use the subpoena power of the courts to support its program."<sup>69</sup>

It is not clear whether the Supreme Court would approve of the use of post-enactment evidence. In addition to *Croson's* language that governments must identify discrimination "with some specificity before they may use race-conscious relief,"<sup>70</sup> a 1996 Supreme Court opinion rejecting a racially gerrymandered election-district plan discussed the importance of pre-enactment evidence. In *Shaw v. Hunt*, the Court emphasized that an "institution that makes [a] racial distinction must have had a 'strong basis in evidence' to conclude that remedial action was necessary, 'before it embarks on an affirmative-action program.'"<sup>71</sup> A recent Seventh Circuit decision striking down an MWBE program cited *Shaw* when it noted the absence of pre-enactment evidence.<sup>72</sup> In addition, a Tennessee district court that criticized the reasoning of *Coral Construction* noted that the circuit court opinions allowing post-enactment evidence were issued before *Shaw*.<sup>73</sup>

#### B. *Adarand*: Strict Scrutiny for Federal Preferences

In *Adarand Constructors, Inc. v. Pena*, the Supreme Court held that racial classifications by the federal government are also subject to strict scrutiny.<sup>74</sup> *Adarand* thus overruled a 1990 decision<sup>75</sup> holding that the federal government's use of racial classifications was subject to inter-

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cation for a racially conscious statute in advance of its passage; the time of a challenge to the statute, at trial, is not the time for the state to undertake factfinding.").

<sup>68</sup> *W. Tenn. Chapter of Associated Builders & Contractors, Inc. v. Bd. of Educ.*, 64 F. Supp. 2d 714, 720 (W.D. Tenn. 1999); see also George R. La Noue, *The Impact of Croson on Equal Protection Law and Policy*, 61 ALB. L. REV. 1, 11-12 (1997) (concluding that the major impact of *Coral Construction* was its acceptance of post-enactment evidence because the rule "added considerably to the cost and uncertainty" of challenges to preference programs).

<sup>69</sup> *W. Tenn. Chapter of Associated Builders*, 64 F. Supp. 2d at 720.

<sup>70</sup> *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 504 (1989).

<sup>71</sup> 517 U.S. 899, 910 (1996) (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986) (plurality opinion)).

<sup>72</sup> *Builders Ass'n*, 256 F.3d at 645.

<sup>73</sup> *W. Tenn. Chapter of Associated Builders*, 64 F. Supp. 2d at 718 & n.3. The only exception is *Engineering Contractors Ass'n of South Florida v. Metropolitan Dade County*, which never mentions *Shaw*. *Id.* at 718 n.3; see also *Associated Gen. Contractors of Am. v. City of Columbus*, 936 F. Supp. 1363, 1382-83 (S.D. Ohio 1996) (criticizing the use of post-enactment evidence, but nevertheless considering it in the opinion), *vacated on other grounds* by 172 F.3d 411 (6th Cir. 1999).

<sup>74</sup> 515 U.S. 200, 235 (1995).

<sup>75</sup> *Metro Broad., Inc. v. FCC*, 497 U.S. 547 (1990).

mediate scrutiny.<sup>76</sup> Unresolved questions remain, however, such as whether and to what extent Congress is entitled to greater deference than state and local governments when resorting to race-based preferences.<sup>77</sup> Given the uncertainty surrounding this issue, this Note focuses on race-based preferences enacted by state and local governments.

## II

### GOVERNMENTS RESPOND TO *CROSON*: DEFENDING PREFERENCE PROGRAMS

When the Supreme Court decided *Croson*, state and local governments had at least 234 MBE programs in place.<sup>78</sup> Some jurisdictions eliminated their MBE programs after concluding they were unconstitutional,<sup>79</sup> but many sought to preserve them by modifying the programs in light of *Croson*.<sup>80</sup>

#### A. Disparity Studies: Finding Statistical Evidence of Discrimination

Those jurisdictions choosing to “*Croson*-proof”<sup>81</sup> their preference programs have focused on the following language from Justice O’Connor’s opinion: “Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality’s prime contractors, an inference of discriminatory exclusion could arise.”<sup>82</sup> Since *Croson*, jurisdictions have spent at least fifty-five million dollars to complete more than 140 disparity studies, which compare MWBE availability and MWBE utilization in an effort to establish the factual predicate

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<sup>76</sup> *Adarand Constructors*, 515 U.S. at 226–27.

<sup>77</sup> *See* *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 489 (1989) (“[O]ther governmental entities might have to show more than Congress before undertaking race-conscious measures: ‘The degree of specificity required in the findings of discrimination and the breadth of discretion in the choice of remedies may vary with the nature and authority of the governmental body.’” (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 515–16 n.14 (1980))).

<sup>78</sup> *See* La Noue, *supra* note 68, at 6. Two other authors estimate that there were *ten times* as many MBE programs at the time—nearly 2,400. Leslie A. Nay & James E. Jones, Jr., *Equal Employment and Affirmative Action in Local Governments: A Profile*, 8 LAW & INEQ. 103, 126 (1989) (extrapolating from survey data).

<sup>79</sup> *See* Ryland, *supra* note 5, at 42 & n.172 (citing eight state attorney general opinions).

<sup>80</sup> Memorandum from Assistant Attorney General Walter Dellinger, to General Counsels 31 (June 28, 1995), <http://www.usdoj.gov/olc/adarand.wpd>.

<sup>81</sup> Docia Rudley & Donna Hubbard, *What a Difference a Decade Makes: Judicial Response to State and Local Minority Business Set-Asides Ten Years After City of Richmond v. J.A. Croson*, 25 S. ILL. U. L.J. 39, 42 n.17 (2000).

<sup>82</sup> *Croson*, 488 U.S. at 509.

needed to withstand strict scrutiny review.<sup>83</sup> Typical disparity studies estimate the number of available firms for each ethnic group (or gender group) and compare each group's availability with its share of public-contracting dollars.<sup>84</sup> If a disparity study indicates that minority contractors are significantly underutilized, then a government can better argue that it has a compelling interest in using a race-conscious remedy. In addition to statistical analysis, disparity studies generally include anecdotal evidence of discrimination, which is the focus of this Note.<sup>85</sup>

Disparity studies succeeded in minimizing, or at least delaying, *Croson's* impact. In the first six years after *Croson*, courts struck down only a few MBE programs, and no disparity studies were successfully challenged in court.<sup>86</sup>

### B. Criticisms of Disparity Studies

According to one political scientist, many disparity studies are not objective efforts to pinpoint when and where discrimination is occurring, but instead are "designed to be briefs for MBE programs and to function as insurance policies designed to discourage litigation."<sup>87</sup> In some cases, public officials' expectations are explicit, such as those in which a Miami city commissioner criticized consultants for failing to uncover a significant disparity: "The whole purpose of this study was for you to prove that there was a disparity in minority hiring."<sup>88</sup>

Critics of disparity studies contend that the analyses are methodologically flawed.<sup>89</sup> One fundamental criticism is that most disparity studies fail to take into account the differing qualifications and capacities of contracting firms,<sup>90</sup> despite *Croson's* language calling for a comparison of firms that are "qualified[,] . . . willing and able to perform a

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<sup>83</sup> George R. La Noue, *To the "Disadvantaged" Go the Spoils?*, PUB. INT., Winter 2000, at 91, 93. Given the costs associated with disparity studies, some jurisdictions have opted to eliminate their MWBE programs altogether. Rudley & Hubbard, *supra* note 81, at 42 n.18.

<sup>84</sup> See George R. La Noue, *Who Counts?: Determining the Availability of Minority Businesses for Public Contracting After Croson*, 21 HARV. J.L. & PUB. POL'Y 793, 797-805 (1998).

<sup>85</sup> See discussion *infra* Parts III-IV.

<sup>86</sup> See La Noue, *supra* note 68, at 29, 36.

<sup>87</sup> *Id.* at 12-13.

<sup>88</sup> Dorothy J. Gaiter, *Court Ruling Makes Discrimination Studies a Hot New Industry*, WALL ST. J., Aug. 13, 1993, at A1 (quoting Vice Mayor Miller Dawkins (internal quotation marks omitted)); see also *Lawmakers Blast Study*, TAMPA TRIB., Jan. 11, 1996, Florida/Metro, at 10 (reporting Florida lawmakers' criticism of the methods and motives of disparity study authors who found no evidence of discriminatory exclusion); James Rainey, *Council Calls Study of Contracts Inadequate*, L.A. TIMES, Dec. 10, 1994, at B3 (reporting Los Angeles City Council's reaction to study concluding that black contractors were not underutilized).

<sup>89</sup> See, e.g., La Noue, *supra* note 2, at 490-521; La Noue, *supra* note 84, at 797-805; Jeff Hanson, *Comments on the Preliminary Draft of the "State of Washington Disparity Study"*, (Wash. Inst. Found., Seattle, Wash.), May 2000, available at <http://www.washingtonpolicycenter.org/ECP/PBHansonECPDisparity.html> (manuscript on file with author).

<sup>90</sup> See La Noue, *supra* note 2, at 488, 497 (characterizing fifty-nine disparity studies).

particular service.”<sup>91</sup> Instead, disparity studies typically estimate availability simply by “counting heads”—treating each firm as equally available for any size public contract.<sup>92</sup> MWBE firms, however, tend to be smaller and newer, and they are more likely to focus on subcontracting specialties and are less able to compete for the largest prime contracting opportunities.<sup>93</sup> Thus, when disparity studies compare the *number* of minority firms with their share of prime contract *dollars*,<sup>94</sup> a significant portion of which may be associated with a very small number of very large contracting jobs,<sup>95</sup> the authors likely overstate MBE underutilization.

Beginning in 1995, several courts began scrutinizing disparity studies, criticizing their methodologies, and concluding that particular MWBE programs were unconstitutional because they did not have sufficiently strong bases in evidence of discrimination.<sup>96</sup> Federal district courts struck down MWBE programs in Philadelphia, Columbus, Dade County, Fulton County, and Denver; in each case, the court identified serious methodological flaws in the disparity studies offered in support of the preference programs.<sup>97</sup> For example, Judge Rys-

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<sup>91</sup> *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509 (1989).

<sup>92</sup> La Noue, *supra* note 84, at 799; *see also* Associated Gen. Contractors of Ohio, Inc. v. Drabik, 214 F.3d 730, 736–37 (6th Cir. 2000) (“Any time two non-minority firms merge, or a minority firm splits in two, the total proportion of minority contracting firms in the state increases; but it would be ludicrous to imagine that such alteration affects the overall degree of discrimination.”).

