

# RESOLVING CONSTITUTIONAL UNCERTAINTY IN AFFIRMATIVE ACTION THROUGH CONSTRAINED CONSTITUTIONAL EXPERIMENTATION

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*There is significant uncertainty as to what types of remedial affirmative action programs in government contracting are constitutional. This uncertainty adversely affects policymakers, courts, government agencies, and businesses. This Note discusses how one remedial contracting affirmative action effort, the Department of Transportation (DOT) Disadvantaged Business Enterprise (DBE) Program, has a unique cooperative federalist structure that can help policymakers address this constitutional uncertainty. This structure, constrained constitutional experimentation, has three aspects: (1) an underlying context of constitutional uncertainty, (2) the use of the federal government's Spending Power to create incentives for and constrain state action, and (3) the preservation of state governments' flexibility to experiment. Because of this structure's ability to transfer the results of experimentation from one state to others, the DBE program helps policymakers resolve the constitutional uncertainty surrounding remedial contracting affirmative action programs.*

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INTRODUCTION

The United States federal government is the world’s largest buyer of goods and services.<sup>1</sup> When combined with state and local contracting, this market totaled over one trillion dollars in 2010, spanning from janitorial services to information technology, fighter jets to paper clips.<sup>2</sup> Due to historical imbalances among recipients of these contracts, governments at all levels have created contracting affirmative action programs to remedy the present effects of past discrimination.<sup>3</sup> This Note focuses specifically on race-based remedial affirmative action programs in contracting.<sup>4</sup>

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<sup>1</sup> *Contracting Opportunities*, U.S. SMALL BUS. ADMIN., <http://archive.sba.gov/contractingopportunities/index.html> (last visited Aug. 13, 2012) (noting that the U.S. government purchases over \$425 billion in goods and services annually).

<sup>2</sup> In 2010, federal, state, and local governments spent approximately \$1.1 trillion on intermediate goods and services and approximately \$200 billion on equipment and software investments. U.S. BUREAU OF ECON. ANALYSIS, *SURVEY OF CURRENT BUSINESS*, at D-28 tbl.3.9.5, D-31 tbl.3.10.5 (2011), available at [http://www.bea.gov/scb/pdf/2011/09%20September/D%20pages/0911dpg\\_a.pdf](http://www.bea.gov/scb/pdf/2011/09%20September/D%20pages/0911dpg_a.pdf).

<sup>3</sup> See, e.g., MARIA E. ENCHAUTEGUI ET AL., THE URBAN INSTITUTE, *DO MINORITY-OWNED BUSINESSES GET A FAIR SHARE OF GOVERNMENT CONTRACTS?*, at viii, x (1997), available at <http://www.urban.org/uploadedpdf/dmobjfsgc.pdf> (noting barriers faced by minority-owned businesses in contracting and finding that “[m]inority-owned businesses as a group receive only 57 cents of each dollar they would be expected to receive”).

<sup>4</sup> Affirmative action programs in contracting do not focus on race-based considerations alone. For example, many states and the federal government have enacted programs aimed at women-owned businesses. See, e.g., Press Release, U.S. Small Bus. Admin., *SBA Announces Contracting Program for Women-Owned Small Businesses* (Feb. 1, 2011), <http://www.sba.gov/content/sba-announces-contracting-program-women-owned-small>

Remedial contracting affirmative action programs vary greatly among states. To begin with, a few states outlaw consideration of race in state contracting or other affirmative action efforts.<sup>5</sup> However, states without such categorical prohibitions adopt various race-conscious policies, employ a variety of methods, and use differing constitutional justifications.<sup>6</sup> Despite the proliferation of remedial contracting affirmative action programs, there remains great uncertainty as to these programs' constitutionality. The uncertainty centers around which specific programmatic features and justifications pass constitutional muster in practice.

In 1995, the Supreme Court attempted to resolve some of this uncertainty. In *Adarand Constructors, Inc. v. Peña*, the Court assessed the constitutionality of a remedial federal contracting affirmative action program.<sup>7</sup> *Adarand* established that all race-conscious affirma-

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businesses (describing a new program designed to provide greater access to federal contracting opportunities for women-owned small businesses).

<sup>5</sup> See, e.g., CAL. CONST. art. I, § 31(a) ("The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting."); MICH. CONST. art. I, § 26(2) (same). These states have specific constitutional clauses that still allow use of racial preferences when such programs are required as a condition of federal funding. See, e.g., CAL. CONST. art. I, § 31(e) ("Nothing in this section shall be interpreted as prohibiting action which must be taken to establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the State."); MICH. CONST. art. I, § 26(4) ("This section does not prohibit action that must be taken to establish or maintain eligibility for any federal program, if ineligibility would result in a loss of federal funds to the state.").

<sup>6</sup> For example, some programs suggest aspirational, race-conscious targets, while others set race-neutral goals or no goals at all. See, e.g., N.Y. EXEC. LAW § 315(5) (McKinney 2012) (requiring each agency to establish annual goals for contracts with minority- and women-owned businesses); Commonwealth of Va., Office of the Governor, Exec. Order No. 33 (Aug. 10, 2006), available at [http://www.lva.virginia.gov/public/EO/eo33\(2006\).pdf](http://www.lva.virginia.gov/public/EO/eo33(2006).pdf) (establishing race-neutral small business goals to support minority- and women-owned businesses). But see *Grutter v. Bollinger*, 539 U.S. 306, 334 (2003) (reaffirming that racial quotas are unconstitutional). Programs also use a variety of other methods to boost participation by underrepresented groups in government contracting, including price preferences, set-asides, bonding, training, business development, outreach, and technical assistance. See, e.g., FLA. STAT. ANN. § 255.102(1) (West 2009) ("Agencies shall consider the use of price preferences . . . as determined appropriate . . . to increase minority participation."); OHIO REV. CODE ANN. § 125.081(A) (West 2002) (requiring the state to set aside a portion of certain state competitive purchases for minority business enterprises); OHIO REV. CODE ANN. § 122.88 (creating a minority business bonding fund); MICH. COMP. LAWS ANN. § 247.659b Sec. 9b(1) (West 2001) (requiring the state to establish technical assistance programs, assist in providing nontraditional capital, create incentives for mentorship, and increase information programs to assist minority businesses). The data on which states base these programs also vary. See *infra* notes 43–48 and accompanying text (discussing the use of disparity studies, other statistical information, and anecdotal evidence to support affirmative action programs).

<sup>7</sup> 515 U.S. 200, 204 (1995) (summarizing the Court's analysis of whether "the Federal Government's practice of giving general contractors on Government projects a financial

tive action efforts must survive strict scrutiny, requiring the program to (1) promote a compelling governmental interest, and (2) be narrowly tailored to serve that interest.<sup>8</sup>

However, any hope for constitutional clarity was short-lived. The *Adarand* Court vacated the lower court decision and remanded for consideration based on the new constitutional standard,<sup>9</sup> but failed to provide meaningful guidance on what makes these programs constitutional in practice.<sup>10</sup> Moreover, since *Adarand*, the Supreme Court has not revisited the constitutionality of remedial contracting programs.<sup>11</sup> In fact, under its current Equal Protection jurisprudence, the Supreme Court has never affirmatively upheld a government contracting affirmative action program.<sup>12</sup>

The lack of constitutional certainty in this area has potentially significant costs. First, policymakers must develop remedial contracting programs at their own risk—which is a problem, given the size of the contracting market and the growing role these contracts play in government administration.<sup>13</sup> Second, lower courts struggle to interpret *Adarand* and identify what constitutes a compelling governmental interest and narrow tailoring for purposes of remedying racial

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incentive to hire subcontractors controlled by ‘socially and economically disadvantaged individuals’. . . violates the . . . Due Process Clause”).

<sup>8</sup> See *id.* at 235 (“Federal racial classifications, like those of a state, must serve a compelling governmental interest, and must be narrowly tailored to further that interest.”).

<sup>9</sup> See *id.* at 239 (remanding the case for further proceedings consistent with the opinion).

<sup>10</sup> See *infra* notes 39–52, 58–62, and accompanying text (discussing the open questions remaining after *Adarand*).

<sup>11</sup> The Supreme Court has denied petitions for certiorari to resolve some of these constitutional issues on multiple occasions. See *infra* note 33 and accompanying text.

<sup>12</sup> The Supreme Court has upheld two federal affirmative action contracting and licensing programs, but both of them were decided before *Adarand* established that federal affirmative action programs must be subject to strict scrutiny. See *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 566, 569 (1990) (upholding a federal licensing affirmative action effort because “benign race-conscious measures mandated by Congress . . . are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives”); *Fullilove v. Klutznick*, 448 U.S. 448 (1980) (upholding, in multiple opinions, a federal law that required ten percent of funds to go to minority-owned businesses for some public works projects); see also George C. Hlavac, *Interpretation of the Equal Protection Clause: A Constitutional Shell Game*, 61 GEO. WASH. L. REV. 1349, 1354–55 (1993) (describing the standard of review in *Metro Broadcasting* as “intermediate scrutiny”).

<sup>13</sup> See ACQUISITION ADVISORY PANEL, REPORT OF THE ACQUISITION ADVISORY PANEL TO THE OFFICE OF FEDERAL PROCUREMENT POLICY AND THE UNITED STATES CONGRESS 414 (2007), available at [https://www.acquisition.gov/comp/aap/24102\\_GSA.pdf](https://www.acquisition.gov/comp/aap/24102_GSA.pdf) (discussing the drivers of the increased use of contractors as service providers for the federal government); *supra* notes 1–2 and accompanying text (describing the size of the government contracting market).

inequity in contracting.<sup>14</sup> Third, businesses must compete without assurances regarding the constitutionality of the contracting programs on which they rely. Finally, uncertainty about the constitutional bounds of affirmative action programs can undercut development of substantive affirmative action policy for the many businesses that partake in and benefit from these programs; if affirmative action programs stand on constitutionally uncertain ground, policymakers may spend more effort simply ensuring that the programs survive constitutional scrutiny, rather than improving them.<sup>15</sup>

Still, there may be good reasons that the Supreme Court leaves certain issues unresolved. In other contexts, the Supreme Court has discussed the importance of allowing lower courts and other government branches to “percolate” on important issues before resolving constitutional or statutory debate.<sup>16</sup> This same approach could explain why the Court avoids clarifying the uncertainty in remedial affirmative action: The Court may wish to leave it to lower courts, along with federal and state executive and legislative actors, to clarify this uncertainty.

If there are costs to uncertainty, and yet the Supreme Court wants these unresolved constitutional issues to percolate, it is important to identify the best ways to allow this percolation to take place. One program, the Department of Transportation (DOT) Disadvantaged Business Enterprise (DBE) Program, is particularly helpful in this regard. First enacted in 1982, the program requires states to develop their own participation goals for small businesses owned by socially and economically disadvantaged individuals and to implement state-level programs to receive federal DOT grants.<sup>17</sup>

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<sup>14</sup> See *infra* notes 39–52, 58–62, and accompanying text (demonstrating uncertainty in the doctrine after *Adarand*).

<sup>15</sup> In fiscal year 2010, small disadvantaged businesses received over \$34 billion in federal government contracts. U.S. SMALL BUS. ADMIN., GOVERNMENT-WIDE PERFORMANCE: 2010 SMALL BUSINESS PROCUREMENT SCORECARD (2011), available at [http://www.sba.gov/sites/default/files/files/FY10%20SB%20Procurement%20Scorecard\\_FINAL\\_GOVERNMENT%20WIDE.pdf](http://www.sba.gov/sites/default/files/files/FY10%20SB%20Procurement%20Scorecard_FINAL_GOVERNMENT%20WIDE.pdf).

<sup>16</sup> See Philip J. Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U. L. REV. 1692, 1702–03 (2001) (arguing that the Supreme Court “can benefit from ‘percolation’ of different approaches before ultimately settling upon a single approach or delineating the scope of acceptable approaches”); see also *United States v. Mendoza*, 464 U.S. 154, 160 (1984) (“Allowing only one final adjudication would deprive this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question . . . .”); cf. Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111, 1156–57 (1990) (arguing that in administrative rulemaking, circuit conflicts allow agencies more time to analyze similar issues, improve legal decisionmaking, and facilitate dialogue).