<sup>93</sup> La Noue, *supra* note 84, at 799–800. Of course, historical discrimination is one factor explaining the tendency of MWBE firms to be smaller and newer. *O'Donnell Constr. Co. v. District of Columbia*, 963 F.2d 420, 427 (D.C. Cir. 1992). But *Croson* does not permit race-conscious remedies based on such generalized assertions. *Id.* After all, “[i]t is sheer speculation how many minority firms . . . would [exist] absent past societal discrimination.” *Croson*, 488 U.S. at 499. *See generally* George R. La Noue & John Sullivan, “*But for*” *Discrimination: How Many Minority-Owned Businesses Would There Be?*, 24 COLUM. HUM. RTS. L. REV. 93 (1992–93) (analyzing the strengths and weaknesses of three studies that attempt to document the present effects of historical discrimination on MBEs).

<sup>94</sup> Though this comparison departs from the *Croson* formulation—the *number* of willing and able minority contractors compared with the *number* of contractors actually engaged, 488 U.S. at 509—almost all disparity studies make this shift. *See* La Noue, *supra* note 2, at 499–500.

<sup>95</sup> For example, data from a Washington state disparity study indicate that construction prime contracts exceeding one million dollars, which represented less than eight percent of the *number* of total contracts, accounted for well over half of the total contract *dollars*. *See* Hanson, *supra* note 89 (manuscript at 8–9).

<sup>96</sup> Professor George R. La Noue attributes the success of earlier disparity studies to their limited scrutiny by plaintiffs. *See* La Noue, *supra* note 83, at 93 (“In fact, none of the [disparity] studies has survived when subjected to discovery and brought to trial.”).

<sup>97</sup> *See* Concrete Works of Colo., Inc. v. City of Denver, 86 F. Supp. 2d 1042 (D. Colo. 2000), *rev'd*, 321 F.3d 950 (10th Cir. 2003); *Webster v. Fulton County*, 51 F. Supp. 2d 1354 (N.D. Ga. 1999), *aff'd*, 218 F.3d 1267 (11th Cir. 2000) (per curiam); *Eng'g Contractors Ass'n of S. Fla., Inc. v. Metro. Dade County*, 943 F. Supp. 1546 (S.D. Fla. 1996), *aff'd*, 122 F.3d 895 (11th Cir. 1997); *Associated Gen. Contractors of Am. v. City of Columbus*, 936 F. Supp. 1363 (S.D. Ohio 1996), *vacated on other grounds by* 172 F.3d 411 (6th Cir. 1999); *Contractors Ass'n of E. Pa., Inc. v. City of Philadelphia*, 893 F. Supp. 419 (E.D. Pa. 1995),

kamp identified an alternative explanation for a statistical disparity in a Dade County study:

It is important to note that the *average* capital construction contract let by Dade County is worth approximately \$3 million. . . . If, as the evidence indicates, MWBEs tend to be, on average, smaller, and non-MWBEs tend to be larger, this could account for disparities in the average size of the County contract awarded.<sup>98</sup>

The court that struck down Denver's MWBE ordinances criticized the city's disparity studies for making the "implausible assumption" that all MBEs and WBEs reported in census data had the qualifications and capacity to complete any size public construction project.<sup>99</sup> Given the increasing judicial scrutiny of disparity studies, it seems likely that jurisdictions intent on "Crososn-proofing" their preference programs must demand more sophisticated statistical analyses from their disparity study consultants.

### III

#### THE ROLE OF ANECDOTAL EVIDENCE

Improved statistical analyses alone, however, likely will not save MBE programs from serious court challenges. In their inquiries into MBE programs, some courts also have rejected the anecdotal evidence

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*aff'd*, 91 F.3d 586 (3d Cir. 1996); *see also* Paul M. Barrett, *Courts Attack Studies Used for Set-Asides*, WALL ST. J., Sept. 26, 1996, at B1 ("A trio of recent rulings . . . have struck down city and county programs because judges concluded they were based on junk science.").

<sup>98</sup> *Eng'g Contractors*, 943 F. Supp. at 1564 (citation omitted). As the Eleventh Circuit declared in affirming the district court,

Because they are bigger, bigger firms have a bigger chance to win bigger contracts. . . . [A]ll other factors being equal and in a perfectly nondiscriminatory market, one would expect the bigger (on average) non-MWBE firms to get a disproportionately higher percentage of total construction dollars awarded than the smaller MWBE firms.

122 F.3d at 917. In *Associated General Contractors of America*, Judge Graham stated that "indirect statistical analysis" is not even appropriate for investigating discrimination with respect to prime contracts:

The process of awarding prime contracts is not the equivalent of a lottery in which every bidder has an equal chance. Prime contracts are awarded to the lowest responsible bidder. . . . If there is no manipulation of the bidding process and if [MWBEs] are nevertheless receiving a disproportionately low amount of prime contracts, then there is a non-discriminatory reason for that disparity—they were underbid.

936 F. Supp. at 1400.

<sup>99</sup> *Concrete Works*, 86 F. Supp. 2d at 1065-66 ("They justified the use of such an implausible assumption by accepting, without qualification, that size elasticity means that all of those MBEs and WBEs could grow at will to develop capacity to meet the contract requirements of every project."). Reversing on appeal, the Tenth Circuit held that "[a]lthough [the plaintiff] advanced a seemingly meritorious argument that the size and experience of M/WBEs may explain the [statistical] disparities," the plaintiff did not respond to rebuttal evidence offered by the government. *See Concrete Works*, 321 F.3d at 981-82, 991.

offered in support of preference programs.<sup>100</sup> As an essential component of equal protection analysis, anecdotal evidence must meet minimal standards of objectivity. The quality of anecdotal evidence typically offered by local governments, however, will satisfy few courts applying strict scrutiny.<sup>101</sup>

#### A. Essential, Corroborating Evidence

As part of a government's "evidentiary mosaic," anecdotal evidence can "vividly complement" statistical evidence of discrimination.<sup>102</sup> Convincing statistical and anecdotal evidence can make for a "potent" combination,<sup>103</sup> because anecdotal evidence can bring "cold numbers convincingly to life."<sup>104</sup> In an early post-*Croson* case, however, the Ninth Circuit held that "rarely, if ever, can [anecdotal] evidence show a systemic pattern of discrimination necessary" to justify an MBE program.<sup>105</sup> The *Croson* Court itself qualified that anecdotal evidence of "individual discriminatory acts can, *if supported by appropriate statistical proof*, lend support to a local government's determination that broader remedial relief is justified."<sup>106</sup> According to the Eleventh Circuit, "statistical underpinnings" are required to prove that MBEs lost a substantial amount of business because of discrimination.<sup>107</sup>

Though not sufficient by itself, except perhaps in an exceptional case, anecdotal evidence nevertheless is essential if a government is to defend an MBE program successfully. Because a gross statistical disparity does not conclusively establish discrimination, plaintiffs who challenge an MBE plan may defeat the program by presenting persuasive rebuttal evidence.<sup>108</sup> In addition to attacking the statistical evidence itself, plaintiffs may attempt to rebut evidence of a statistical

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<sup>100</sup> See, e.g., *Eng'g Contractors*, 943 F. Supp. at 1577-80; *Associated Gen. Contractors*, 936 F. Supp. at 1402-07, 1411-30.

<sup>101</sup> See discussion *infra* Part IV.

<sup>102</sup> *Concrete Works of Colo., Inc. v. City of Denver*, 36 F.3d 1513, 1520 (10th Cir. 1994).

<sup>103</sup> *Coral Constr. Co. v. King County*, 941 F.2d 910, 919 (9th Cir. 1991).

<sup>104</sup> See *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977) (employment discrimination context).

<sup>105</sup> *Coral Constr. Co.*, 941 F.2d at 919; see also *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1166 (10th Cir. 2000) (holding that anecdotal evidence by itself is not "appropriate in the strict scrutiny calculus"); *Eng'g Contractors Ass'n of S. Fla., Inc. v. Metro. Dade County*, 122 F.3d 895, 925 (11th Cir. 1997) ("[O]nly in the rare case will anecdotal evidence suffice standing alone."); *Contractors Ass'n of E. Pa., Inc. v. City of Philadelphia*, 6 F.3d 990, 1003 (3d Cir. 1993) ("Although anecdotal evidence alone may, in an exceptional case, be so dominant or pervasive that it passes muster under *Croson*, it is insufficient here.").

<sup>106</sup> 488 U.S. 469, 509 (1989) (emphasis added).

<sup>107</sup> *Eng'g Contractors*, 122 F.3d at 925-26.

<sup>108</sup> See *United Black Firefighters Ass'n v. City of Akron*, 976 F.2d 999, 1011 (6th Cir. 1992) (applying *Croson* in employment discrimination context); see also *Int'l Bhd. of Teamsters*, 431 U.S. at 340 ("We caution only that statistics are not irrefutable; they come in

disparity by providing a neutral explanation for the disparity.<sup>109</sup> Anecdotal evidence is essential to counter such rebuttal evidence. For a government to make a persuasive case that it had a compelling interest when enacting a race-based remedy, it must offer anecdotal evidence to demonstrate that a statistical disparity is better explained by discrimination than by a plaintiff's alternative theories.<sup>110</sup> After all, strict scrutiny permits racial classification "to remedy *discrimination*[:;] [i]t is not permissible to remedy *disparity*, without more."<sup>111</sup> As Fourth Circuit Chief Judge Wilkinson declared, "A race-conscious remedy is simply too drastic a measure to rest upon the slender reed of . . . statistical comparisons."<sup>112</sup>

Anecdotal evidence is also necessary to satisfy the narrow tailoring prong of strict scrutiny, which requires the government to identify the source of discrimination.<sup>113</sup> Because one "narrow-tailoring" factor is the effect of race-conscious remedies on innocent third parties,<sup>114</sup> anecdotal evidence is needed to identify the wrongdoers. The *Croson* Court discussed the possibility of inferring discriminatory exclusion from a significant statistical disparity, and held that in such circumstances a jurisdiction "could act to dismantle the closed business system by taking appropriate measures *against those who discriminate* on the basis of race or other illegitimate criteria."<sup>115</sup> Based on the requirement that remedial measures target wrongdoers, a federal district court struck down—on a motion for summary judgment—an MWBE program administered by the Florida Department of Transportation.<sup>116</sup> Assuming, for the purpose of summary judgment consideration, that the department's evidence of a significant statistical

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infinite variety and, like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all of the surrounding facts and circumstances.").

<sup>109</sup> *Coral Constr. Co.*, 941 F.2d at 921 (listing the following rebuttal options: providing "a neutral explanation for the statistical disparities"; demonstrating flaws in the statistics; showing that the disparities are statistically insignificant or not actionable; and offering contrasting statistical evidence). The same methods are listed in *Engineering Contractors*, 122 F.3d at 916, and *Contractors Ass'n of Eastern Pennsylvania*, 6 F.3d at 1007.

<sup>110</sup> *Cf. Md. Troopers Ass'n v. Evans*, 993 F.2d 1072, 1077 (4th Cir. 1993) ("[W]hen the Supreme Court has approved a race-conscious remedy on the basis of [statistical disparities in an employer's workforce], the statistics have been corroborated by significant anecdotal evidence of racial discrimination.").

<sup>111</sup> *Middleton v. City of Flint*, 92 F.3d 396, 406 (6th Cir. 1996) (employment discrimination context). The possibility of a neutral explanation for a statistically significant disparity ought to sound familiar to any student of elementary statistics who recalls the oft-emphasized axiom that correlation does not equal causation. *See, e.g.*, SAM KASH KACHIGAN, STATISTICAL ANALYSIS 213 (1986).

<sup>112</sup> *Md. Troopers Ass'n*, 993 F.2d at 1079 (employment discrimination context).

<sup>113</sup> *See La Noue, supra* note 83, at 97; *La Noue, supra* note 2, at 521.

<sup>114</sup> *See supra* note 42 and accompanying text.

<sup>115</sup> *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 509 (1989) (emphasis added); *see Phillips & Jordan, Inc. v. Watts*, 13 F. Supp. 2d 1308, 1313 (N.D. Fla. 1998) (citing the above passage from *Croson*).

<sup>116</sup> *See Phillips & Jordan, Inc.*, 13 F. Supp. 2d at 1316.

disparity was valid, Judge Stafford declared the MWBE program unconstitutional because "none of the [state's] experts [did] anything but speculate about the cause of the disparities."<sup>117</sup> The court held that "[b]ecause [the department] . . . produced nothing more than evidence of an ill-defined wrong allegedly caused by some unknown wrongdoers, [its] set-aside program cannot survive [the plaintiff's] motion for summary judgment under the Fourteenth Amendment."<sup>118</sup>

Anecdotal evidence is also relevant for a narrow-tailoring analysis because it can provide specific examples of discrimination, which should prompt inquiry into the locality's responses to individual cases of discrimination. How a government responds to reported cases of discrimination provides insight into whether an MBE plan is in fact a narrowly tailored solution to a systemic pattern of discrimination. As the *Croson* Court noted: "[L]ocal government [is not] powerless to deal with individual instances of racially motivated refusals to employ minority contractors. Where such discrimination occurs, a city would be justified in penalizing the discriminator and providing appropriate relief to the victim of such discrimination."<sup>119</sup> Because *Croson* permits a preference program only in an "extreme case" and after consideration of alternative remedies,<sup>120</sup> courts likely will view an MBE plan critically if a government has not first taken steps to penalize individuals and firms that discriminate. Without evidence of serious enforcement of antidiscrimination laws, a government's introduction of an MBE program likely will appear to be premature and therefore not a narrowly tailored remedy.<sup>121</sup>

In striking down Dade County's MBE program, the Eleventh Circuit noted that the county had "not taken any action whatsoever to ferret out and respond to instances of discrimination if and when they have occurred in the [c]ounty's own contracting process."<sup>122</sup> The court criticized the county for failing to "clean its own house" if it believed discrimination had occurred, which the county itself contended based on its anecdotal evidence.<sup>123</sup> The county had not taken

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<sup>117</sup> *Id.* at 1314.

<sup>118</sup> *Id.* at 1316. Though the department presented results of a telephone survey, the court rejected the anecdotal evidence as inadequate. *See id.* at 1314.

<sup>119</sup> 488 U.S. at 509.

<sup>120</sup> *See id.* at 509-10.

<sup>121</sup> An absence of enforcement evidence may also call into question the reliability of anecdotal claims of discrimination. *Cf. id.* at 502 n.3 ("The complete silence of the record concerning enforcement of the city's own antidiscrimination ordinance flies in the face of the dissent's vision of a 'tight-knit industry' which has prevented blacks from obtaining the experience necessary to participate in construction contracting.").

<sup>122</sup> *Eng'g Contractors Ass'n of S. Fla., Inc. v. Metro. Dade County*, 122 F.3d 895, 928 (11th Cir. 1997).

<sup>123</sup> *See id.* at 928-29.

steps to “inform, educate, discipline, or penalize” county officials or employees for their alleged discriminatory conduct, nor had it passed ordinances outlawing discrimination by contractors, suppliers, bankers, or insurers.<sup>124</sup> Accordingly, the court held that Dade County’s MBE program was not narrowly tailored because, “[i]nstead of turning to race[-] and ethnicity-conscious remedies as a last resort, the [c]ounty . . . turned to them as a first resort.”<sup>125</sup>

### B. Typical Sources and Content of Anecdotal Evidence

Recognizing the essential role of anecdotal evidence in defending preference programs, disparity study consultants often supplement their statistical analyses with anecdotal evidence.<sup>126</sup> The most common methods for collecting anecdotal evidence of discrimination are surveys, public hearings, and interviews.<sup>127</sup> If an MWBE program is challenged in court, governments may also introduce anecdotal evidence through testimony or affidavits.<sup>128</sup> A court may deem such testimony irrelevant, however, if it refuses to consider post-enactment evidence and the offered testimony or affidavits concern information not available to policy makers at the time they implemented the MWBE program.<sup>129</sup>

Studies in Denver and Fulton County, Georgia, relied, in part, on surveys that asked MWBE firms whether they believed that they had encountered discrimination in their business dealings.<sup>130</sup> The Denver study, for example, asked each firm if it had “‘been treated less favorably than otherwise similar firms because of the . . . race, ethnicity, or sex of its owners.’”<sup>131</sup> The survey asked respondents to answer the

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<sup>124</sup> *Id.* at 929.

<sup>125</sup> *Id.*

<sup>126</sup> *See, e.g.*, MGT of America, Inc., City of Phoenix, Second Generation Disparity Study Final Report 6-5 (1999), <http://www.ci.phoenix.az.us/CITYGOV/disparity.html> (“To support findings of statistical disparity, *Croson* and subsequent cases require that anecdotal research tie the disparity to discriminatory practices in the market area.”). MGT of America, Inc. is a prominent disparity study consulting firm, having completed more than seventy studies. *See* MGT of America, Inc., *Disparity Studies*, at <http://www.mgtamer.com/core.cfm?type=2&id=10> (last visited Apr. 15, 2003).

<sup>127</sup> *See* La Noue, *supra* note 2, at 521–28.

<sup>128</sup> *See, e.g.*, *Concrete Works of Colo., Inc. v. City of Denver*, 86 F. Supp. 2d 1042, 1071 (D. Colo. 2000) (limiting the number of witnesses to avoid duplication, but receiving lay opinions, accepting hearsay, relaxing relevance standards, and restricting the scope of cross-examination), *rev’d on other grounds*, 321 F.3d 950 (10th Cir. 2003); *Eng’g Contractors Ass’n of S. Fla., Inc. v. Metro. Dade County*, 943 F. Supp. 1546, 1578–79 (S.D. Fla. 1996) (allowing the introduction of statements by at least twenty-one contractors and subcontractors, through their trial and deposition testimony and affidavits, which described purported instances of discrimination), *aff’d*, 122 F.3d 895 (11th Cir. 1997).

<sup>129</sup> *See supra* notes 63–73 and accompanying text.

<sup>130</sup> *See Concrete Works*, 86 F. Supp. 2d at 1060–61; *Webster v. Fulton County*, 51 F. Supp. 2d 1354, 1379 (N.D. Ga. 1999), *aff’d*, 218 F.3d 1267 (11th Cir. 2000) (per curiam).

<sup>131</sup> *Concrete Works*, 86 F. Supp. 2d at 1060.

question with respect to thirteen categories of business dealings, such as applying for bonds or loans, bidding on private- or public-sector contracts, and handling the demands on, and evaluation of, their work.<sup>132</sup> Nearly half of the fifty-six minority-owned firms responding to the survey believed they had been discriminated against in the previous five years.<sup>133</sup> The Fulton County survey found that fifty-three percent of MWBE firms believed that they had encountered discrimination by majority-owned firms during the five years preceding the study, and sixteen percent believed that the county had discriminated against them.<sup>134</sup>

Fulton County also held public hearings to solicit anecdotal evidence of discrimination,<sup>135</sup> as did the cities of Columbus<sup>136</sup> and Phoenix.<sup>137</sup> Public hearings can provide an opportunity for speakers to recount details of their specific experiences of discrimination and to respond to questions from a hearing panel. In Phoenix, for example, eighteen MWBE owners testified before panels comprised of members of the city's Human Relations Commission, Human Relations Minority and Women Development Committee, and MWBE Oversight Committee.<sup>138</sup>

Personal interviews, the other common method for collecting anecdotal evidence, also allow for the collection of detailed accounts of discrimination. Unlike public hearings, however, personal interviews typically allow participants to remain anonymous.<sup>139</sup> For this reason, the prominent disparity study consulting firm Mason Tillman Associates (MTA)<sup>140</sup> considers interviews to be "superior" to surveys and public hearings.<sup>141</sup> MTA also prefers the interview method "because it affords the researcher a greater opportunity to assess not only the effects of discriminatory practices on [MWBEs] but also the means by

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<sup>132</sup> See *id.*

<sup>133</sup> *Id.* at 1061.

<sup>134</sup> *Webster*, 51 F. Supp. 2d at 1379.

<sup>135</sup> See *id.* at 1378-79.

<sup>136</sup> See *Associated Gen. Contractors of Am. v. City of Columbus*, 936 F. Supp. 1363, 1402-07, 1411-13, 1421-23 (S.D. Ohio 1996), *vacated on other grounds by* 172 F.3d 411 (6th Cir. 1999).