<sup>17</sup> See *infra* note 67 and accompanying text (discussing states’ responsibilities under the DBE program). The DBE program’s requirements apply to all recipients of certain federal

Under the program, the federal government conditions certain federal transportation grants to states on development of remedial contracting affirmative action programs. Congress creates this condition through its significant Spending Power.<sup>18</sup> This “power of the purse” gives the federal government substantial control over state DBE programs.<sup>19</sup> Still, DBE program regulations give states significant flexibility in implementing their programs, which allows them to experiment within the bounds set by federal regulations.<sup>20</sup>

The DBE program’s structure, as summarized above, is novel in affirmative action.<sup>21</sup> I describe this cooperative federalist structure as “constrained constitutional experimentation,” which has three aspects: (1) an underlying context of constitutional uncertainty, (2) the use of the federal government’s Spending Power to create incentives for and constrain state action, and (3) the preservation of state governments’ flexibility to experiment.<sup>22</sup>

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DOT grants, but this Note focuses on states’ implementation of the DBE program. *See* 49 C.F.R. § 26.3(a) (2011) (describing which recipients are governed by the DBE program regulations).

<sup>18</sup> *See infra* notes 90–95 and accompanying text (discussing the scope of Congress’s Spending Power, including the limitation of its potential scope in the 2012 Supreme Court case *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012)).

<sup>19</sup> *See infra* notes 138–40 and accompanying text (discussing the extent of federal control over the DBE program).

<sup>20</sup> *See infra* notes 152–66 and accompanying text (identifying where states have flexibility in the DBE program).

<sup>21</sup> None of the several other types of affirmative action programs promulgated by federal and state entities is like the DBE program. Most remedial contracting programs aim to remedy discrimination at the same level of government. *See, e.g.*, 15 U.S.C. § 637 (2006) (creating a federal affirmative action program aimed at remedying discrimination in federal contracting through business development and contracting assistance for individuals “who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities”); OHIO REV. CODE ANN. § 125.081(A) (West 2002) (creating a state affirmative action program aimed at remedying discrimination in state contracting); *see also* *Ritchey Produce Co. v. Ohio Dep’t of Admin. Servs.*, 707 N.E.2d 871, 915 (Ohio 1999) (noting that while the bill did not explicitly discuss the Ohio statute’s remedial goals, it was “evident . . . that the purpose of the . . . [Minority Business Enterprise] set-aside provisions was to halt and to redress past practices in which the state was involved in discrimination against minority contractors”). Federal programs that rely on the Spending Power to encourage state and local actors tend to provide states either with no constraints or with limited flexibility. *See, e.g.*, 34 C.F.R. § 100(3)(b)(6)(i) (2011) (requiring affirmative action programs for previously discriminatory recipients of federal financial assistance from the Department of Education and permitting affirmative action programs for other recipients); 41 C.F.R. § 60-2 (2011) (requiring certain non-construction recipients of government contracts to develop affirmative action programs that are outlined by the Office of Federal Contracting Compliance Programs).

<sup>22</sup> *See* Weiser, *supra* note 16, at 1696 (“Cooperative federalism programs set forth some uniform federal standards . . . but leave state agencies with discretion to implement the federal law, supplement it with more stringent standards, and, in some cases, receive an

This Note argues that the DBE program's use of constrained constitutional experimentation clarifies constitutional uncertainty in remedial contracting affirmative action. This structure allows the federal government to create incentives for states to experiment and develop a range of possible affirmative action programs. Lower courts—and possibly the Supreme Court—then evaluate this variation to delineate the boundaries of constitutional doctrine. Federal and state governments follow by taking this feedback from the courts and further refining their programs.

This Note contributes to the literature on cooperative federalism by demonstrating that federal policymakers can use cooperative federalism to resolve constitutional uncertainty where the Supreme Court has opted not to clarify doctrine.<sup>23</sup> This use of cooperative federalism contrasts with more traditional understandings of the concept, which regard the use of federal control and state flexibility as a means to develop substantive policy, not constitutional doctrine.<sup>24</sup>

Constrained constitutional experimentation clarifies remedial contracting affirmative action doctrine because it enables states to experiment and, more importantly, enables other states to learn from those experiments. The constitutional insights gleaned from experimentation in one state are portable to other states, an effect I label “constitutional portability.” Constitutional portability allows the federal government and its state counterparts to address key questions left open after *Adarand*.<sup>25</sup>

Part I of this Note describes the constitutional uncertainty in remedial contracting affirmative action. Part II introduces the DBE program and discusses its current constitutional status. Part III introduces and develops the key aspects of constrained constitutional experimentation in the context of the DBE program. Part IV then examines several examples of the DBE program's structure in practice, arguing that the program's unique structure helps resolve the constitutional uncertainty in remedial government contracting affirmative action. The Note concludes with observations on the wider applicability of constrained constitutional experimentation.

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exemption from federal requirements.”); *see also infra* notes 131–32 (discussing some of the literature on cooperative federalism).

<sup>23</sup> *See infra* notes 131–32 and accompanying text (discussing the uniqueness of using cooperative federalism to resolve constitutional uncertainty).

<sup>24</sup> *See infra* note 131 (discussing more traditional uses of cooperative federalism).

<sup>25</sup> *See infra* Part III.D (addressing constitutional portability and its benefits in the context of remedial contracting affirmative action).

## I

THE CONSTITUTIONAL STATUS OF REMEDIAL  
CONTRACTING AFFIRMATIVE ACTION PROGRAMS

This Part offers an overview of the current state of remedial contracting affirmative action doctrine, covering the most relevant Supreme Court decisions and the uncertainty they have created among lower courts.

The Supreme Court subjects any government-promulgated racial classification to strict scrutiny, requiring the classification to be narrowly tailored to serve a compelling governmental interest.<sup>26</sup> The Court recognizes two major compelling interests for race-conscious affirmative action: the remedial and diversity interests.<sup>27</sup> Under the diversity interest, the Court has clarified what kinds of programs are constitutional in the higher education context.<sup>28</sup> By contrast, the

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<sup>26</sup> See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007) (“It is well established that when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny.”); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 235 (1995) (“Federal racial classifications, like those of a State, must serve a compelling governmental interest, and must be narrowly tailored to further that interest.”).

Until *Adarand*, there was even uncertainty about the standard of review applicable to racial classifications aimed at remedying past discrimination. See *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 564–66 (1990) (upholding a federal licensing affirmative action program using intermediate scrutiny); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505, 507–08 (1989) (finding a city contracting affirmative action program unconstitutional under strict scrutiny); *Fullilove v. Klutznick*, 448 U.S. 448, 491–92 (1980) (Burger, C.J.) (plurality opinion) (upholding a federal contracting affirmative action program, but applying an unclear standard of scrutiny); *Fullilove*, 448 U.S. at 519 (Marshall, J., concurring) (upholding a federal contracting affirmative action program in a concurring opinion applying intermediate scrutiny). *Adarand* clarified this uncertainty, identifying three features of earlier jurisprudence: “skepticism,” which necessitated strict scrutiny; “consistency,” which required similar treatment of racial classifications, whether “benign” or not; and “congruence,” which subjected state and federal classifications to the same Equal Protection analysis. See *Adarand*, 515 U.S. at 223–25 (outlining these three principles of pre-*Adarand* affirmative action jurisprudence).

<sup>27</sup> See *Parents Involved*, 551 U.S. at 720–22 (“[I]t suffices to note that our prior cases . . . have recognized two interests that qualify as compelling[:] . . . remedying the effects of past intentional discrimination [and] . . . diversity in higher education . . .”). The Court has also considered, and generally rejected, several other interests for affirmative action. See, e.g., *id.* at 788 (Kennedy, J., concurring) (leaving open the possibility that racial isolation in lower education may be addressable through race-conscious measures); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274–76 (1986) (rejecting a “role model” theory as the basis for a compelling interest in a race-based teacher layoff policy); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 307–11 (1978) (opinion of Powell, J.) (considering and rejecting interests in racial balancing and remedying societal discrimination, but leaving open the possibility of finding a compelling interest in promoting health care delivery).

<sup>28</sup> This Note does not focus on the diversity interest. In *Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Gratz v. Bollinger*, 539 U.S. 244 (2003), the Supreme Court clarified the constitutional status of affirmative action programs promoting diversity in higher educa-



Court has provided little practical guidance on what qualifies as a constitutional remedial interest, particularly for contracting programs.

The most recent Supreme Court case to clarify remedial contracting affirmative action doctrine was *Adarand* in 1995. In *Adarand*, a non-disadvantaged business subcontractor challenged the award of a highway construction subcontract to a disadvantaged business that submitted a higher bid.<sup>29</sup> The challenged DBE program provided incentives to contractors to hire subcontractors that were disadvantaged businesses, and businesses with at least fifty-one percent minority ownership were presumed disadvantaged.<sup>30</sup> The plaintiff claimed that the financial incentives for hiring disadvantaged subcontractors violated the Equal Protection guarantees of the Fifth and Fourteenth Amendments.<sup>31</sup> The Supreme Court instructed the lower court to apply strict scrutiny and remanded the case for reconsideration.<sup>32</sup>

Since then, lower courts have struggled to apply *Adarand*. Although *Parents Involved* discussed the remedial interest in primary education briefly, the Supreme Court has declined several petitions for certiorari in cases challenging the constitutionality of remedial

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tion. In *Grutter*, the Court applied strict scrutiny and upheld the challenged law school affirmative action program for admissions. 539 U.S. at 343. The Court concluded that a state could establish that there is a compelling interest in diversity because of the “real,” “substantial” “educational benefits” that it confers. *Id.* at 330. The Court then also identified specific elements of the law school admissions plan that made it narrowly tailored. *See id.* at 334 (pointing to a lack of quotas and a “flexible, nonmechanical” decision process in upholding the plan). By contrast, in *Gratz*, the Court invalidated an undergraduate admissions effort because it was not narrowly tailored due to its more rigid, mechanical approach. 539 U.S. at 271–72 (noting that the admissions policy “automatically distributes” a certain number of points to applicants from underrepresented minority groups). The reach of these decisions was limited by *Parents Involved*, in which the Court refused to extend the diversity interest to the primary and secondary education context. *See Parents Involved*, 551 U.S. at 724–25 (noting the “unique context of higher education”).

<sup>29</sup> *Adarand*, 515 U.S. at 205–06 (reciting the facts that led to *Adarand*’s challenge).

<sup>30</sup> *Id.* at 206–08 (explaining the mechanics of the DBE program).

<sup>31</sup> *Id.* at 205–06.

<sup>32</sup> *Id.* at 235, 239. On remand, the district court found that the DBE program was not narrowly tailored. *Adarand Constructors, Inc. v. Peña*, 965 F. Supp. 1556, 1577–84 (D. Colo. 1997) (analyzing whether the DBE was narrowly tailored, and finding that it was not). Eventually, after several appeals, the Tenth Circuit found that while the original DBE program under challenge was not narrowly tailored and therefore violated the Equal Protection guarantee, the revised DBE program was narrowly tailored to serve a compelling governmental interest. *See Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1155 (10th Cir. 2000) (“[T]he . . . DBE certification program[] as currently structured, though not as [it was] structured in 1997 when the district court last rendered judgment, pass[es] constitutional muster . . .”), *cert. granted sub nom.* *Adarand Constructors, Inc. v. Mineta*, 532 U.S. 941, *and cert. dismissed*, 534 U.S. 103, 111 (2001) (dismissing the writ of certiorari as improvidently granted).

contracting affirmative action programs.<sup>33</sup> In fact, the Court has not found any remedial contracting affirmative action program constitutional under its current Equal Protection jurisprudence, leaving lower courts without identifiable program parameters.<sup>34</sup> As a result, the specific requirements of each prong of strict scrutiny remain uncertain in the remedial contracting affirmative action context.

### A. *Uncertainty in Defining a Compelling Remedial Interest*

Contracting programs generally assert remediation of the present effects of past discrimination as a compelling governmental interest.<sup>35</sup> To meet the requirements of strict scrutiny, the government actor must first demonstrate a “strong basis in evidence” for a compelling interest.<sup>36</sup>

In *City of Richmond v. J.A. Croson Co.*, the Supreme Court required that prior discrimination be identified “with some speci-

<sup>33</sup> *E.g.*, *W. States Paving Co. v. Wash. State Dep’t of Transp.*, 407 F.3d 983, 987 (9th Cir. 2005) (describing the issue in the case as whether a law which “authorizes the use of race- and sex-based preferences in federally funded transportation contracts[ ] violates equal protection”), *cert. denied sub nom. City of Vancouver v. W. States Paving Co.*, 546 U.S. 1170 (2006); *Sherbrooke Turf, Inc. v. Minn. Dep’t of Transp.*, 345 F.3d 964, 968 (8th Cir. 2003) (describing the issue in the case as whether the revised DBE program “satisfies strict scrutiny”), *cert. denied*, 541 U.S. 1041 (2004); *Concrete Works of Colo., Inc. v. City of Denver*, 321 F.3d 950, 954 (10th Cir.) (describing the case as involving a challenge to an affirmative action ordinance establishing participation goals for racial minorities and women), *cert. denied*, 540 U.S. 1027 (2003).

<sup>34</sup> The Supreme Court has upheld two federal affirmative action contracting or licensing programs, but both of them were before *Adarand* established that federal affirmative action programs are subject to strict scrutiny. *See Metro Broad., Inc. v. FCC*, 497 U.S. 547, 566 (1990) (upholding, under intermediate scrutiny, a federal licensing affirmative action effort); *Fullilove v. Klutznick*, 448 U.S. 448 (1980) (upholding, in multiple opinions, a federal law that required ten percent of funds to go to minority-owned businesses for some public works projects).

<sup>35</sup> *See, e.g., Rothe Dev. Corp. v. Dep’t of Def.*, 545 F.3d 1023, 1036 (Fed. Cir. 2008) (discussing a compelling interest in “remedying the effects of past or present racial discrimination” (internal quotation marks omitted)). In the government contracting and licensing contexts, the Supreme Court once suggested that diversity could serve as a compelling interest. *See Metro Broad.*, 497 U.S. at 566 (upholding, under the diversity interest, a federal affirmative action program in the broadcast licensing context). However, *Parents Involved*, when read together with *Adarand*, makes the existence of a valid compelling interest in diversity for contracting programs unlikely. *See Michelle Adams, Stifling the Potential of Grutter v. Bollinger: Parents Involved in Community Schools v. Seattle School District No. 1*, 88 B.U. L. REV. 937, 979–82 (2008) (arguing that *Parents Involved* may have closed the door to a compelling interest in diversity in other affirmative action contexts by limiting *Grutter’s* reach to higher education). Even if diversity could be an acceptable compelling interest for contracting, the Court has not clarified the practical contours of this doctrine.

<sup>36</sup> *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989) (citing *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986) (plurality opinion)).

ficity”<sup>37</sup> before a remedial interest could be found compelling for a local remedial contracting effort. However, as subsequent lower court decisions acknowledge, “there is no precise mathematical formula to assess the quantum of evidence that rises to the *Croson* strong basis in evidence benchmark.”<sup>38</sup>

First, it is unclear what kind of evidence suffices to meet the *Croson* benchmark, and lower courts diverge in their assessments of the question. For example, the Federal Circuit held in *Rothe* that a district court could rely only on evidence that was before Congress when the challenged law was enacted.<sup>39</sup> The court also expressed skepticism as to whether statistical studies mentioned in floor speeches were sufficiently “before Congress”<sup>40</sup> and cautioned that Congress should use “reasonably up-to-date” data.<sup>41</sup> These *Rothe* requirements conflict with other recent decisions.<sup>42</sup>

Second, it remains unclear what roles disparity studies,<sup>43</sup> other statistical information, and anecdotal evidence can play in establishing a compelling interest. In *Western States Paving*, the Ninth Circuit considered facial and as-applied challenges to Washington State’s DBE program.<sup>44</sup> When assessing the validity of the federal program, the court considered a wide range of evidence.<sup>45</sup> The court noted that Congress does not need to undertake the “onerous task” of proving nationwide discrimination when enacting a national program.<sup>46</sup> Yet in the same opinion, the court struck down Washington State’s implementation of the DBE program. The court held that the state’s basic statistical evidence, unaccompanied by disparity studies or anecdotal

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<sup>37</sup> *Id.* at 504.

<sup>38</sup> *H.B. Rowe Co. v. Tippett*, 615 F.3d 233, 241 (4th Cir. 2010) (internal quotation marks omitted) (citing *Rothe*, 545 F.3d at 1049).

<sup>39</sup> *Rothe*, 545 F.3d at 1032 (citing *Rothe Dev. Corp. v. Dep’t of Def.*, 413 F.3d 1327, 1338 (Fed. Cir. 2005)).

<sup>40</sup> *Id.* at 1039–40.

<sup>41</sup> *Id.* at 1039 (internal citations omitted).

<sup>42</sup> Other lower courts have considered: post-enactment evidence, *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1166 (10th Cir. 2000), studies mentioned in floor debate when the legislation was before Congress, *W. States Paving Co. v. Wash. State Dep’t of Transp.*, 407 F.3d 983, 991–92 (9th Cir. 2005), and studies conducted nearly ten years before the challenge, *id.* at 992.

<sup>43</sup> Disparity studies estimate the availability and utilization of DBEs and also compile evidence of disparities in the opportunities available to them. *See infra* notes 163–64 and accompanying text (discussing disparity studies).

<sup>44</sup> 407 F.3d at 987 (“We must decide whether the [challenged legislation] . . . violates equal protection, either on its face or as applied by the state of Washington.”).

<sup>45</sup> *See id.* at 991 (“Both statistical and anecdotal evidence of discrimination are relevant in identifying the existence of discrimination.”); *cf. Adarand*, 228 F.3d at 1166 (“Both statistical and anecdotal evidence are appropriate in the strict scrutiny calculus, although anecdotal evidence by itself is not.”).

<sup>46</sup> *W. States Paving*, 407 F.3d at 992.

evidence, failed to satisfy the *Croson* standard.<sup>47</sup> By contrast, other courts have upheld state programs without a disparity study.<sup>48</sup> This causes significant confusion for states as they develop and implement remedial affirmative action programs.

Third, although the Supreme Court accepts certain remedial interests as compelling, it has narrowed the scope of acceptable justifications. Remedial programs serve a compelling interest if they aim to remedy the present effects of past discrimination.<sup>49</sup> Even under a narrower view of what constitutes a remedial interest that requires the targeted past discrimination to be intentional,<sup>50</sup> questions remain about how these tests apply in practice and how policymakers can demonstrate “present effects” of “past discrimination.” For example, the Supreme Court rejects the use of affirmative action to remedy “societal discrimination.”<sup>51</sup> Yet courts recognize governmental interests in not being a “passive participant” in a discriminatory market.<sup>52</sup>

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<sup>47</sup> *Id.* at 1000–03 (noting that “[s]uch claims of general societal discrimination . . . cannot be used to justify race-conscious remedial measures”).

<sup>48</sup> See, e.g., *N. Contracting, Inc. v. Illinois*, 473 F.3d 715, 717, 722–23 (7th Cir. 2007) (upholding state DBE program supported by a custom census instead of a disparity study); *Sherbrooke Turf, Inc. v. Minn. Dep’t of Transp.*, 345 F.3d 964, 973–74 (8th Cir. 2003) (upholding a state DBE program based on a basic statistical study of minority participation in highway contracting); cf. *S. Fla. Chapter of Associated Gen. Contractors v. Broward Cnty.*, 544 F. Supp. 2d 1336, 1341 (S.D. Fla. 2008) (noting that there is no requirement that “a recipient of funds carry out a disparity study” in the context of a county DOT grant recipient).

<sup>49</sup> See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007) (identifying a compelling interest in “remedying the effects of past intentional discrimination”); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995) (“The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it.”).

<sup>50</sup> See *Parents Involved*, 551 U.S. at 720 (identifying a compelling interest in “remedying the effects of past intentional discrimination”).

<sup>51</sup> See, e.g., *Shaw v. Hunt*, 517 U.S. 899, 909–10 (1996) (“[A]n effort to alleviate the effects of societal discrimination is not a compelling interest.”); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505 (1989) (“To accept Richmond’s claim that past societal discrimination alone can serve as the basis for rigid racial preferences would be to open the door to competing claims for ‘remedial relief’ for every disadvantaged group.”).

<sup>52</sup> See, e.g., *Croson*, 488 U.S. at 492 (plurality opinion) (noting that affirmative action would be permissible if the city could establish that it “[became] a ‘passive participant’ in a system of racial exclusion . . . by . . . the local construction industry” and adding that there is a compelling interest in not “financ[ing] the evil of private prejudice”); *W. States Paving*, 407 F.3d at 991 (discussing the federal government’s interest in ensuring that public and private discrimination is not perpetuated); *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1164 (10th Cir. 2000) (recognizing the permissibility of race-conscious efforts “to eradicate discrimination by the governmental entity itself and to prevent the public entity from acting as a ‘passive participant’ in a system of racial exclusion” (quoting *Concrete Works of Colo., Inc. v. City of Denver*, 36 F.3d 1513, 1519 (10th Cir. 1994))). For more discussion on the uncertainty associated with the “passive participant” rationale, see Karen M. Winter, *Adarand Constructors, Inc. v. Slater and Concrete Works of Colorado, Inc. v.*

Reconciling these conflicts will clarify remedial affirmative action doctrine.

### B. *Uncertainty in Determining What Constitutes Narrow Tailoring*

Uncertainty also exists as to how governments can tailor a remedial program narrowly. The *Adarand* Court emphasized that it is possible for truly narrowly tailored remedial programs to survive strict scrutiny.<sup>53</sup> The Court viewed several factors as relevant to narrow tailoring, without resolving the full scope of any of the factors. At a minimum, the promulgating entity must give “‘serious, good faith consideration of workable race-neutral alternatives.’”<sup>54</sup> In *Rothe*, the Federal Circuit synthesized other factors the Supreme Court deems relevant:

(1) the necessity of relief; (2) the efficacy of alternative, race-neutral remedies; (3) the flexibility of relief, including the availability of waiver provisions; (4) the relationship of the stated numerical goals to the relevant labor market; (5) the impact of relief on the rights of third parties; and (6) the overinclusiveness or underinclusiveness of the racial classification.<sup>55</sup>

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City of Denver: *Breathing New Life into Croson’s Passive Participant Model*, 27 U. HAW. L. REV. 469, 471 (2005) (arguing that the Tenth Circuit’s reliance on the “passive participant” rationale fits within the Court’s interpretation of the strict scrutiny standard).

<sup>53</sup> *Adarand*, 515 U.S. at 237 (“[W]e wish to dispel the notion that strict scrutiny is ‘strict in theory, but fatal in fact.’ . . . When race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the ‘narrow tailoring’ test this Court has set out in previous cases.” (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring))).

<sup>54</sup> *Parents Involved*, 551 U.S. at 735 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003)). However, some argue that as a result of *Parents Involved*, courts will assess with more skepticism the existence of “good faith consideration.” See Adams, *supra* note 35, at 981–82.

<sup>55</sup> *Rothe Dev. Corp. v. Dep’t of Def.*, 545 F.3d 1023, 1036 (Fed. Cir. 2008) (citing *United States v. Paradise*, 480 U.S. 149, 171 (1987)); see also *Adarand*, 515 U.S. at 237–38 (noting that some factors relevant to the question of narrow tailoring include “whether there was ‘any consideration of the use of race-neutral means to increase minority business participation’ . . . or whether the program was appropriately limited such that it ‘will not last longer than the discriminatory effects it is designed to eliminate’” (quoting *Croson*, 488 U.S. at 507; *Fullilove*, 448 U.S. at 513 (Powell, J., concurring))); *Croson*, 488 U.S. at 507 (discussing the lack of “any consideration of the use of race-neutral means to increase minority business participation”); *Paradise*, 480 U.S. at 171 (listing several factors, including “the necessity for the relief and the efficacy of alternative remedies; the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties”).

In addition to these factors, the Supreme Court considers the “duration of the relief”<sup>56</sup> and disallows use of racial balancing alone to meet narrow tailoring.<sup>57</sup>

It remains unclear how courts should interpret these narrow tailoring considerations. *Adarand* acknowledged several open questions, including whether the promulgators of an affirmative action policy adequately considered race-neutral means, whether there were sufficient limitations on program duration, and what types of presumptions were permissible.<sup>58</sup> Other open issues include the specific types of efforts and programs permitted;<sup>59</sup> issues of proof, addressing how a government can show a close enough “fit” between discrimination and its remedy;<sup>60</sup> and the roles that geographic diversity<sup>61</sup> and the presence of multiple racial groups<sup>62</sup> play in the narrow-tailoring analysis. Because the Supreme Court’s decisions leave a substantial amount of constitutional uncertainty, lower courts continue to wrestle with these and related issues.