<sup>137</sup> See *MGT of America, Inc.*, *supra* note 126, at 5-2 to 5-3.

<sup>138</sup> *Id.*

<sup>139</sup> See, e.g., *Webster*, 51 F. Supp. 2d at 1378; *Associated Gen. Contractors*, 936 F. Supp. at 1403-04; *Mason Tillman Assocs.*, *supra* note 1, at 2-57; *MGT of America, Inc.*, *supra* note 126, at 5-4.

<sup>140</sup> By mid-2001, MTA had conducted sixty-three disparity studies. See Press Release, *Mason Tillman Assocs.*, Dallas Area Rapid Transit Contracts Mason Tillman Associates (June 15, 2001), [http://www.mtaltd.com/press\\_release/press.html](http://www.mtaltd.com/press_release/press.html).

<sup>141</sup> *Mason Tillman Assocs.*, *supra* note 1, at 2-57.

which those practices occur.”<sup>142</sup> Moreover, personal interviews can be in-depth, often lasting more than an hour.<sup>143</sup>

Disparity studies utilizing public hearings or personal interviews typically include extensive sections with excerpts from participants’ statements.<sup>144</sup> Disparity study authors often group the excerpts in categories such as the following: racist or sexist stereotypes;<sup>145</sup> difficulty obtaining bonding or financing;<sup>146</sup> late payment by prime contractors;<sup>147</sup> “bid shopping” (that is, asking a majority subcontractor to undercut an MWBE subcontractor’s low bid) or bid manipulation;<sup>148</sup> and difficulty breaking into the “good old boys” network.<sup>149</sup>

<sup>142</sup> *Id.*

<sup>143</sup> *See, e.g., id.* (averaging two hours); MGT of America, Inc., *supra* note 126, at 5-4 (ranging from forty-five minutes to two hours).

<sup>144</sup> *See, e.g.,* Mason Tillman Assocs., *supra* note 1, at 2-59 to 2-156; MGT of America, Inc., *supra* note 126, at 5-12 to 5-41 .

<sup>145</sup> *See, e.g.,* Mason Tillman Assocs., *supra* note 1, at 2-59 to 2-72; MGT of America, Inc., *supra* note 126, at 5-28 to 5-34; *see also* Associated Gen. Contractors of Am. v. City of Columbus, 936 F. Supp. 1363, 1415 (S.D. Ohio 1996) (analyzing the stereotypical attitudes and racial hostility portion of a disparity study), *vacated on other grounds by* 172 F.3d 411 (6th Cir. 1999).

<sup>146</sup> *See, e.g.,* Mason Tillman Assocs., *supra* note 1, at 2-75 to 2-92; MGT of America, Inc., *supra* note 126, at 5-34 to 5-36; *see also* Associated Gen. Contractors, 936 F. Supp. at 1416-18 (analyzing the financing and bonding portions of the study). One African-American male contractor, for example, perceived a

general hesitancy to work with . . . Black businesses. . . I’ve seen White counterparts who’ve gone bankrupt and been invited out of bankruptcy to apply for loans. I just think that the biggest discrimination is in financing. If you want my opinion, the [problem is] being asked for additional materials, being overanalyzed by computer in terms of every element [of your finances], every ratio . . . [and] using those thing[s] [for] their rejection decisions.

Mason Tillman Assocs., *supra* note 1, at 2-78 (first and third omissions and alterations in original).

<sup>147</sup> *See, e.g.,* Mason Tillman Assocs., *supra* note 1, at 2-97 to 2-104; MGT of America, Inc., *supra* note 126, at 5-36 to 5-37; *see also* Associated Gen. Contractors, 936 F. Supp. at 1419 (analyzing the slow payment and non-payment portions of the study).

<sup>148</sup> *See, e.g.,* Mason Tillman Assocs., *supra* note 1, at 2-118 to 2-122; MGT of America, Inc., *supra* note 126, at 5-12 to 5-23; *see also* Associated Gen. Contractors, 936 F. Supp. at 1419 (analyzing the bid shopping and bid manipulation portions of the study).

<sup>149</sup> *See, e.g.,* Mason Tillman Assocs., *supra* note 1, at 2-113 to 2-118; *see also* Associated Gen. Contractors, 936 F. Supp. at 1418-19 (analyzing the social and organizational discrimination portion of the study). For example, an African-American male contractor described his perception of the “good old boy network”:

One of the problems that I have predominantly with State inspectors and more on the State level, all of them . . . receive benefits, and this old “good old boy network,” . . . they break bread together, they’re invited to their banquets, they get awards, they socialize together, they do things together, they know one another on a first name basis. . . . Once they leave from working for the State, they end up with a prime contractor and a major prime contractor.

Mason Tillman Assocs., *supra* note 1, at 2-122 (omissions in original).

## IV

JUDICIAL TREATMENT OF ANECDOTAL EVIDENCE USED TO  
SUPPORT MBE PROGRAMS

Even though the Supreme Court has established rigorous standards under strict scrutiny,<sup>150</sup> a district court's determination of the adequacy of anecdotal evidence in a particular case likely will receive deferential review on appeal. For example, in the Eleventh Circuit, a district court's decision as to whether anecdotal (or statistical) evidence represents a "strong basis in evidence" to justify a race-based remedy is treated as a factual determination, not to be set aside unless clearly erroneous.<sup>151</sup> The Tenth Circuit, on the other hand, considers the ultimate determination as to whether evidence is strong enough to establish a compelling interest to be a question of law, subject to de novo review.<sup>152</sup> Even so, "[u]nderlying that legal conclusion . . . are factual determinations about the accuracy and validity of a municipality's evidentiary support for its program."<sup>153</sup> Thus, under either standard of review, an appeals court likely will afford significant deference to a district court's evaluation of anecdotal evidence.<sup>154</sup>

How have courts treated the anecdotal evidence offered by jurisdictions defending their public-contracting preference programs? The answer is more tentative than one might expect given that more than a decade has passed since the Supreme Court decided *Croson*. Because anecdotal evidence must be "supported by appropriate statistical proof,"<sup>155</sup> courts that find the statistical evidence insufficient need not scrutinize the anecdotal evidence.<sup>156</sup> In the following three

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<sup>150</sup> See discussion *supra* Part I.A.

<sup>151</sup> See *Eng'g Contractors Ass'n of S. Fla. v. Metro. Dade County*, 122 F.3d 895, 903 (11th Cir. 1997) (citing FED. R. Civ. P. 52(a), and *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986) (plurality opinion)).

<sup>152</sup> See *Concrete Works of Colo., Inc. v. City of Denver*, 321 F.3d 950, 958 (10th Cir. 2003); see also *Contractors Ass'n of E. Pa., Inc. v. City of Philadelphia*, 91 F.3d 586, 596 (3d Cir. 1996) (indicating that the Third Circuit also considers the determination as to whether there is a strong basis in evidence of discrimination to be a question of law).

<sup>153</sup> *Concrete Works of Colo., Inc. v. City of Denver*, 36 F.3d 1513, 1522 (10th Cir. 1994).

<sup>154</sup> When a trial court decides whether a remedy is narrowly tailored to serve a compelling interest, it applies law to the facts. The narrow-tailoring determination, therefore, is subject to de novo appellate review. See *Eng'g Contractors*, 122 F.3d at 905. An appellate court will likely consider anecdotal evidence of discrimination when reviewing whether an MBE program is a narrowly tailored remedy (*i.e.*, whether the program identifies the source of discrimination, and whether the policy makers adequately responded to individual instances of discrimination before turning to a broad-based remedy). See *supra* notes 113-25 and accompanying text.

<sup>155</sup> *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509 (1989); see also *supra* notes 102-12 and accompanying text (describing the role of anecdotal evidence as supportive of statistical evidence).

<sup>156</sup> See, *e.g.*, *Coral Constr. Co. v. King County*, 941 F.2d 910, 919 (9th Cir. 1991) ("Undoubtedly, the written testimony of the numerous affiants suggests that there *may* be . . .

cases, however, the district courts devoted significant attention to the anecdotal evidence presented in support of a challenged MBE program.<sup>157</sup>

A. *Associated General Contractors of California, Inc. v. Coalition for Economic Equity*

Four months after the *Croson* decision, the San Francisco Board of Supervisors unanimously passed an ordinance granting a ten-percent bid preference for local MWBEs.<sup>158</sup> Prior to passing the ordinance, the Board considered written testimony, public hearing testimony, and the results of a statistical analysis of MWBE participation in city contracts.<sup>159</sup> In October 1990, Judge Thelton Henderson denied a motion for a preliminary injunction against the enforcement of the ordinance on the grounds that the plaintiff's equal protection claim was not likely to succeed.<sup>160</sup>

The district court found the evidentiary basis for the ordinance "in stark contrast" to the City of Richmond's evidence in *Croson*.<sup>161</sup> In addition to a "[p]articularly significant" statistical analysis,<sup>162</sup> Judge Henderson found persuasive the testimony of discriminatory practices presented to the Board of Supervisors.<sup>163</sup> The court did not summarize the "lengthy" record, but it mentioned "some of the illustrative testimony."<sup>164</sup> For example, a "not uncommon complaint" was that MBEs with the lowest bids were nevertheless denied prime contracts.<sup>165</sup> An MBE testified at a public hearing that a city staff member tried to convince him to withdraw his bid by telling him, "[Y]our pro-

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systemic discrimination within the King County construction industry. Without a statistical foundation, the picture is incomplete."); *Webster v. Fulton County*, 51 F. Supp. 2d 1354, 1378-79 (N.D. Ga. 1999) (summarizing the anecdotal evidence before concluding that "[i]t is insufficient to offset the weaknesses of Fulton County's statistical evidence"), *aff'd*, 218 F.3d 1267 (11th Cir. 2000) (per curiam).

<sup>157</sup> Unlike two of the cases that follow, which explicitly reject the anecdotal evidence as inadequate, see *infra* Part IV.B-C, *Coral Construction* and *Webster* do not reject the anecdotal evidence. See *Coral Constr.*, 941 F.2d at 919; *Webster*, 51 F. Supp. 2d at 1379. But because the *Webster* and *Coral Construction* courts found the statistical evidence insufficient, one cannot properly interpret their failure to reject the anecdotal evidence as an acceptance of its adequacy.