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<sup>56</sup> *Paradise*, 480 U.S. at 171; see also *Grutter*, 539 U.S. at 342 (“[R]ace-conscious admissions policies must be limited in time.”).

<sup>57</sup> *Croson*, 488 U.S. at 507.

<sup>58</sup> *Adarand*, 515 U.S. at 237–38.

<sup>59</sup> The Supreme Court has made it clear that racial balancing and quotas are not acceptable narrowly-tailored means. See *Grutter*, 539 U.S. at 334 (“[A] race-conscious admissions program cannot use a quota system . . .”). However, the Court has not ruled on the constitutionality of set-asides, price preferences, aspirational goals, or any number of other potential race-conscious approaches that states have implemented. See *Adarand*, 515 U.S. at 238–39 (vacating a lower court judgment and remanding on the issue of whether the price preferences challenged in the case were narrowly tailored); *supra* note 33 and accompanying text (discussing how the Supreme Court has declined petitions for certiorari challenging contracting affirmative action programs on numerous occasions since *Adarand*).

<sup>60</sup> For a discussion on the role of disparity studies, other statistical analyses, and anecdotal evidence, see *supra* notes 43–48 and accompanying text.

<sup>61</sup> See *W. States Paving Co. v. Wash. State Dep’t of Transp.*, 407 F.3d 983, 992 (9th Cir. 2005) (declining to require Congress to show discrimination in every state to adopt a remedial affirmative action program). *But see id.* at 997–98 (requiring the state to show discrimination in the state transportation industry for the program to be narrowly tailored).

<sup>62</sup> See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 723 (2007) (criticizing challenged school district plans for considering race only in very limited ways: “white/nonwhite . . . in Seattle and black/‘other’ . . . in Jefferson County”); *Croson*, 488 U.S. at 506 (criticizing a challenged city program for not demonstrating any discrimination against a number of non-black minority groups); *Rothe Dev. Corp. v. Dep’t of Def.*, 545 F.3d 1023, 1047–48 (Fed. Cir. 2008) (requiring evidence of discrimination to be “sufficiently probative of nationwide discrimination against the range of minority groups afforded a presumption”); *W. States Paving*, 407 F.3d at 998 (“[E]ven when discrimination is present within a State, a remedial program is only narrowly tailored if its application is limited to those minority groups that have actually suffered discrimination.”).

## II

## THE DBE PROGRAM AND ITS CONSTITUTIONAL STATUS

This Part introduces the DBE program, discussing both its history and its current structure. It then analyzes the constitutional status of this program by examining several recent lower court decisions on its constitutionality.

*A. Introduction to the DBE Program*

In 1982 Congress passed the Surface Transportation Assistance Act, creating a DOT program to increase minority-owned business participation in transportation contracting.<sup>63</sup> This statute, the precursor to the DBE program, set a requirement, with limited exceptions, that ten percent of funding spent through several DOT grant programs go to small businesses owned by socially and economically disadvantaged individuals.<sup>64</sup> According to Representative Parren Mitchell, the program aimed “to insure the participation of [small and disadvantaged] businesses in these mass public spending[ ] [programs].”<sup>65</sup>

The statute largely left implementation to DOT, and DOT promulgated regulations in 1983.<sup>66</sup> To receive certain DOT grants, states were required to implement a state-level DBE program, develop their own DBE participation goals, and attempt corrective action if they missed their goals.<sup>67</sup> At the same time, even though

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<sup>63</sup> Pub. L. No. 97-424 § 105(f), 96 Stat. 2097 (codified as amended at 23 U.S.C. § 101 (2006)).

<sup>64</sup> *Id.* at 2100 (“Except to the extent that the Secretary determines otherwise, not less than 10 per centum of the amounts authorized to be appropriated under this Act shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals . . .”). Before this effort, DOT had adopted its own regulation, Participation by Minority Business Enterprise in Department of Transportation Programs, 45 Fed. Reg. 21,172 (Mar. 31, 1980) (codified at 49 C.F.R. pt. 23 (1980)), which required select DOT grant recipient-states to set contract goals, award contracts accordingly, and certify firms as Minority Business Enterprises (MBEs).

<sup>65</sup> 128 Cong. Rec. 28,927 (1982) (statement of Rep. Mitchell). Representative Mitchell (D-Md.) introduced the requirement that that ten percent of funding spent through the DOT grant programs go to small businesses owned by socially and economically disadvantaged individuals as a floor amendment during the congressional debates on the Surface Transportation Assistance Act. *See id.*

<sup>66</sup> Participation by Minority Business Enterprises in Department of Transportation Programs, 48 Fed. Reg. 33,432, 33,432 (July 21, 1983).

<sup>67</sup> *See id.* at 33,440 (explaining that a recipient would be deemed out of compliance when it fails to have an approved disadvantaged business program, have an approved overall goal for disadvantaged businesses, or meet its overall goal without reasons beyond its control, and then fails to take additional steps ordered by the Administrators of the Federal Highway Administration or Urban Mass Transit Administration to improve its disadvantaged business participation).

DOT did not penalize states for missing their goals if they complied in good faith, it required states to justify any downward departures from the nationwide ten percent goal.<sup>68</sup>

The initial regulations left states with opportunities to customize their plans, especially if they established more ambitious programs. States had greater flexibility in the early years of the program because the initial regulations were governed by the more lenient *Fullilove* decision, which appeared to subject “benign” federal race-conscious programs to less than strict scrutiny.<sup>69</sup> Although the regulations made clear that the program did not employ quotas<sup>70</sup> or require the use of set-asides,<sup>71</sup> states were relatively free to use group set-asides if they “ha[d] the authority to do so.”<sup>72</sup>

In the wake of *Adarand*, which clarified the applicable standard of review, the DBE program underwent alterations to survive strict scrutiny. Congressional debate on reauthorizing the DBE program showed significant divisions among members of Congress as to whether the program was constitutional, appropriate, effective, and still necessary to remedy discrimination.<sup>73</sup> Still, Congress reauthorized the program in 1998 and left the challenging specifics of implementation to DOT and the Department of Justice (DOJ).<sup>74</sup>

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<sup>68</sup> *Id.* at 33,437 (discussing reasons for requiring states to justify state goals of under ten percent adequately).

<sup>69</sup> *Fullilove v. Klutznick*, 448 U.S. 448 (1980) (upholding, in multiple opinions, a federal law that required ten percent of funds to go to minority-owned businesses for some public works projects); see also Participation by Minority Business Enterprises in Department of Transportation Programs, 48 Fed. Reg. at 33,433 (noting that *Fullilove* upheld a predecessor federal affirmative action statute).

<sup>70</sup> Participation by Minority Business Enterprises in Department of Transportation Programs, 48 Fed. Reg. at 33,438 (noting that the DBE program does not use quotas because the Department cannot “impose penalties or sanctions on recipients simply because they fail to meet an overall goal”).

<sup>71</sup> *Id.* at 33,437 (noting that “the existing DOT MBE regulation . . . does not require[] recipients to use ‘set-asides’ on contracts as a means of meeting overall goals”).

<sup>72</sup> *Id.*

<sup>73</sup> Proponents argued that the program remained constitutional and that it was important for ensuring fairness. See, e.g., 144 CONG. REC. 2679 (1998) (statement of Sen. Baucus) (“First, the program is constitutional; second, the program is fair; and third, it works.”). Opponents countered that the program was an unconstitutional quota or set-aside program. See, e.g., 144 CONG. REC. 2671–72 (statement of Sen. McConnell) (“[W]hat is the reward for these government-preferred firms? The reward is a \$17.3 billion quota. . . . [I]f the government decides that you are the preferred race and gender, then you are able to compete for \$17.3 billion of taxpayer-funded highway contracts. But, if you are [not], then—too bad . . . .”); 144 CONG. REC. 2672 (statement of Sen. McConnell) (“We have the Government committing racial and gender discrimination and paying \$3 million extra just to do it.”); 144 CONG. REC. 2675 (statement of Sen. Sessions) (“[I]t is wrong to have quotas and set-asides [in affirmative action].”).

<sup>74</sup> Supporters anticipated that new regulations would change the program. See, e.g., 144 CONG. REC. 2679 (1998) (statement of Sen. Baucus) (discussing the Clinton



In 1999, DOT issued revised regulations for the DBE program that aimed to address congressional objections to the program's structure<sup>75</sup> and tailor the program narrowly so it could survive strict scrutiny.<sup>76</sup> The regulations made several significant changes. First, they required states to set goals based on the availability of qualified firms in the relevant market and on estimates of DBE participation in a market free of discrimination.<sup>77</sup> States could no longer set goals solely based on the federal ten percent goal or any other aspirational target.<sup>78</sup> Next, the regulations introduced personal net worth limits on DBE owners.<sup>79</sup> Third, the regulations required recipient-states to meet their goals using race-neutral measures to the greatest extent possible.<sup>80</sup> Fourth, the revisions clarified that the presumptions of social disadvantage for women and minorities were rebuttable<sup>81</sup> and allowed non-minorities to prove social disadvantage.<sup>82</sup> Fifth, the changes authorized waivers if states believed that they had more effective ways to boost DBE participation<sup>83</sup> and eliminated the independent justification requirement for states with goals below ten percent.<sup>84</sup> Finally, the new rules explicitly prohibited the use of quotas

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Administration's review of federal affirmative action programs generally and of the DBE program specifically, and noting "significant changes to the DBE program, designed to make the program more flexible, more targeted, and . . . more narrowly tailored"). The Clinton DOJ undertook a significant review of all race-conscious government programs to ensure compliance with the *Adarand* decision. See Response to Comments to Department of Justice Proposed Reforms to Affirmative Action in Federal Procurement, 62 Fed. Reg. 25,648 (May 9, 1997) (responding to comments on DOJ's proposals to bring federal affirmative action into compliance with *Adarand*).

<sup>75</sup> In making these changes, DOT had the 1998 reauthorization debate in mind. For example, DOT made clear that the ten percent goal was "an aspirational goal at the national level," in response to criticism by several senators that the program used quotas or set-asides. Participation by Disadvantaged Business Enterprises in Department of Transportation Programs, 64 Fed. Reg. 5096, 5097 (Feb. 2, 1999) [hereinafter 1999 DBE Regulation Final Rule Notice] (proposing changes to the DBE program). The final rule notice also responds to other aspects of the congressional record. See *id.* at 5098-99, 5100-01 (noting and responding to concerns about economic disadvantage, presumptions and proof of disadvantage, and the regulation's constitutionality).

<sup>76</sup> *Id.* at 5096. DOT revised regulations pertaining to the use of DBEs in other federal Department of Transportation grant programs in 49 C.F.R. pt. 23, but they are similar enough to the primary regulations in 49 C.F.R. pt. 26 for the purposes of this Note.

<sup>77</sup> 49 C.F.R. § 26.45(b) (1999). For a discussion of the program's constitutionality under the Spending Power and the Equal Protection guarantees of the Fifth and Fourteenth Amendments, see Part III.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* § 26.67(b)(1).

<sup>80</sup> *Id.* § 26.51(a).

<sup>81</sup> *Id.* § 26.67(b).

<sup>82</sup> *Id.* § 26.67(d) (establishing a "preponderance of the evidence" standard to prove individual disadvantage).

<sup>83</sup> *Id.* § 26.15(a).

<sup>84</sup> 1999 DBE Regulation Final Rule Notice, *supra* note 75, at 5097.

and allowed the use of set-asides only “when no other method could be reasonably expected to redress egregious instances of discrimination.”<sup>85</sup> These changes attempted to address congressional objections to the program’s structure and ensure that the federal program and state implementation efforts would survive strict scrutiny.

Since 2000, Congress has reauthorized the DBE program several times<sup>86</sup> without making significant changes to either the statute or regulations. Nonetheless, DOJ and Congress have taken steps to strengthen the program’s constitutional footing.<sup>87</sup> In addition, DOT has issued policy guidance in response to state requests and external events. Its guidance in response to the 2005 decision in *Western States Paving Co. v. Washington State Department of Transportation* is particularly significant because of its effects on federal and state DBE policy. Part III.A explores these effects more fully.<sup>88</sup> Over the past three decades, then, the federal government has adjusted the DBE program in response to doctrinal change, taking some, but not all, flexibility from states.

### B. *The Constitutional Status of the DBE Program*

The use of affirmative action in the DBE program is subject to constitutional challenge in three main ways. First, the federal DBE program could be an improper exercise of Congress’s Spending Power since it imposes a set of “unconstitutional conditions” on state governments, forcing the states to violate the Fourteenth Amendment’s Equal Protection Clause. Second, the federal DBE program could

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<sup>85</sup> 49 C.F.R. § 26.43(b).

<sup>86</sup> *E.g.*, Hiring Incentives to Restore Employment Act, Pub. L. No. 111-147, 2010 H.R. 2847 (2010); Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Pub. L. No. 109-59, 2005 H.R. 3 (2005).

<sup>87</sup> *See, e.g.*, DEP’T OF JUSTICE, COMPELLING INTEREST FOR RACE- AND GENDER-CONSCIOUS FEDERAL CONTRACTING PROGRAMS: A DECADE LATER—AN UPDATE TO THE MAY 23, 1996 REVIEW OF BARRIERS FOR MINORITY- AND WOMEN-OWNED BUSINESSES (2009) (documenting disparities in contracting opportunities available to minority- and women-owned businesses); *The Department of Transportation’s Disadvantaged Business Enterprise Program: Hearing Before the H. Comm. on Transp. and Infrastructure*, 110th Cong. 1 (2009) (statement of Rep. James L. Oberstar, Chairman, H. Comm. on Transp. and Infrastructure) (“The purpose of today’s hearing is a very serious and deeply felt need to establish a record on the need for continuation of the Disadvantaged Business Enterprise program.”).

<sup>88</sup> *See* Disadvantaged Business Enterprises: Western States Guidance for Public Transportation Providers, 71 Fed. Reg. 48,579 (Aug. 21, 2006) [hereinafter Western States Guidance Response] (policy guidance); Disadvantaged Business Enterprises: Western States Guidance for Public Transportation Providers, 71 Fed. Reg. 14,775 (Mar. 23, 2006) [hereinafter Western States Guidance Notice] (notice of policy implementation and request for comments); *see also* *W. States Paving Co. v. Wash. State Dep’t of Transp.*, 407 F.3d 983 (9th Cir. 2005).

itself violate the Equal Protection component of the Fifth Amendment. Third, a particular state's implementation of the DBE program could violate the Fourteenth Amendment. The first two challenges involve the facial validity of the federal statute, while the third relates to states' implementation of the program.

Despite the mix of facial and as-applied challenges across the state and federal levels, all three of these types of challenges require the same doctrinal analysis because *Adarand* requires "congruence" between federal and state Equal Protection analysis.<sup>89</sup> DOT's new regulations in response to *Adarand* have withstood facial constitutional scrutiny both under the Fifth Amendment and Spending Power. At the same time, states' experiments in implementing the program have not fared as consistently well. The mixed set of court decisions on the state implementation of the DBE program helps policymakers improve the program's structure and justifications.

### 1. *Challenges to the Constitutionality of the Federal DBE Program*

For a federal program to withstand constitutional scrutiny, it must be a constitutional exercise of congressional power. Congress's authority to enact the DBE program comes from its Spending Power, which generally receives an expansive interpretation by the Supreme Court.<sup>90</sup> This Term, the Supreme Court again considered the Spending Power and narrowed its scope to some degree, perhaps a significant one.<sup>91</sup> However, for the purposes of this Note, I assume that the DBE

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<sup>89</sup> *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 223–24, 226–27 (1995).

<sup>90</sup> *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (noting that while "not unlimited," Congress's Spending Power "is not limited by the direct grants of legislative power found in the Constitution"). Congress's ability to impose conditions on the receipt of federal funds is incident to Congress's Spending Power. *See id.* at 206 ("The Constitution empowers Congress to 'lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States.'" (quoting U.S. CONST. art. I, § 8, cl. 1)). *See id.* ("Incident to this power, Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives." (internal quotation marks and citation omitted)).

<sup>91</sup> The Supreme Court recently found that portions of the Medicaid coverage expansion enacted under the Patient Protection and Affordable Care Act of 2010 exceeded Congress's Spending Power. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2604 (2012) (opinion of Roberts, C.J.) (finding that the threatened loss of over ten percent of a state's overall budget for a state's failure to adopt changes to its Medicaid program constituted "much more than 'relatively mild encouragement'" and amounted to "a gun to the head"); *id.* at 2662 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) (finding that there was "no doubt" that the Medicaid expansion conditions were coercive). This was the first time that the Supreme Court found that conditions imposed on the states amounted to coercion. *See id.* at 2630 (Ginsburg, J., concurring in part and dissenting in part) ("The Chief Justice therefore—for the first time ever—finds an exercise of Congress' spending

program passes muster under the governing *South Dakota v. Dole* test,<sup>92</sup> except to the extent that it violates the unconstitutional conditions prohibition.<sup>93</sup>

Under the Spending Power, the DBE program could be challenged for imposing an unconstitutional condition on states by encouraging them to violate the Fourteenth Amendment's Equal Protection Clause.<sup>94</sup> Alternatively, under the Equal Protection component of the Fifth Amendment's Due Process Clause, the federal government could be directly challenged for violating the Equal Protection guarantee.<sup>95</sup> Because both are facial challenges and because *Adarand* requires "congruence" between federal and state Equal Protection analysis,<sup>96</sup> I analyze these questions together.

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power unconstitutionally coercive."). Looking forward, Chief Justice Roberts, joined by Justices Breyer and Kagan, left open the possibility that statutes with less imposing conditions could also amount to coercion. *See id.* at 2606 (opinion of Roberts, C.J.) ("We have no need to fix a line [for what amounts to coercion]. . . . It is enough for today that wherever that line may be, this statute is surely beyond it.").

<sup>92</sup> The *Dole* test consists of four factors: Congress must exercise its power in "pursuit of the general welfare," set any conditions unambiguously, spend in relation to "the federal interest in particular national projects or programs," and not set conditions that violate any other constitutional provisions. *Dole*, 483 U.S. at 207–08 (internal quotation marks omitted). Additionally, *Dole* cautions Congress to avoid conditions imposed on the state that "might be so coercive as to pass the point at which 'pressure turns into compulsion.'" *Id.* at 211 (noting that the inducement from the federal scheme in *Dole* was "relatively mild encouragement" (quoting *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937))). This additional factor was the basis for the Supreme Court's invalidation of portions of the Patient Protection and Affordable Care Act's Medicaid expansions. *See Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2603–07 (opinion of Roberts, C.J.) (discussing whether the challenged condition was coercive or merely encouragement); *id.* at 2661–66 (Scalia, Kennedy, Thomas, Alito, JJ., dissenting) (analyzing the same issue).

<sup>93</sup> The fourth *Dole* factor has been labeled by some as the "unconstitutional conditions" factor. *See, e.g.*, Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989) (critiquing the murkiness of the unconstitutional conditions doctrine and proposing alternative approaches).

<sup>94</sup> Traditional unconstitutional conditions analysis prevents Congress from designing a program that requires states to adopt an unconstitutional race-conscious classification scheme, even under the Spending Power. *Cf. Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 224 (1995) (emphasizing that there must be congruence between federal and state Equal Protection standards). *But see* Michael Selmi, *Remedying Societal Discrimination Through the Spending Power*, 80 N.C. L. REV. 1575 (2002) (arguing that the Spending Power may give Congress a broader range of powers in remedying societal discrimination).

<sup>95</sup> The federal program must pass constitutional muster under the Due Process Clause of the Fifth Amendment, which reverse-incorporates the Equal Protection guarantees of the Fourteenth Amendment against the federal government and holds the federal government to the same standard as the states. *See Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) (holding that segregation in Washington, D.C. public schools is a "denial of the due process of law guaranteed by the Fifth Amendment"); *see also Adarand*, 515 U.S. at 224 (holding federal and state government use of racial classifications to the same level of scrutiny).

<sup>96</sup> *Adarand*, 515 U.S. at 224.

Every lower court assessing the federal DBE program's constitutionality after the 1999 regulatory changes has upheld the program.<sup>97</sup> Since *Adarand*, a federal racial classification—whether benign or not—is subject to strict scrutiny.<sup>98</sup> Lower courts agree that the federal program serves a compelling governmental interest and that it is narrowly tailored. In so doing, several courts cite the 1999 changes to the DBE program as critical.<sup>99</sup>

Under the first prong of strict scrutiny analysis, courts find a strong basis in evidence of a compelling remedial interest.<sup>100</sup> They rely on statistical evidence in the congressional record,<sup>101</sup> a DOJ study documenting racial disparities,<sup>102</sup> discussions of the barriers faced by minority businesses,<sup>103</sup> and, in some cases, local disparity studies on which Congress relied.<sup>104</sup> Courts also suggest that due to the broad scope of national programs, Congress need not show nationwide discrimination.<sup>105</sup>

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<sup>97</sup> See *N. Contracting, Inc. v. Illinois*, 473 F.3d 715, 720–22 (7th Cir. 2007) (acknowledging the federal DBE program's constitutionality and only considering an as-applied challenge to the state program); *W. States Paving Co. v. Wash. State Dep't of Transp.*, 407 F.3d 983, 991–95 (9th Cir. 2005) (upholding the federal program against a facial challenge, but striking down the state program as applied); *Sherbrooke Turf, Inc. v. Minn. Dep't of Transp.*, 345 F.3d 964, 969–73, 1002 (8th Cir. 2003) (upholding the federal program against a facial challenge and the state program against an as-applied challenge).

<sup>98</sup> *Adarand*, 515 U.S. at 235.

<sup>99</sup> See, e.g., *W. States Paving*, 407 F.3d at 993–96 (identifying key changes to DBE regulations that allow them to withstand strict scrutiny); *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1178–87 (10th Cir. 2000) (referring repeatedly to changes made by Congress and DOT in finding that the federal program is narrowly tailored).

<sup>100</sup> See, e.g., *Sherbrooke Turf*, 345 F.3d at 970 (arguing that Congress has established a strong basis in evidence that there is a compelling interest) (citing *Adarand*, 228 F.3d at 1167–76); *W. States Paving*, 407 F.3d at 991–93.

<sup>101</sup> See *W. States Paving*, 407 F.3d at 991–92 (citing 144 CONG. REC. H3945, H3958 (daily ed. May 22, 1998) (statement of Del. Norton)). But see *Adarand*, 228 F.3d at 1167 (concluding that floor statements by members of Congress that cite evidence of disparity are insufficient to establish a compelling interest).

<sup>102</sup> See *W. States Paving*, 407 F.3d at 992 (citing Appendix—The Compelling Interest for Affirmative Action in Federal Procurement: A Preliminary Summary, 61 Fed. Reg. 26,050, 26,055, 26,058–59 (May 23, 1996)). But see *Adarand*, 228 F.3d at 1167 (citing the same DOJ study, but arguing that it alone would not establish a compelling interest).

<sup>103</sup> See *Adarand*, 228 F.3d at 1168–72 (discussing barriers faced by minority businesses in business formation and competition).

<sup>104</sup> See *id.* at 1172–74 (discussing local disparities studies on which Congress relied).

<sup>105</sup> See *W. States Paving*, 407 F.3d at 992–93 (“Congress had strong basis in evidence for concluding that—at least in some parts of the country—discrimination within the transportation contracting industry hinders minorities’ ability to compete for federally funded contracts.”); *Sherbrooke Turf*, 345 F.3d at 970 (“If Congress or the federal agency acted for a proper purpose and with a strong basis in the evidence, the program has the requisite compelling government interest nationwide, even if the evidence did not come from or apply to every State or locale in the Nation.”).