<sup>158</sup> See *Associated Gen. Contractors of Cal., Inc. v. City of San Francisco*, 748 F. Supp. 1443, 1445-46 (N.D. Cal. 1990), *aff'd*, 950 F.2d 1401 (9th Cir. 1991). The Ninth Circuit had previously invalidated the race-based provisions of a 1984 San Francisco ordinance, which included a bidding preference and a ten percent set aside for MBEs. *Associated Gen. Contractors of Cal., Inc. v. City of San Francisco*, 813 F.2d 922, 928-39 (9th Cir. 1987).

<sup>159</sup> *Associated Gen. Contractors*, 748 F. Supp. at 1445 n.3.

<sup>160</sup> See *id.* at 1456.

<sup>161</sup> *Id.* at 1449-50.

<sup>162</sup> *Id.* at 1450.

<sup>163</sup> See *id.* at 1451-53.

<sup>164</sup> *Id.* at 1451.

<sup>165</sup> *Id.*

posal is ridiculous because you're not qualified.'"<sup>166</sup> The court also cited testimony by a Contract Compliance Liaison for the Port of San Francisco, who told the Board the following: "[I]t is well known at the Port that minorities are not welcome at the Port. I came there about five years ago and I found that . . . in cases of engineers, the attitude [ ] was that minorities were incompetent and they couldn't perform . . . the highly technical work the Port produces."<sup>167</sup>

On appeal, the Ninth Circuit affirmed the district court's denial of a preliminary injunction.<sup>168</sup> Based on the Board of Supervisors' consideration of numerous written statements and testimony taken at public hearings, the court concluded that the record supported the Board's "detailed findings of prior discrimination."<sup>169</sup> Rejecting the plaintiff's argument, the court held that "there is no requirement that the legislative findings specifically detail each and every instance that the legislative body has relied upon in support of its decision that affirmative action is necessary."<sup>170</sup>

Although a victory for proponents of MWBE preference programs, *Associated General Contractors of California* may have limited significance today. Not only is the case more than a decade old, but the court's decision also rested on a motion for a preliminary injunction.<sup>171</sup> Moreover, there was no trial with expert testimony and cross-examination, nor did the plaintiffs conduct discovery.<sup>172</sup> Trial and discovery can significantly affect a court's evaluation of anecdotal evidence. According to a 1997 statement by Professor George La Noue, courts have *never* upheld an MBE program on the basis of anecdotal evidence that had been exposed to discovery and trial.<sup>173</sup>

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<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 1451–52.

<sup>168</sup> See *Associated Gen. Contractors of Cal., Inc. v. Coalition for Econ. Equity*, 950 F.2d 1401, 1418 (9th Cir. 1991).

<sup>169</sup> See *id.* at 1414–16.

<sup>170</sup> *Id.* at 1416.

<sup>171</sup> In a concurring opinion, Judge O'Scannlain emphasized the limited nature of appellate review of a decision on a motion for a preliminary injunction. See *id.* at 1419 (O'Scannlain, J., concurring) ("Detailed consideration of the merits of [the plaintiff's] constitutional claim is neither necessary nor appropriate in this context.").

<sup>172</sup> See La Noue, *supra* note 68, at 8.

<sup>173</sup> *The Compelling Interest Basis for the Use of Race and Ethnic Conscious Means in the U.S. DOT Proposed Regulations for Modifying Its DBE Program: An Analysis: Hearing Before the Subcomm. on the Constitution, Federalism and Prop. Rights of the S. Comm. on the Judiciary*, 105th Cong. (Sept. 30, 1997) [hereinafter *Hearing*]. LEXIS, Federal News Service File (testimony of George R. La Noue, Professor of Political Science, Policy Sciences Graduate Program, University of Maryland Graduate School).

B. *Engineering Contractors Ass'n of South Florida v. Metropolitan Dade County*

In 1996, the U.S. District Court for the Southern District of Florida struck down Dade County's MBE and WBE programs.<sup>174</sup> In declaring the programs unconstitutional, Judge Kenneth Ryskamp held that the county's statistical<sup>175</sup> and anecdotal evidence<sup>176</sup> was too weak to justify race- or gender-based remedies, which the court also held were not narrowly tailored.<sup>177</sup> The court concluded that the anecdotal evidence "cannot cure the weaknesses of [the county's] statistical evidence" because "it is not the sort of 'identified discrimination' contemplated by *Croson*."<sup>178</sup>

The anecdotal evidence that Dade County presented included the testimony of two county employees,<sup>179</sup> the testimony of more than twenty MWBE contractors and subcontractors (primarily by affidavit),<sup>180</sup> and a study based on interviews with individuals at seventy-eight construction firms owned by African Americans.<sup>181</sup> One county employee described a possible instance of discrimination in which a supplier quoted to a minority subcontractor a substantially higher price for equipment than the supplier quoted to a non-minority subcontractor.<sup>182</sup> The county employee, however, did not recall the names of the parties involved, nor did he know if credit histories or volume of purchases had affected the quoted prices.<sup>183</sup>

The other county employee who testified stated that he had heard county employees discuss the inability of minority- and women-

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<sup>174</sup> *Eng'g Contractors Ass'n of S. Fla., Inc. v. Metro. Dade County*, 943 F. Supp. 1546, 1584-85 (S.D. Fla. 1996), *aff'd*, 122 F.3d 895 (11th Cir. 1997). The Dade County programs included five types of measures to increase MWBE participation: set-asides; subcontractor goals; project goals (county selects MWBEs for specified types of work); bid preferences; and selection factors (similar to a bid preference; advantages flow to MWBEs when price is but one of several factors). *See id.* at 1552-53.

<sup>175</sup> *See id.* at 1560-77.

<sup>176</sup> *See id.* at 1577-80.

<sup>177</sup> *See id.* at 1580-83. The district court erred by using a single, narrow-tailoring standard, rather than analyzing the WBE program under the "substantial relationship" standard (the lesser requirement under intermediate scrutiny). *Eng'g Contractors*, 122 F.3d at 929. The error did not change the result, however, because the Eleventh Circuit held that the district court did not clearly err in its finding of insufficient evidence supporting the county's stated rationale for the WBE program. *See id.*

<sup>178</sup> *Eng'g Contractors*, 943 F. Supp. at 1580.

<sup>179</sup> *See id.* at 1577-78 (describing the testimony of Herbert Johnson, director of the Dade County Performing Arts Center construction project, and Gregory Owens, former director of the county department that implements the MWBE programs).

<sup>180</sup> *Eng'g Contractors*, 122 F.3d at 924-25 (referring to twenty-three MWBE contractors); *Eng'g Contractors*, 943 F. Supp. at 1578-79 (referring to twenty-one MWBE contractors and subcontractors).

<sup>181</sup> *Eng'g Contractors*, 943 F. Supp. at 1579.

<sup>182</sup> *Id.* at 1577.

<sup>183</sup> *Id.* The employee also acknowledged that the county did not investigate the incident, nor did the county discipline the supplier. *Id.*

owned firms to meet tight deadlines and adequately perform the work.<sup>184</sup> He did not identify the employees making the statements, however, and he said he did not think the county reprimanded employees for making the statements.<sup>185</sup> He also testified that MWBEs often complain that prime contractors give them lengthy "punch lists," which set forth items that must be redone for not meeting specifications, although these same contractors do not give lengthy "punch lists" to non-MWBEs on the same jobs.<sup>186</sup>

In evaluating the county employees' testimony, the district court noted that neither employee identified specific instances in which county personnel had deprived a deserving MWBE of a contract award due to discrimination.<sup>187</sup> The court characterized the testimony as follows: "[T]hey testified in general terms about the fact that County personnel 'could' be 'predisposed' to view minorities or female contractors less favorably than their white male counterparts, or that County personnel 'could' hold negative stereotypes of MWBEs that 'could' influence their decision making with regard to contract awards."<sup>188</sup> Such speculation, Judge Ryskamp concluded, "does not form a strong basis in evidence of discrimination."<sup>189</sup>

The court briefly summarized the complaints of discrimination contained in the testimony and affidavits of twenty-one MWBE contractors and subcontractors.<sup>190</sup> The contractors described instances that they attributed to discrimination, such as the following: project supervisors dealing with a non-MWBE employee rather than dealing directly with a minority or female business owner; suppliers quoting higher prices for MWBEs; prime contractors "shopping" MWBE subcontractor bids to solicit lower bids from non-MWBE subcontractors; prime contractors sending MWBEs bid invitations at the last minute; and prime contractors replacing MWBE subcontractors with a non-MWBE subcontractor within days after the start of a project.<sup>191</sup> With respect to the study based on interviews with seventy-eight African-American owners of construction firms, the court summarized the findings as follows: many owners stated that they had difficulty securing financing and bonding; that they often were not paid promptly by prime contractors; that racial stereotypes led to unfair evaluations of

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184 *Id.*

185 *Id.* at 1577-78.

186 *Id.* at 1578.

187 *Id.*

188 *Id.*

189 *Id.* The court did find "more persuasive" the employees' testimony about barriers to entry facing new construction firms, but it stated that the county could take race-neutral steps to address the problem. *See id.*

190 *See id.* at 1578-79.

191 *Id.* at 1579.

their performance; that they struggled to get information on contracting processes from county employees; and that suppliers charged them higher prices.<sup>192</sup>

Judge Ryskamp questioned the reliability of the anecdotal evidence collected from contractors.<sup>193</sup> In the first of three criticisms of the evidence, the court stated that a proper determination of discrimination can be a complex undertaking requiring knowledge of both parties' perspectives, as well as information about the treatment of comparably placed individuals of other races and genders.<sup>194</sup> In the court's view, people providing anecdotal evidence rarely have this information, and they may perceive discrimination from what is really just aggressive business behavior or barriers facing all small businesses.<sup>195</sup>

In its second criticism, the court noted two problems that concern social scientists reviewing any interview or survey: "interviewer bias" and "response bias."<sup>196</sup> According to the court, interviewer bias can occur when either the interviewer words questions in a suggestive manner or the interviewer makes the political purpose of the questions known to the respondent.<sup>197</sup> Response bias is a concern when a sample is not carefully constructed and therefore is unrepresentative of the population of interest because the people most likely to respond are those who feel most strongly about the problem under study.<sup>198</sup>

Finally, the court expressed concern that the anecdotal evidence was unreliable because individuals with "a vested interest in preserving a benefit" provided the anecdotes and thus may have had motive to view events in a manner justifying the benefit.<sup>199</sup> Given this danger, the court concluded that an analyst should attempt to investigate and verify the anecdotal evidence provided.<sup>200</sup> In his conclusion, Judge Ryskamp again emphasized the importance of verifying anecdotal evidence:

Without corroboration, the Court cannot distinguish between allegations that in fact represent an objective assessment of the situa-

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192 *Id.*

193 *See id.* ("Plaintiffs[ ] respond with several points the Court believes to be valid concerning the reliability of this anecdotal evidence.").

194 *Id.*; *see also* La Noue, *supra* note 2, at 523 ("Discrimination anecdotes are not just about facts, but about perceptions of one's own and other[s'] motives. Subsequent events which are encountered personally or indirectly through the larger political process can affect what is remembered.").

195 *Eng'g Contractors*, 943 F. Supp. at 1579.

196 *Id.*

197 *See id.*

198 *See id.*

199 *Id.*

200 *See id.*

tion, and those that are fraught with heartfelt, but erroneous, interpretations of events and circumstances. The costs associated with the imposition of race, ethnicity, and gender preferences are simply too high to sustain a patently discriminatory program on such weak evidence.<sup>201</sup>

In the end, the court concluded that the anecdotal evidence that Dade County offered was insufficient to overcome weaknesses in the statistical evidence.<sup>202</sup>

On appeal, the Eleventh Circuit affirmed the district court's decision striking down Dade County's race- and gender-based public-contracting preference programs.<sup>203</sup> Without directly commenting on the district court's criticisms of the anecdotal evidence, the court of appeals held that the district court did not clearly err in finding that Dade County had failed to present a sufficiently strong basis in evidence to justify the MWBE programs.<sup>204</sup>

The decision in *Engineering Contractors* is significant because the court found the anecdotal evidence insufficient, despite a relatively high number of anecdotal claims of discrimination.<sup>205</sup> Moreover, the court questioned the reliability of unverified anecdotal evidence. On the other hand, the court, having already found the county's statistical evidence of discrimination inadequate, confronted the anecdotal evidence.<sup>206</sup> Although the court found that the "anecdotal evidence cannot cure the weaknesses of defendants' statistical evidence,"<sup>207</sup> it is not clear whether the court would have found the anecdotal evidence adequate if the statistical evidence had been stronger.

### C. *Associated General Contractors of America v. City of Columbus*

A more definitive rejection of anecdotal evidence is found in an opinion decided three weeks before Dade County's MWBE programs

<sup>201</sup> *Id.* at 1584.

<sup>202</sup> *Id.* at 1580.

<sup>203</sup> See *Eng'g Contractors Ass'n of S. Fla., Inc. v. Metro. Dade County*, 122 F.3d 895, 929 (11th Cir. 1997).

<sup>204</sup> See *id.* at 924–26. The court concluded:

Without the requisite statistical foundation for the anecdotal evidence to reinforce, supplement, support, and bolster, we cannot say on the facts and circumstances of this case that the district court clearly erred by failing to find that the anecdotal evidence formed a sufficient evidentiary basis to support any of the MWBE programs—either taken alone or in combination with the statistics that the district court found to be ambiguous at best.

*Id.* at 926.

<sup>205</sup> See *supra* text accompanying notes 178–82.

<sup>206</sup> See *Eng'g Contractors*, 943 F. Supp. at 1584 (“[T]he Court finds that the conflicting statistical evidence presented by the defendants is insufficient to provide the strong basis in evidence necessary to support the use of race[-] and ethnicity-conscious contract measures . . . . The proffered anecdotal evidence does not change this result.”).

<sup>207</sup> *Id.* at 1580.

were struck down.<sup>208</sup> After a thorough evaluation of statistical and anecdotal evidence,<sup>209</sup> District Court Judge James Graham held that a City of Columbus MWBE plan failed to meet the equal protection requirements outlined in *Croson*.<sup>210</sup> More specifically, because the city failed to present a strong basis in evidence of past discrimination (and, further, because it did not fashion a narrowly tailored remedy), the court denied the city's motion to modify and dissolve a 1991 injunction stemming from an earlier version of the MWBE program.<sup>211</sup> On appeal, the Sixth Circuit vacated the judgment on jurisdictional grounds.<sup>212</sup>

Despite the Sixth Circuit's vacation of the judgment, Judge Graham's opinion remains instructive. After all, the court of appeals vacated the judgment on jurisdictional, not substantive, grounds. The district court opinion represents a thorough analysis of the statistical and anecdotal evidence the city offered, as the Sixth Circuit acknowledged: "We are unhappily aware of the harshness of the result of our conclusion that the district court lacked jurisdiction . . . . The record in this case is voluminous and the district court's effort in reviewing that record and issuing its ruling was thorough and exhaustive."<sup>213</sup> One cannot doubt that plaintiffs challenging MWBE programs will carefully study Judge Graham's opinion.

The anecdotal evidence the City of Columbus presented is notable because it drew from a large number of sources. Indeed, the court considered anecdotal evidence from testimony at five sets of city council hearings;<sup>214</sup> interviews with minority and women contractors reported in a city disparity study ("predicate study");<sup>215</sup> complaints to individual city council members;<sup>216</sup> a "Management Study" reporting the results of interviews with city employees, MWBE representatives, minority business organizations, and non-MWBE representatives;<sup>217</sup> an "Employment Study" presenting the responses to questionnaires

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<sup>208</sup> *Associated Gen. Contractors of Am. v. City of Columbus*, 936 F. Supp. 1363 (S.D. Ohio 1996), *vacated on other grounds* by 172 F.3d 411 (6th Cir. 1999).

<sup>209</sup> The court issued a seventy-one-page opinion and twenty-page appendix reporting individual complaints contained in the anecdotal evidence. *See id.* The court's discussion of the anecdotal evidence runs more than forty pages. *See id.* at 1402-07, 1411-23, 1425-30, 1442-61.

<sup>210</sup> *See id.* at 1371-74. The city's MWBE program, the Equal Business Opportunity Code of 1993, included MWBE subcontracting goals, as well as bonding, financing, and technical assistance programs for MWBEs. *See id.* at 1371.

<sup>211</sup> *Id.* at 1441.

<sup>212</sup> *Associated Gen. Contractors*, 172 F.3d at 421.

<sup>213</sup> *Id.*

<sup>214</sup> *See Associated Gen. Contractors*, 936 F. Supp. at 1402-03, 1406-07, 1411-12, 1421-22 (S.D. Ohio 1996).

<sup>215</sup> *See id.* at 1403-06, 1413-20, 1442-58.

<sup>216</sup> *See id.* at 1412-13.

<sup>217</sup> *See id.* at 1420.

probing employment discrimination in the Columbus construction and goods industries;<sup>218</sup> and testimony at a public hearing of the Ohio Advisory Committee of the U.S. Civil Rights Commission.<sup>219</sup>

Despite the volume of anecdotal evidence, the district court held that the “anecdotal evidence in this case fell far short of proof of pervasive discrimination in the private sector.”<sup>220</sup> The court noted that the city’s anecdotal evidence was “poorly executed.”<sup>221</sup> Among the court’s criticisms was its view that the anecdotal evidence improperly emphasized *perceptions* of discrimination, rather than *actual* discrimination.<sup>222</sup>

As in *Engineering Contractors*, the court criticized the consultants for not taking steps to verify individuals’ reports of discrimination.<sup>223</sup> Rather than inquiring about possible nondiscriminatory explanations for behavior complained of by MWBEs, the consultants for Columbus “reported every business disappointment of an [MWBE] as though it was an example of discrimination.”<sup>224</sup> For anecdotal evidence to have validity, the court stated that the collection of the evidence must meet “minimum standards of objectivity and diligence.”<sup>225</sup> Judge Graham declared that investigators should insist on appropriate details by asking “the fundamental questions any first-year journalism student knows to ask: ‘who, what, when, where, why and how?’”<sup>226</sup> Moreover, investigators should consider the credibility and potential bias of witnesses and respondents.<sup>227</sup> Judge Graham summarized his view of adequate standards as follows:

Such an investigation should meet minimum standards for a reasonably competent forensic investigation. The investigators should be impartial and unbiased and they should be reasonably thorough and diligent. Extra care should be taken in gathering and evaluating anecdotal evidence from advocates of race- and gender-based preferences. Such informants may be prone to exaggerate or fabri-

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<sup>218</sup> See *id.* at 1420–21.

<sup>219</sup> See *id.* at 1422–23.

<sup>220</sup> *Id.* at 1373.

<sup>221</sup> *Id.*

<sup>222</sup> See *id.*

<sup>223</sup> Compare *Eng’g Contractors Ass’n of S. Fla., Inc. v. Metro. Dade County*, 943 F. Supp. 1546, 1584 (S.D. Fla. 1996) (“Without corroboration, the Court cannot distinguish between . . . objective assessment[s] . . . and . . . erroneous[ ] interpretations of events and circumstances.”), *aff’d*, 122 F.3d 895 (11th Cir. 1997), with *Associated Gen. Contractors*, 936 F. Supp. at 1373 (“No efforts were made to verify reports of discrimination.”).

<sup>224</sup> *Associated Gen. Contractors*, 936 F. Supp. at 1427.

<sup>225</sup> *Id.* at 1426.

<sup>226</sup> *Id.*

<sup>227</sup> See *id.* at 1428; see also La Noue, *supra* note 2, at 524 (“Since most MBE owners polled, questioned personally, or invited to testify, know full well that the continuation of the MBE program may rest in their ability to create a record of discrimination, the incentive to engage in memory contrivance, consciously or unconsciously, is substantial.”).

cate circumstances and events or omit important details. Attempts should be made to verify claims of discrimination where it is reasonable to do so. . . . The collection of evidence . . . . should include a fair sampling of all segments of the community who have relevant knowledge and who would be impacted by such legislation.<sup>228</sup>

In its evaluation of the anecdotal evidence in the city's disparity study, the court "carefully reviewed each of the interview reports to determine whether the anecdotal evidence collected by [the city's consultant] supports its conclusions."<sup>229</sup> The court presented its analysis of the interview reports by organizing the claims of discrimination into ten categories.<sup>230</sup> After reviewing the interview reports according to its standards, the court concluded that none of the categories included evidence sufficient to warrant an inference of pervasive discrimination; about half of the categories had *zero* accounts with sufficient facts to warrant an inference of discrimination in the specific instances cited, let alone an inference of pervasive discrimination.<sup>231</sup>

Judge Graham also concluded that "[p]olitical pressures may have clouded the factfinding process" because the city's consultants "were not impartial investigators, but aggressive advocates of minority set aside legislation."<sup>232</sup> As an example, the court noted that the consultant "facilitating" the 1992 city council hearings "estimated that it would require 'roughly twelve hours per witness to draft, review and prepare for presentation of testimony.'"<sup>233</sup> From such evidence, the court concluded that the hearings were designed to create a record to support MWBE preferences, not to investigate discrimination.<sup>234</sup>

## V

### DEFENDING AN MBE PROGRAM WITH ANECDOTAL EVIDENCE OF DISCRIMINATION

Given the discussion in Part IV, what steps should a local government take if it hopes to introduce or retain a public-contracting preference program? In addition to designing a narrowly tailored

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<sup>228</sup> *Associated Gen. Contractors*, 936 F. Supp. at 1426.