Courts have held that the federal DBE regulations satisfy the second prong of strict scrutiny as well. They highlight as evidence of narrow tailoring the program's strong preference for race-neutral means, the aspirational nature of the goals, the prohibition of quotas, the lack of a penalty for failing to achieve goals, and durational limitations through frequent congressional reauthorization.<sup>106</sup> In addition, one court pointed to flexibility in how individuals are classified as disadvantaged, finding the program neither over- nor under-inclusive.<sup>107</sup>

State flexibility also plays a significant role in decisions declaring the program facially constitutional. Courts find the program narrowly tailored in part because of the requirement that state-specific goals be based on the number of ready, willing, and able DBE businesses in the market.<sup>108</sup> In addition, courts accept state and local disparity studies as permissible evidence of a *national* compelling interest for the DBE program,<sup>109</sup> which is noteworthy because of their less forgiving view of such limited evidence in other federal programs. For example, in *Rothe*, the Federal Circuit struck down a purely federal affirmative action effort because the government failed to establish sufficient evidence of disparity on a nationwide basis.<sup>110</sup> The *Rothe* court found that six state and local disparity studies and other evidence were insufficient to show a strong basis in evidence of a compelling interest.<sup>111</sup> The court noted that the evidence failed to show nationwide discrimination against the range of minority groups protected under the statute, rejecting the district court's finding that a few isolated instances of discrimination sufficiently establish a compelling remedial interest.<sup>112</sup>

The difference in outcome between *Rothe* and challenges to the federal DBE program may be partly due to states' flexibility under the

<sup>106</sup> See, e.g., *W. States Paving*, 407 F.3d at 993–94 (pointing to all of the factors considered in upholding the federal program as narrowly tailored); *Sherbrooke Turf*, 345 F.3d at 971–73 (discussing program flexibility, state waivers, and an emphasis on proving discrimination in local markets).

<sup>107</sup> See *W. States Paving*, 407 F.3d at 995 (finding that net worth limitations, along with the ability of non-minority-owned businesses to qualify as DBEs, make the program narrowly tailored).

<sup>108</sup> See, e.g., *id.* (noting that this requirement “ensures that each State sets a minority utilization goal that reflects the realities of its own labor market”); *Sherbrooke Turf*, 345 F.3d at 971 (citing this feature in upholding the federal DBE regulation).

<sup>109</sup> See, e.g., *Adarand*, 228 F.3d at 1172–74 (accepting state and local studies as evidence of federal compelling interest).

<sup>110</sup> *Rothe Dev. Corp. v. Dep't of Def.*, 545 F.3d 1023, 1049 (Fed. Cir. 2008).

<sup>111</sup> *Id.* at 1036–49 (considering and rejecting the evidence as insufficient to establish a compelling interest).

<sup>112</sup> *Id.* at 1045, 1047–48.

DBE program.<sup>113</sup> Since states generally must establish that their programs are narrowly tailored,<sup>114</sup> courts appear more willing to ease the federal burden of showing a compelling interest and narrow tailoring. Courts uniformly find that the federal DBE statute and regulations do not exceed Congress's Spending Power or violate the Fifth Amendment's Equal Protection guarantee.

## 2. *Challenges to the Constitutionality of State Implementation of the DBE Program*

Plaintiffs have also challenged the DBE program as implemented by the states. When considering such as-applied challenges,<sup>115</sup> lower courts are split on whether the state DBE programs are constitutional under the Fourteenth Amendment's Equal Protection Clause.

In *Western States Paving* and *Sherbrooke Turf*, two of the more recent decisions on the constitutionality of state DBE programs, the courts agreed that the state did not need to assert an independent state-specific compelling interest for the program.<sup>116</sup> However, they differed as to whether the challenged programs were narrowly tailored enough to survive strict scrutiny. In *Western States Paving*, the

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<sup>113</sup> See *id.* at 1046 ("Different studies, in the context of different legislative history, may support different conclusions."). Compare *Sherbrooke Turf*, 345 F.3d at 972 (discussing "substantial flexibility" for states in upholding federal DBE program regulations), with *Rothe*, 545 F.3d at 1045–46 (discussing reasons that Congress did not sufficiently establish nationwide discrimination).

<sup>114</sup> Cf. *infra* note 115 and accompanying text (discussing a circuit split on state programs' susceptibility to an as-applied challenge).

<sup>115</sup> There is a circuit split as to whether state DBE programs are susceptible to separate constitutional challenge. Some circuits have held that state DBE programs are not subject to independent constitutional scrutiny. See *N. Contracting, Inc. v. Illinois*, 473 F.3d 715, 721–22 (7th Cir. 2007) (refusing to allow an as-applied challenge against state implementation of a DBE program unless the state's implementation exceeded federal authorization); *Tenn. Asphalt Co. v. Farris*, 942 F.2d 969, 975 (6th Cir. 1991) (same). Other circuits have held that states' implementation of the program can be challenged. See *W. States Paving Co. v. Wash. State Dep't of Transp.*, 407 F.3d 983, 996 (9th Cir. 2005) (allowing an as-applied challenge); *Sherbrooke Turf*, 345 F.3d at 973 (same). For further discussion of this issue, see generally Ross R. Fulton, Comment, "*Our Federal System*": *States' Susceptibility to Challenge When Applying Federal Affirmative Action Law*, 74 U. CHI. L. REV. 687 (2007). For the DBE program to be helpful in determining what features of affirmative action programs are constitutional in practice, courts should allow as-applied challenges to state programs.

<sup>116</sup> *W. States Paving*, 407 F.3d at 997 (finding that Washington State "need not demonstrate an independent compelling interest for its DBE program"); *Sherbrooke Turf*, 345 F.3d at 973 ("[B]ecause the revised DBE program affords grantee States substantial discretion, [the claim that the challenged programs are not narrowly tailored as-applied] requires us to examine the program as implemented by those States."). For a critique of this approach, see Laurie A. Kelly, *Strict Scrutiny in Race-Based Government Contracts: As-Applied Challenges Require More Than a Narrow Tailoring Analysis*, 7 SETON HALL CIRCUIT REV. 417 (2011).

Ninth Circuit struck down Washington State's DBE program because it was not narrowly tailored.<sup>117</sup> By contrast, the Eighth Circuit upheld state DBE programs in Minnesota and Nebraska in *Sherbrooke Turf* and its companion case, *Gross Seed Co. v. U.S. Department of Transportation*,<sup>118</sup> respectively, finding that both of those programs were narrowly tailored.

First, the courts differed on the evidentiary value of certain types of statistical data. In *Western States Paving*, the court held that the state did not provide evidence of discrimination in its own market because it only used basic statistical evidence without conducting disparity studies.<sup>119</sup> By contrast, in *Sherbrooke Turf*, the court upheld Minnesota's DBE program even though the state failed to conduct a disparity study.<sup>120</sup>

Second, the two circuits gave different weight to evidence that suggested a decline in DBE participation without race-conscious measures. While the *Sherbrooke Turf* court gave this evidence considerable weight, the *Western States Paving* court rejected the validity of such information, thus clarifying that, at least in the Ninth Circuit, this form of proof is insufficient to establish narrow tailoring of state DBE programs.<sup>121</sup>

Finally, the two courts took different views on the role of anecdotal evidence in proving narrow tailoring. In *Western States Paving*, the court specifically pointed to the lack of anecdotal evidence from the state to justify its program as narrowly tailored.<sup>122</sup> By contrast, this was not a significant consideration in *Sherbrooke Turf*.

In each circuit, these decisions on the DBE program enabled other states to improve their DBE programs.<sup>123</sup> While circuit splits on some important issues now exist, the experimentation fostered by the DBE program has led lower courts to address doctrinal uncertainty resulting from the Supreme Court's decision in *Adarand*.

<sup>117</sup> 407 F.3d 983.

<sup>118</sup> 345 F.3d 964.

<sup>119</sup> See *W. States Paving*, 407 F.3d at 1000–03.

<sup>120</sup> See *Sherbrooke Turf*, 345 F.3d at 973 (justifying a state DBE based on a basic statistical study of minority participation in highway contracting).

<sup>121</sup> *W. States Paving*, 407 F.3d at 1000 (“This oversimplified statistical evidence is entitled to little weight . . . .”); *Sherbrooke Turf*, 345 F.3d at 973 (“The precipitous drop in DBE participation in 1999, when no race-conscious methods were employed, supports MnDOT’s conclusion that a substantial portion of its 2001 overall goal could not be met with race-neutral measures . . . .”).

<sup>122</sup> See *W. States Paving*, 407 F.3d at 1001; cf. *H.B. Rowe Co. v. Tippett*, 615 F.3d 233, 241 (4th Cir. 2010) (requiring that, in a challenge to a state program, “evidence [of statistical disparity] be ‘corroborated by significant anecdotal evidence of racial discrimination’” (quoting *Md. Troopers Ass’n v. Evans*, 993 F.2d 1072, 1077 (4th Cir. 1993))).

<sup>123</sup> See *infra* Part IV.A (discussing responses to *Western States Paving*).



## III

INTRODUCING CONSTRAINED CONSTITUTIONAL  
EXPERIMENTATION IN THE DBE PROGRAM

This Part will first lay out the DBE program's structure: constrained constitutional experimentation. Constrained constitutional experimentation has three aspects: (1) an underlying context of constitutional uncertainty, (2) the use of the federal government's Spending Power to create incentives for and constrain state action, and (3) the preservation of state governments' flexibility to experiment. After examining these three features, this Part will discuss an important benefit of the DBE program's structure—portability of the results of state experimentation to other states.

To demonstrate the uniqueness of the program, this Part begins by briefly discussing three alternative structures potentially available to Congress to implement the DBE program. First, Congress could use its Commerce Clause power to create the program, exercising its authority to regulate economic activity that substantially affects interstate commerce.<sup>124</sup> Requiring states to create their own affirmative action programs when dispersing *state* funds, however, raises Tenth Amendment "commandeering" concerns.<sup>125</sup> Using the Spending Power instead, Congress avoided those concerns.<sup>126</sup>

Second, Congress could use its Spending Power to specify a particular affirmative action program for *all* states. But this option prevents experimentation by states and reduces the chances that the federal program survives the narrow tailoring requirement under Equal Protection analysis. If the federal program were struck down, Congress would have to go back to the drawing board.

Third, Congress could leave the decision to adopt affirmative action programs to the states entirely, a more typical approach to

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<sup>124</sup> See *United States v. Lopez*, 514 U.S. 549, 558–59 (1995) (describing permissible regulation under the Commerce Clause of channels of interstate commerce, instrumentalities of interstate commerce, or activities that substantially affect interstate commerce); see *Gonzales v. Raich*, 545 U.S. 1, 17 (2005) ("Our case law firmly establishes Congress' power to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce.").

<sup>125</sup> See *New York v. United States*, 505 U.S. 144, 166, 175, 209 (1992) (recognizing that there are a "variety of methods, short of outright coercion, by which Congress may urge a State to adopt a legislative program," but drawing a line at "inducement[s]" that "commandeer" state legislative processes).

<sup>126</sup> See *South Dakota v. Dole*, 483 U.S. 203, 210 (1987) ("[T]he Spending Power is not . . . a prohibition on the indirect achievement of objectives which Congress is not empowered to achieve directly."); *id.* at 210 ("[A] perceived Tenth Amendment limitation on Congressional regulation of state affairs did not concomitantly limit the range of conditions legitimately placed on federal grants.").

leveraging federalism for experimentation.<sup>127</sup> However, this option results in two negative consequences. Either states might not adopt any affirmative action programs, especially in those states that currently ban them,<sup>128</sup> or states might adopt programs lacking sufficient constraints, reducing portability to other states.<sup>129</sup>

### A. *Cooperative Federalism in a Constitutional Context*

Constrained constitutional experimentation is a form of cooperative federalism, an umbrella term describing federal and state governments' joint regulation in a coordinated fashion.<sup>130</sup> Constrained constitutional experimentation is a unique form of cooperative federalism primarily because of the context in which it occurs. Traditionally, cooperative federalism involves states and the federal government working together to identify the "best" possible policy for achieving a substantive goal.<sup>131</sup> This Note does not focus on states and the federal government experimenting to find an "optimal" affirmative action program, which would perhaps maximize participation of minorities in contracting or achieve any number of other policy goals. Instead, it argues that the flexibility in this program allows the federal government and states to resolve *constitutional* uncertainty.<sup>132</sup>

This process begins when courts—and in particular, the Supreme Court—leave an area of doctrine unresolved or unclear. While there may be many reasons why the Court wishes to leave constitutional

<sup>127</sup> See, e.g., *Lopez*, 514 U.S. at 581 (Kennedy, J., concurring) ("[T]he States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear.").

<sup>128</sup> See *supra* note 5 and accompanying text.

<sup>129</sup> See *infra* Parts III.C–III.D.