<sup>229</sup> *Id.* at 1414.

<sup>230</sup> *See id.* at 1415–20. The court's ten categories are the following: (1) "Stereotypical Attitudes and Racial Hostility"; (2) "Denial of Opportunity to Bid or Unfair Denial of Contract Award"; (3) "Financing"; (4) "Bonding"; (5) "Access to Suppliers—Fair Pricing"; (6) "'Good Old Boy' Network"; (7) "Discrimination In Previous Employment"; (8) "Restrictive Contract Specifications, Bid Shopping, Bid Manipulation, Slow Payment and Non-payment"; (9) "Double Standards and Harassment"; and (10) "Miscellaneous Categories of Discrimination." *See id.*

<sup>231</sup> *See id.*

<sup>232</sup> *Id.* at 1373.

<sup>233</sup> *Id.* at 1425 (quoting Pl.'s Ex. 52).

<sup>234</sup> *See id.* at 1425–26.

remedy,<sup>235</sup> a jurisdiction must ensure that it has a strong basis in evidence of discrimination to justify a race-based remedy.<sup>236</sup> Today, more than a decade after *Croson*, governments with existing MBE programs likely already have disparity studies with statistical and anecdotal evidence purporting to indicate discrimination in the relevant market. But is current evidence likely to withstand serious court challenges? Of more specific concern to this Note is whether typical collections of anecdotal evidence are likely to survive constitutional scrutiny.

As an initial matter, proponents of MBE preferences must recognize that providing sufficient statistical evidence of discrimination represents a fundamental hurdle in successfully defending an MBE program. Anecdotal evidence, alone, will not constitute a sufficiently strong basis in evidence of discrimination, except perhaps in an exceptional case.<sup>237</sup> Moreover, courts have increasingly scrutinized the statistical evidence that state and local governments have offered to support preference programs,<sup>238</sup> and thus proponents of preferences should not overlook the formidable challenge of establishing adequate statistical evidence of discrimination.

Likewise, proponents of MBE preferences cannot afford to overlook the importance of anecdotal evidence of discrimination. Anecdotal evidence is essential for a government to defend an MBE program successfully. Not only is anecdotal evidence of discrimination necessary to rebut plaintiffs' neutral explanations of statistical disparities, thereby corroborating statistical inferences of discrimination, but anecdotal evidence is also needed to identify the sources of discrimination and satisfy the narrow tailoring prong of strict scrutiny.<sup>239</sup>

There are few examples of courts devoting significant attention to anecdotal evidence in support of MBE programs.<sup>240</sup> Moreover, because a district court's evaluation of the strength of the evidence is likely to be afforded significant deference on appeal,<sup>241</sup> the quality of evidence required for an MBE program to survive scrutiny may vary significantly from judge to judge. Nevertheless, after the critical treatment of the anecdotal evidence offered in *Engineering Contractors*<sup>242</sup> and *Associated General Contractors*,<sup>243</sup> plaintiffs are better positioned to

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<sup>235</sup> See discussion *supra* Part I.A.2.

<sup>236</sup> See discussion *supra* Part I.A.3.

<sup>237</sup> See *supra* notes 102-08 and accompanying text.

<sup>238</sup> See discussion *supra* Part II.B.

<sup>239</sup> See *supra* notes 109-25 and accompanying text.

<sup>240</sup> See discussion *supra* Part IV.

<sup>241</sup> See *supra* notes 150-54 and accompanying text.

<sup>242</sup> 943 F. Supp. 1546 (S.D. Fla. 1996); see discussion *supra* Part IV.B.

<sup>243</sup> 936 F. Supp. 1363 (S.D. Ohio 1996), *vacated on other grounds by* 172 F.3d 411 (6th Cir. 1999); see discussion *supra* Part IV.C.

challenge MBE preference programs. Given that advantage and the well-known difficulty of overcoming the Supreme Court's strict scrutiny standard,<sup>244</sup> proponents of MBE preferences would be pursuing a risky strategy if they counted on coming before a "lenient" judge.

A. Methodological Steps to Improve the Likelihood that Anecdotal Evidence Will Survive Judicial Scrutiny

To have confidence that a court will construe anecdotal evidence as strong evidence of discrimination, state and local governments likely will need to require anecdotal evidence that satisfies many of the concerns and standards identified by Judge Ryskamp<sup>245</sup> and Judge Graham.<sup>246</sup> Jurisdictions intent on defending their preference programs should demand objectivity and diligence from consultants collecting and analyzing anecdotal evidence.<sup>247</sup> More specifically, such governments should insist that consultants gathering anecdotal evidence take most, if not all, of the steps below. Although a particular court hearing an MBE<sup>248</sup> challenge may not require all of these steps before being persuaded that anecdotal evidence is sufficient, after *Engineering Contractors*<sup>249</sup> and *Associated General Contractors*,<sup>250</sup> judges will likely consider, and plaintiffs will almost certainly call attention to, those steps that are not taken.

I. *Anecdotal Evidence Should Be Collected from MBE and Non-MBE Contractors*

To obtain a broad perspective of the extent of discrimination in the relevant industry, consultants should not limit their investigation to MBE contractors, but should also collect anecdotal evidence from non-MBE contractors.<sup>251</sup> The collection of anecdotal evidence "should include a fair sampling of all segments of the community who have relevant knowledge and who would be impacted by such legislation."<sup>252</sup> If MBE and non-MBE contractors have similar complaints

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<sup>244</sup> See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995) (asserting that it is not true that "strict scrutiny is 'strict in theory, but fatal in fact,'" although once again striking down a race-based program under strict scrutiny review).

<sup>245</sup> See discussion *supra* Part IV.B.

<sup>246</sup> See discussion *supra* Part IV.C.

<sup>247</sup> See *supra* text accompanying notes 196–200, 225–34.

<sup>248</sup> Because the scope of this Note is limited to race-based preference programs, see *supra* note 6, the recommended steps refer to MBEs. The recommendations, however, are also certainly relevant for jurisdictions seeking to defend gender-based preference programs.

<sup>249</sup> See discussion *supra* Part IV.B.

<sup>250</sup> See discussion *supra* Part IV.C.

<sup>251</sup> See *Associated Gen. Contractors of Am. v. City of Columbus*, 936 F. Supp. 1363, 1426 (S.D. Ohio 1996), *vacated on other grounds by* 172 F.3d 411 (6th Cir. 1999).

<sup>252</sup> *Id.*

(e.g., delays in payments, prime contractor behavior), it could indicate that, in those areas, industry practice is to blame.<sup>253</sup>

2. *In the Collection of Anecdotal Evidence, Attempts Should Be Made to Guard Against "Response Bias" and "Interviewer Bias"*

To minimize the possibility of response bias,<sup>254</sup> jurisdictions collecting anecdotal evidence should ensure that the number and characteristics of respondents constitute a sufficiently representative sample. Because individuals who feel most strongly about an issue may be significantly more likely to respond to surveys, interview requests, or opportunities to testify at public hearings, investigators should construct the sample carefully.<sup>255</sup> In the case of surveys, for example, a Federal Judicial Center reference manual advises the following: "If the response rate drops below 50%, the survey should be regarded with significant caution as a basis for precise quantitative statements about the population from which the sample was drawn."<sup>256</sup>

Another important concern for a jurisdiction collecting anecdotal evidence is the possibility of interviewer bias. As noted by Judge Ryskamp, interviewer bias can occur "[w]hen the respondent is made aware of the political purpose of questions or when questions are worded in such a way as to suggest the answers the inquirer wishes to receive."<sup>257</sup>

3. *Collected Anecdotes of Discrimination Should Be Appropriate in Time and Place*

As *Croson* made clear, evidence of discrimination must be relevant to the *local* industry in question.<sup>258</sup> The *Croson* Court stated that the

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<sup>253</sup> See La Noue, *supra* note 2, at 525.

<sup>254</sup> See *supra* text accompanying note 196.

<sup>255</sup> See Eng'g Contractors Ass'n of S. Fla., Inc. v. Metro. Dade County, 943 F. Supp. 1546, 1579 (S.D. Fla. 1996), *aff'd*, 122 F.3d 895 (11th Cir. 1997).

<sup>256</sup> Shari Seidman Diamond, *Reference Guide on Survey Research*, in FED. JUDICIAL CTR., REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 229, 245 (2d ed. 2000), [http://www.fjc.gov/public/pdf.nsf/lookup/sciman00.pdf/\\$file/sciman00.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/sciman00.pdf/$file/sciman00.pdf); see also *id.* ("Potential bias should receive greater scrutiny when the response rate drops below 75%."). In a Denver study, for example, a survey of MWBE firms yielded a seventeen percent response rate. Concrete Works of Colo., Inc. v. City of Denver, 321 F.3d 950, 968 (10th Cir. 2003). Only ten percent of vendors returned mail surveys in a Broward County disparity study. MGT of America, Inc., Final Report: Broward County Small Disadvantaged Business Enterprise (SDBE) Disparity Study 6-4 (2001), <http://www.mgtamer.com/Reports/Broward/finalreport.pdf> (361 responses out of 3607 questionnaires delivered). According to one estimate, "[r]arely have [disparity study] surveys had [at least] a 20 percent response rate." George R. La Noue, *Discrimination in Public Contracting*, in BEYOND THE COLOR LINE: NEW PERSPECTIVES ON RACE AND ETHNICITY IN AMERICA 201, 205-06 (Abigail Thernstrom & Stephan Thernstrom eds., 2002).