<sup>130</sup> There is a significant body of literature on cooperative federalism. Cooperative federalism serves as a middle ground between "complete federal preemption" and "uncoordinated federal and state action in distinct regulatory spheres." Weiser, *supra* note 16, at 1697. For an overview of the history of cooperative federalism, see Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 668–73 (2001) [hereinafter Weiser, *Constitutional Architecture*].

<sup>131</sup> See, e.g., Jonathan H. Adler, *Cooperation, Commandeering, or Crowding Out?: Federal Intervention and State Choices in Health Care Policy*, 20 KAN. J.L. & PUB. POL'Y 199, 212–16 (2011) (discussing cooperative federalism aspects of the Affordable Care Act); Weiser, *Constitutional Architecture*, *supra* note 130, at 669–70 (discussing cooperative federalism in environmental laws from the 1960s and 1970s, including the Clean Air Act); Weiser, *Federal Common Law*, *supra* note 16, at 1740–43 (discussing cooperative federalism in telecom policy).

<sup>132</sup> This structure implicates issues associated with separation of powers, which is outside the scope of this Note but discussed briefly in the Conclusion. See *infra* Conclusion (pointing out Congress's enlistment of the states in a dialogue with the courts to resolve constitutional uncertainty).

doctrine unresolved,<sup>133</sup> one possible reason is its desire to give the issue time to “percolate” in lower courts and in federal and state legislative and executive branches.<sup>134</sup> In the remedial contracting affirmative action context, the Court has never explicitly expressed such an interest, although it has done so in other contexts.<sup>135</sup>

The decision by the Supreme Court to leave an area of doctrine unresolved can also create uncertainty that hinders development of good policy. In remedial contracting affirmative action, this uncertainty weighs on the government, courts, policymakers, and potential contractors.<sup>136</sup>

The process of constrained constitutional experimentation continues when policymakers step into this vacuum. Their actions help resolve the constitutional uncertainty. For example, Professor Weiser notes that agencies, much like the Supreme Court, have an incentive to allow issues to “percolate” and to resolve them through cooperative federalism.<sup>137</sup>

In the DBE program, the federal government encourages states to experiment and develop a range of possible affirmative action programs. Lower courts—and possibly the Supreme Court—then evaluate these variations to delineate the boundaries of constitutional affirmative action doctrine. Federal and state governments subsequently take this information and further refine their programs. The remainder of this Part discusses how the DBE program uses federal

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<sup>133</sup> See, e.g., Sanford Levinson, *Assessing the Supreme Court's Current Caseload: A Question of Law or Politics?*, 119 *YALE L.J. ONLINE* 99 (2010), <http://yalelawjournal.org/the-yale-law-journal-pocket-part/supreme-court/assessing-the-supreme-court's-current-caseload:a-question-of-law-or-politics/> (discussing a variety of reasons for the Supreme Court to deny or grant certiorari); cf. Amanda Frost, *Overvaluing Uniformity*, 94 *V.A. L. REV.* 1567 (2008) (discussing possible reasons that uniformity of federal law may not be desirable and why the Supreme Court should reassess its desire for uniformity).

<sup>134</sup> See Weiser, *supra* note 16, at 1702–03 (noting that the Supreme Court “can benefit from ‘percolation’ of different approaches before ultimately settling upon a single approach or delineating the scope of acceptable approaches”); cf. Revesz, *supra* note 16, at 1156–57 (arguing that in the context of administrative rules, circuit conflicts allow agencies more time to analyze similar issues, improve legal decisionmaking, and facilitate dialogue).

<sup>135</sup> See, e.g., *United States v. Mendoza*, 464 U.S. 154, 160 (1984) (attributing the rule against nonmutual collateral estoppel against the government to its desire to benefit from “permitting several courts of appeals to explore a difficult question”); *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) (discussing percolation in the class action context); *E.I. duPont de Nemours & Co. v. Train*, 430 U.S. 112, 135 n.26 (1977) (discussing percolation in the context of agency interpretations of a rule).

<sup>136</sup> See *supra* notes 13–16 and accompanying text (discussing the costs of constitutional uncertainty in this context).

<sup>137</sup> See Weiser, *supra* note 16, at 1702–03 (discussing percolation in the context of agencies benefitting from a variety of approaches before “settling upon a single approach or delineating the scope of acceptable approaches”).

control and state experimentation to clarify this area of constitutional uncertainty.

### *B. Constraints Through the Federal Spending Power*

The federal government controls the DBE program through Congress's Spending Power, conditioning states' receipt of certain DOT grants on participation in, and good-faith compliance with, the DBE program.<sup>138</sup> Thus, rather than issuing an explicit mandate to states, DOT places significant federal highway and other transportation grant funding at stake.<sup>139</sup> For example, in FY 2007, DOT provided over \$31 billion in Federal Highway Fund grants alone to states.<sup>140</sup>

Federal constraints on the DBE program have two significant effects. First, federal control encourages state experimentation because the program creates incentives for states to adopt affirmative action programs. This creates a "policy floor" or baseline below which states cannot act if they wish to continue receiving federal funding.<sup>141</sup>

Second, federal control sets upper bounds on state experimentation. Since program enforcement is left to DOT, the extent of federal control over state programs can be adjusted through the administrative process. This sets a "constitutional ceiling" above which states cannot experiment.

The use of the Spending Power allows for significant federal calibration over how much control to exert. In the early years of the program, states had broader flexibility in how they set and met their goals.<sup>142</sup> After *Adarand*, however, DOT tightened some of its requirements to ensure the survival of state programs under constitutional

<sup>138</sup> See *supra* notes 90–95 and accompanying text (discussing the use of the Spending Power in the DBE program); see also 23 U.S.C. § 101 (2006) (authorizing DBE program); 49 C.F.R. § 26.3 (2010) (implementing the DBE program and creating requirements for certain federal DOT grant recipients).

<sup>139</sup> Of course, no state has ever lost grant money for failing to comply with the program in good faith. However, the Department has threatened cuts if a state refuses to have a program or fails to set a goal. See *Disadvantaged Business Enterprise: Program Improvements*, 76 Fed. Reg. 5083, 5091 (Jan. 28, 2011).

<sup>140</sup> NATIONAL COOPERATIVE HIGHWAY RESEARCH PROGRAM, REP. NO. 644, GUIDELINES FOR CONDUCTING A DISPARITY AND AVAILABILITY STUDY FOR THE FEDERAL DBE PROGRAM 10–11 tbl.1, available at [http://onlinepubs.trb.org/onlinepubs/nchrp/nchrp\\_rpt\\_644.pdf](http://onlinepubs.trb.org/onlinepubs/nchrp/nchrp_rpt_644.pdf) [hereinafter NCHRP DISPARITY STUDY GUIDELINES].

<sup>141</sup> Encouraging states to act above a "policy floor" may indicate a diminution in Congress's risk-aversion to experimentation by local policymakers. *But see* Susan Rose-Ackerman, *Risk Taking and Reelection: Does Federalism Promote Innovation?*, 9 J. LEGAL STUD. 593, 594 (1980) (arguing that federalism may not be as effective at promoting experimentation because lower level governments are risk-averse).

<sup>142</sup> See *supra* notes 67–69 and accompanying text (discussing greater state flexibility in the DBE program pre-*Adarand*).

scrutiny.<sup>143</sup> When constitutional standards tighten, federal regulations must tighten as well. In this way, the federal government sets a constitutional ceiling below which states can experiment, both to identify unique solutions for themselves and potentially identify widely-applicable policy options.

### C. Experimentation Through State Flexibility

While the federal government exercises control over the DBE program through its use of the Spending Power, states maintain flexibility in implementing the program. This flexibility promotes experimentation by states.<sup>144</sup> The program offers states flexibility in developing the program's content and structure, and it also requires states to produce their own constitutional justification for state programs.<sup>145</sup> Understanding how state experimentation shapes the DBE program requires understanding where states actually have flexibility. This Part looks at the major roles states play under this program.<sup>146</sup>

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<sup>143</sup> See *supra* notes 75–85 and accompanying text (discussing tightened standards post-*Adarand*).

<sup>144</sup> This concept of state experimentation underlies Justice Brandeis's famous *New State Ice* dissent, which emphasizes the role that states can play as laboratories for new ideas. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”). But see Rose-Ackerman, *supra* note 141, at 594 (arguing that federalism may not be as effective at promoting experimentation because lower level governments are risk-averse).

<sup>145</sup> While this Note focuses on the experimentation rationale for federalism, many scholars and court decisions have discussed several other merits of federalism. See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (discussing merits of federalism, including “a decentralized government . . . more sensitive to the diverse needs of a heterogeneous society”; “increase[d] opportunity for citizen involvement”; “more innovation and experimentation”; and “more responsive [government] by putting the States in competition for a mobile citizenry”); Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 *YALE L.J.* 1256 (2009) (highlighting states voicing disagreement with the federal government through “uncooperative federalism”); Barry Friedman, *Valuing Federalism*, 82 *MINN. L. REV.* 317, 386–405 (1997) (discussing benefits of federalism, including: “efficiency”; “public participation”; “accountability”; “protecting health, safety, and welfare”; “cultural and local diversity”; and “diffusing power to protect liberty”); John O. McGinnis & Ilya Somin, *Federalism vs. States Rights: A Defense of Judicial Review in a Federal System*, 99 *Nw. U. L. REV.* 89, 106–12 (2004) (discussing three rationales for federalism: “diversity” across states, “horizontal competition among state governments,” and “vertical competition between states and the federal government”).

<sup>146</sup> Not every state in the DBE program necessarily engages in significant experimentation. Nonetheless, this Part illustrates that there is variability in states' DBE program implementation. As long as enough states are willing to experiment, the federal program will promote beneficial experimentation that can resolve remedial contracting affirmative action doctrine, even if some states are risk-averse. Cf. Rose-Ackerman, *supra* note 141 (discussing political actors' risk aversion in the context of state experimentation).

In implementing the DBE program, each state must set a state-wide goal for DBE participation on contracts funded by relevant DOT grant programs. Until the 1999 regulatory revisions, DOT instructed states to aim for at least ten percent DBE participation. If states believed that they could not achieve that goal, they had to request an exemption from DOT.<sup>147</sup> Since 1999, DOT has required states to develop their DBE participation goals by considering only what DBE participation would be absent discrimination and what proportion of the state's relevant markets of "ready, willing, and able" contractors are DBEs.<sup>148</sup> In some respects, federal regulations enacted after *Adarand* constrain the methods by which states can set their DBE goals.<sup>149</sup>

Still, states maintain flexibility in calculating goals based on their own methodology and on consideration of state-specific factors,<sup>150</sup> including what portion of "ready, willing, and able" businesses are DBEs.<sup>151</sup> In creating this target, individual states use a broad array of approaches, including disparity studies, bidder lists, DBE directories, the goals of other DOT recipients in "same, or substantially similar, market[s]," or other methods approved by DOT.<sup>152</sup> For example, only ten states set their goals based on disparity studies, while around half of the state programs use bidder lists.<sup>153</sup>

States then adjust their goals based on some, none, or all of a series of factors, including current DBE capacity, evidence from disparity studies, local market differences, and barriers faced by DBEs in the state.<sup>154</sup> This adjustment again gives states substantial flexibility in implementing the federal program and in accounting for the effects of discrimination. At the end of this process, states' goals span a significant range.<sup>155</sup>

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<sup>147</sup> 1999 DBE Regulation Final Rule Notice, *supra* note 75, at 5107 ("Recipients are no longer required to make a special justification if their overall goals are less than 10 percent.").

<sup>148</sup> 49 C.F.R. § 26.45(b)(2) (2010).

<sup>149</sup> See *supra* notes 66–72 and accompanying text (discussing pre-*Adarand* DBE program regulations and the flexibility that allowed states to adopt more ambitious programs).

<sup>150</sup> See NCHRP DISPARITY STUDY GUIDELINES, *supra* note 140, at 25–28 (discussing the variety of methods states employ to calculate and set DBE goals).

<sup>151</sup> 49 C.F.R. § 26.45(b)(2). This figure represents the state's best estimate of the share of contracts DBEs could receive but for the effects of discrimination. *Id.*

<sup>152</sup> *Id.* § 26.45(c).

<sup>153</sup> NCHRP DISPARITY STUDY GUIDELINES, *supra* note 140, at 25.