<sup>257</sup> Eng'g Contractors, 943 F. Supp. at 1579.

<sup>258</sup> See City of Richmond v. J.A. Croson Co., 488 U.S. 469, 504-05 (1989).

probative value of nationwide discrimination is “extremely limited” when evaluating a local MBE program;<sup>259</sup> similarly, findings of discrimination from another jurisdiction lack probative value.<sup>260</sup> Thus, jurisdictions should ensure that collected anecdotes concern discrimination in the local market. Further, given the formidableness of strict-scrutiny review, jurisdictions likely should focus on collecting anecdotes of relatively recent acts of discrimination.<sup>261</sup>

4. *Collected Anecdotes of Discrimination Should Relate Specifically to Discrimination in Public Contracting*

“While there is no doubt that the sorry history of both private and public discrimination in [the United States] has contributed to a lack of opportunities for [minority] entrepreneurs,” strict scrutiny requires particularized evidence of discrimination.<sup>262</sup> According to the *Croson* majority, for example, the history of educational discrimination in Richmond “does little to define the scope of any injury to minority contractors in Richmond or the necessary remedy.”<sup>263</sup> Given *Croson*’s guidance, anecdotes of educational or societal discrimination<sup>264</sup> are likely to receive little consideration by courts evaluating a challenged MBE program. Instead, collected anecdotes should relate specifically to discrimination in public contracting.

5. *Collected Anecdotes of Discrimination Should Be Industry Specific*

Strict scrutiny likely requires further differentiation. In its discussion of statistical evidence, the *Croson* Court emphasized that the relevant pool of firms to consider are those that are “qualified to undertake the particular task.”<sup>265</sup> As a result, disparity studies often conduct separate statistical analyses for categories such as construction, services and commodities.<sup>266</sup> To perform its essential, cor-

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<sup>259</sup> See *id.* at 504.

<sup>260</sup> See *id.* at 505 (“Justice Marshall’s suggestion [in dissent] that findings of discrimination may be ‘shared’ from jurisdiction to jurisdiction . . . is unprecedented. We have never approved the extrapolation of discrimination in one jurisdiction from the experience of another.” (citation omitted)).

<sup>261</sup> See *Associated Gen. Contractors of Am. v. City of Columbus*, 936 F. Supp. 1363, 1414 (S.D. Ohio 1996), *vacated on other grounds by* 172 F.3d 411 (6th Cir. 1999) (“Many of the anecdotes . . . were irrelevant because they . . . were too remote in time.”).

<sup>262</sup> See *Croson*, 488 U.S. at 499.

<sup>263</sup> *Id.* at 505.

<sup>264</sup> See, e.g., *Mason Tillman Assocs.*, *supra* note 1, at 1-18 to 1-23 (presenting anecdotes of discrimination relating to personal and educational experiences during the 1930s–1960s).

<sup>265</sup> See *Croson*, 488 U.S. at 501–02.

<sup>266</sup> See *La Noue*, *supra* note 2, at 492; see, e.g., *MGT of America, Inc.*, *supra* note 126, at 4-1 (indicating that separate statistical analyses were conducted for “construction contracting, general services contracting, and purchasing of commodities”); see also *Hearing*,

roborating role,<sup>267</sup> anecdotal evidence likely requires similar differentiation. Thus, jurisdictions should collect and report anecdotes of discrimination for each industry category included in an MBE preference program.<sup>268</sup>

#### 6. *Collected Anecdotes of Discrimination Should Be Group Specific*

*Croson* clearly requires evidence of discrimination against *each* racial group included in an MBE preference program.<sup>269</sup> The Court criticized the Richmond plan for its “random inclusion of racial groups” for which there was “*absolutely no evidence* of past discrimination.”<sup>270</sup> Thus, jurisdictions should collect anecdotal (and statistical) evidence of discrimination against each racial or ethnic group benefited by an MBE program.<sup>271</sup>

#### 7. *Collected Anecdotes of Discrimination Should Contain Adequate Details of Specific Instances of Discrimination*

Given *Croson*'s requirement of “particularized findings” rather than “generalized assertion[s]” of discrimination,<sup>272</sup> it is essential that jurisdictions gather details of specific instances of discrimination, rather than general assessments of discriminatory conditions.<sup>273</sup> In Judge Graham's formulation, consultants collecting anecdotal evidence should ask, “‘who, what, when, where, why and how?’”<sup>274</sup>

#### 8. *Attempts Should Be Made to Corroborate Anecdotes of Discrimination*

As the Dade County<sup>275</sup> and Columbus<sup>276</sup> cases made clear, it can be fundamentally important for jurisdictions to demand that consul-

*supra* note 173 (concluding that *Croson* requires even further differentiation within these categories).

<sup>267</sup> See discussion *supra* Part III.A.

<sup>268</sup> Often, however, disparity studies do not break down anecdotal evidence by category. See, e.g., *Mason Tillman Assocs.*, *supra* note 1, at 2-55 to 2-126; *MGT of America, Inc.*, *supra* note 126, at 5-12 to 5-41.

<sup>269</sup> See *supra* text accompanying notes 59-62.

<sup>270</sup> See *Croson*, 488 U.S. at 506.

<sup>271</sup> See, e.g., *Contractors Ass'n of E. Pa., Inc. v. City of Philadelphia*, 6 F.3d 990, 1008 (3d Cir. 1993) (affirming the district court's summary judgment order striking down a city preference program with respect to businesses owned by Hispanic and Asian-American individuals, because the city did not present sufficient statistical and anecdotal evidence with respect to those groups).

<sup>272</sup> See 488 U.S. at 498 (quoting, in part, *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986)).

<sup>273</sup> See *supra* text accompanying notes 187-89, 226.

<sup>274</sup> See *Associated Gen. Contractors of Am. v. City of Columbus*, 936 F. Supp. 1363, 1426 (S.D. Ohio 1996), *vacated on other grounds by* 172 F.3d 411 (6th Cir. 1999).

<sup>275</sup> See discussion *supra* Part IV.B.

<sup>276</sup> See discussion *supra* Part IV.C.

tants diligently seek to verify individuals' accounts of discrimination.<sup>277</sup> Adequate verification will require consultants to approach the task with skepticism. They should assess the credibility and potential bias of respondents, solicit the perspectives of parties accused of discriminatory acts, and consider potential nondiscriminatory explanations.<sup>278</sup> As Judge Ryskamp noted, "Without corroboration, the Court cannot distinguish between allegations that in fact represent an objective assessment of the situation, and those that are fraught with heart-felt, but erroneous, interpretations of events and circumstances."<sup>279</sup>

Diligent attempts to corroborate anecdotes of discrimination may be one of the most important steps that a jurisdiction can take to improve the persuasiveness of its anecdotal evidence. When corroboration proves impossible for a specific account of discrimination, consultants collecting the evidence should report that verification was attempted, while acknowledging that the account is uncorroborated. Such diligence and forthrightness would likely enhance the persuasiveness of the evidence for a court applying strict scrutiny.

#### 9. *Anonymous Responses Should Be Discouraged*

Although confidential interviews are favored by some disparity study consultants,<sup>280</sup> anonymous anecdotes are problematic within the context of strict scrutiny. As an initial matter, if anecdotal evidence is anonymous, it would be very difficult for a jurisdiction to assess the credibility of the evidence.<sup>281</sup> Attempts to corroborate accounts of discrimination likely would be hampered. For example, it would be difficult to get the perspective of a party accused of discrimination while, at the same time, preserving the confidentiality of the accusatory party (i.e., providing more details of the alleged discriminatory incident makes it more likely that confidentiality will be compromised). Further, if an MBE program is challenged in court, anonymous anecdotes may be of limited value. Plaintiffs will certainly request interview notes and other related documents, and they may also seek to depose individuals who supplied anecdotal evidence. If, because of the need to protect interviewees' confidentiality, plaintiffs are denied the opportunity to rebut anecdotal accounts of discrimination, a court applying strict scrutiny is likely to view such evidence skeptically. To enhance the persuasiveness of anecdotal evidence of

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<sup>277</sup> See *supra* notes 200, 228 and accompanying text.

<sup>278</sup> See *supra* text accompanying notes 194-95, 199-200.

<sup>279</sup> Eng'g Contractors Ass'n of S. Fla., Inc. v. Metro. Dade County, 943 F. Supp. 1546, 1584 (S.D. Fla. 1996), *aff'd*, 122 F.3d 895 (11th Cir. 1997).

<sup>280</sup> See, e.g., Mason Tillman Assocs., *supra* note 1, at 2-57 (stating that anonymous interviews provide MWBEs "a protected setting").

<sup>281</sup> See Associated Gen. Contractors of Am. v. City of Columbus, 936 F. Supp. 1363, 1414 (S.D. Ohio 1996), *vacated on other grounds by* 172 F.3d 411 (6th Cir. 1999).

discrimination, therefore, jurisdictions should discourage consultants from relying on anonymous responses.

### B. Post-Enactment Evidence

MBE program proponents should also consider the current uncertainty about whether courts may consider post-enactment evidence of discrimination when evaluating whether a government had a strong basis in evidence of discrimination when it enacted a race-based remedy.<sup>282</sup> Because the 1996 Supreme Court opinion *Shaw v. Hunt* suggests that the Court will only permit pre-enactment evidence,<sup>283</sup> jurisdictions may find it necessary to reenact their MBE programs after they have gathered adequate statistical and anecdotal evidence of discrimination.

### CONCLUSION

Many jurisdictions' race-based preference programs for public contracts are vulnerable to equal protection challenges because the localities do not have adequate anecdotal evidence of discrimination. Persuasive anecdotal evidence of discrimination is essential for local policy makers to construct a race-based preference program that can withstand constitutional scrutiny. Most jurisdictions' typical anecdotal evidence, however, consists largely of general statements of discriminatory conditions or unverified accounts of individual discrimination. For MBE preference programs to survive serious court challenges, jurisdictions likely will need to demand fundamental changes in the types and quality of anecdotal evidence used to support those programs. Policy makers intent on *Crosby*-proofing their MBE programs should insist on anecdotal evidence of discrimination that is specific, detailed, and verified.

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<sup>282</sup> See *supra* notes 63–73 and accompanying text.

<sup>283</sup> See 517 U.S. 899, 910 (1996); *supra* notes 70–72 and accompanying text.