<sup>154</sup> 49 C.F.R. § 26.45(d).

<sup>155</sup> For example, in 2011, Illinois had a 22.77% goal, while Maine had set a goal of 2.9% for 2012 through 2014. See ILL. DEP'T OF TRANSP., FFY 2011 FEDERAL AVIATION ADMINISTRATION, OVERALL DBE GOAL (2011), available at <http://www.dot.il.gov/sbe/IDOT%20FAA%202011%20DBE%20goal%20document,%208.11.10.pdf> [hereinafter ILLINOIS FFY 2011 GOAL]; MAINE DEP'T OF TRANSP., ANNUAL GOAL FOR FFY

Each state then assigns race-neutral and race-conscious components to the goal. Race-neutral goals reflect the state's belief as to what portion of the overall goal it can achieve before using contract-specific DBE goals and other race-conscious methods. States "must meet the maximum feasible portion of [their] overall goal by using race-neutral means of facilitating DBE participation."<sup>156</sup> The difference between the overall goal and the race-neutral goal is the race-conscious target. In determining the race-conscious component of their goal, states can consider market conditions and prior DBE performance under race-neutral programs. This analysis yields a wide range of race-neutral and race-conscious goals.<sup>157</sup>

States use a variety of methods to meet their goals as well. Some states use race-conscious business assistance programs and mentor-protégé efforts.<sup>158</sup> Most states conduct some race-neutral outreach.<sup>159</sup> Also, even though federal regulations limit the use of set-asides to "limited and extreme circumstances . . . when no other method could be reasonably expected to redress egregious instances of discrimination,"<sup>160</sup> states' actual use of set-asides varies.<sup>161</sup>

Perhaps the most significant variation in state programs involves the justifications provided to satisfy constitutional scrutiny. States base their justifications on a combination of disparity studies, availa-

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2012–2014, available at <http://www.maine.gov/mdot/disadvantaged-business-enterprises/pdf/Final%20goal%202012%20to%202014.pdf> [hereinafter MAINE FFY 2012–2014 GOAL] (noting that its new goal is substantially lower than it was in prior years).

<sup>156</sup> 49 C.F.R. § 26.51.

<sup>157</sup> For example, in fiscal year 2011, Illinois's race-conscious goal was 21.36%, while Maine's overall goal was 2.9% without a race-conscious goal for 2012–2014. See ILLINOIS FFY 2011 GOAL, *supra* note 155; MAINE FFY 2012–2014 GOAL, *supra* note 155 (noting that its new overall goal is substantially lower than it was in prior years).

<sup>158</sup> See, e.g., ARK. STATE HIGHWAY & TRANSP. DEP'T, DISADVANTAGED BUSINESS ENTERPRISE PROGRAM, app. A at 2–3 (2011) [hereinafter ARKANSAS DBE PLAN] (adopting business management assistance and mentor-protégé efforts in the state DBE program).

<sup>159</sup> See, e.g., CAL. DEP'T OF TRANSP., BUSINESS PLAN FOR DBE OUTREACH ON FEDERALLY-FUNDED PROJECTS (2010), available at <http://www.dot.ca.gov/hq/bep/documents/DBEOutreachPlan.pdf> (offering a detailed outreach plan to improve DBE participation).

<sup>160</sup> 49 C.F.R. § 26.43.

<sup>161</sup> For example, Arkansas uses a combination of measures, including set-asides on rare occasions. See ARKANSAS DBE PLAN, *supra* note 158, at VII-1 to -2, XII-1, XIV-1 (2011) (discussing the use of information-dissemination, technical assistance, consideration of DBEs prior to the contract award, and even limited use of set-asides to meet DBE goals). By contrast, Connecticut does not use set-asides, focusing on training programs. See Inst. of Tech. & Bus. Dev., Cent. Conn. State Univ., *CT Bowd Center—The Connecticut Business Opportunities and Workforce Development Center Program Purpose & Eligibility for Services*, <http://web.ccsu.edu/itbd/CT%20BOWD%20Center/programpurpose.htm> (last visited Aug. 13, 2012) (describing training programs for contractors).

bility studies,<sup>162</sup> other statistical assessments, and anecdotal evidence. The details of these methods are not relevant to this Note, but the existence of variation is. Identifying and quantifying compelling interests, as well as narrowly tailoring the programs to effectuate those interests, are crucial components of resolving constitutional uncertainty in this area.

Disparity studies establish the analytical foundation for a compelling governmental interest in remedial contracting affirmative action programs. They estimate DBE availability and utilization and also compile evidence of disparities in the opportunities available to DBEs.<sup>163</sup> As of 2009, slightly over half of all state DOTs had performed or were performing a disparity or availability study.<sup>164</sup> Developing robust disparity studies is not easy. As a result, most states still do not use them as the basis for setting their DBE participation goals.<sup>165</sup> Different state-commissioned disparity studies include different factors.<sup>166</sup> Experimenting on and standardizing disparity studies could be a significant offshoot of the DBE program's structure, requiring both state flexibility and federal control, as this Note discusses in Part IV.A.

States retain a significant amount of flexibility to experiment in many facets of the DBE program. The experimentation resulting from state flexibility can be beneficial for many reasons, one of which is explored more fully in the next Part of this Note.

#### *D. State Flexibility Furthering Constitutional Portability*

Under traditional applications of cooperative federalism, the combination of federal control and state flexibility has several useful applications: “(1) to allow states to tailor federal . . . programs to local conditions; (2) to promote competition . . . ; and (3) to permit experimentation with different approaches that may assist in determining an optimal . . . strategy.”<sup>167</sup>

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<sup>162</sup> Availability studies are less comprehensive than disparity studies. See NCHRP DISPARITY STUDY GUIDELINES, *supra* note 140, at 55 (comparing availability studies with disparity studies).

<sup>163</sup> *Id.* at 16–25 (describing common elements in current disparity and availability studies).

<sup>164</sup> *Id.* at 16 (providing an overview of disparity studies conducted or in progress as of 2009). The states performed the studies at different times; for example, seven states had conducted their studies over five years ago. *Id.*

<sup>165</sup> See *supra* note 153 and accompanying text (discussing the limited use of disparity studies in goal-setting).

<sup>166</sup> See NCHRP DISPARITY STUDY GUIDELINES, *supra* note 140, at 16–25 (discussing differences in state disparity studies).

<sup>167</sup> Weiser, *supra* note 16, at 1698.



In this Part, I focus on the third benefit of cooperative federalism. Namely, in addition to encouraging state experimentation in resolving constitutional uncertainty, the DBE program's structure facilitates portability of that experimentation from one state to others.<sup>168</sup>

I call this aspect of cooperative federalism "constitutional portability." Constitutional portability involves transferring state solutions to constitutional uncertainty to other states.

To be sure, when the DBE program was reauthorized in 1998, many proponents of the program did not appear to focus on this benefit to the DBE program's structure. Instead, they emphasized the program's flexibility.<sup>169</sup> They argued that the law's flexibility offered an opportunity for states to tailor their programs narrowly enough to survive strict scrutiny.<sup>170</sup> Since *Adarand* emphasized the importance of congruence between federal and state standards,<sup>171</sup> the federal government has an interest in states promulgating their own affirmative action programs. If the federal government can no longer enact affirmative action programs with less scrutiny, then state efforts must ensure the narrow tailoring of these programs.

Still, while allowing individual states to find their own affirmative action solutions is important, constitutional portability suggests a potentially more meaningful use for state flexibility in the DBE program. There may be elements of the program—especially its structure and justification—that can be transferred from one state to others.<sup>172</sup>

Even if solutions in one state are not portable to the entire nation, this form of experimentation is still powerful. In the affirma-

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<sup>168</sup> While they are not the focus of this Note, I briefly discuss the other two benefits of cooperative federalism. The DBE program clearly promotes the tailoring of state programs to local conditions, as evidenced by Congress's intent to use the program to meet the constitutional requirement of narrow tailoring. *See, e.g.*, 144 CONG. REC. 2678 (1998) (statement of Sen. Baucus) (emphasizing the state's role under the DOT regulations); 144 CONG. REC. 2685 (1998) (statement of Sen. Kerry) ("The DBE program is a very flexibly defined program. It allows for each State to respond to local conditions. By definition, by allowing each State to respond to the needs of that State, it becomes very narrowly tailored."). While this benefit of cooperative federalism allows states to identify their own solutions, it does not facilitate clarification of constitutional uncertainty unless the results of state experimentation are portable to other states. As for the second benefit of cooperative federalism, the DBE program's structure likely does not promote competition between states.

<sup>169</sup> *See supra* note 168 (discussing congressional statements that focus on how states have flexibility to develop narrowly tailored affirmative action programs).

<sup>170</sup> *See* 144 CONG. REC. 2685 (1998) (statement of Sen. Kerry) (noting that "by allowing each State to respond to the needs of that State, [the program] becomes very narrowly tailored").

<sup>171</sup> *See Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 224 (1995) (emphasizing that there must be congruence between federal and state Equal Protection standards).

<sup>172</sup> *See infra* Part IV.B (discussing elements of the DBE program that are portable between states and arguing that these features make the DBE program effective at clarifying constitutional uncertainty in remedial contracting affirmative action).

tive action context, the specifics of a constitutional program likely are not portable nationally because of the stringent requirements of narrow tailoring. However, a narrower version of portability is possible: Particular elements of solutions can be transferred from one state to the nation as a whole or to a subset of states. The most basic example of subnational portability is when a federal court of appeals rules on the constitutionality of a particular state's DBE program. Once that court has decided the issue, other states in the circuit must follow the same standard, and states outside the circuit receive valuable guidance. While Congress probably did not intend constitutional portability when it enacted the program, Part IV.B of this Note discusses specific ways that constitutional portability can resolve constitutional uncertainty involving remedial contracting affirmative action.

#### IV

##### HOW CONSTRAINED CONSTITUTIONAL EXPERIMENTATION HELPS RESOLVE CONSTITUTIONAL UNCERTAINTY IN REMEDIAL CONTRACTING AFFIRMATIVE ACTION

This Part explores how the DBE program's structure helps resolve constitutional uncertainty surrounding remedial contracting affirmative action. This Part first examines responses to the Ninth Circuit's decision in *Western States Paving*, which invalidated Washington State's implementation of its DBE program.<sup>173</sup> This response illustrates how federal constraints and state experimentation operate to provide constitutional clarification. Next, this Part considers state experimentation resulting in constitutional solutions that are portable to other states, focusing on three contexts in which the results of experimentation are portable. These illustrations demonstrate the ability of this structure to resolve constitutional uncertainty.

##### A. *Resolving Constitutional Uncertainty: The Response to Western States Paving*

After the Ninth Circuit's 2005 ruling in *Western States Paving*, many states that had not used disparity studies suddenly began the process of doing so. In *Western States Paving*, the Ninth Circuit invalidated Washington State's DBE program because it lacked sufficient justification through a disparity study.<sup>174</sup> This decision generated two significant responses. One response, initiated by DOT, highlights the positive impact of federal control, while the other, initiated by a

<sup>173</sup> *W. States Paving Co. v. Wash. State Dep't of Transp.*, 407 F.3d 983 (9th Cir. 2005).

<sup>174</sup> *Id.* at 1000–03; *see also supra* notes 44–48, 116–22 and accompanying text (discussing the *Western States Paving* decision).

highway research organization, illustrates the benefits of state flexibility and constitutional portability.

Shortly after *Western States Paving*, DOT issued guidance to all states in the Ninth Circuit, outlining the key requirements laid out by the court in its decision and providing an action plan for states.<sup>175</sup> The guidance aimed both to help states respond to the changed legal environment and to adjust federal policy. For example, in response to the Ninth Circuit's concern that the program was over-inclusive of certain minority groups, the policy guidance adapted the federal program to allow limited waivers of the prohibition against group-specific goals.<sup>176</sup> The notice also instructed states to consider commissioning a disparity study and provided states with information on how to conduct such a study.<sup>177</sup> The guidance even offered federal funding to support state attempts to conduct disparity studies.<sup>178</sup>

The *Western States Paving* decision and subsequent guidance had a significant effect. In the immediate aftermath of *Western States Paving*, several states in the Ninth Circuit, including Washington, eliminated the race-conscious component of their DBE program goals.<sup>179</sup> Some of them later conducted disparity studies and reinstated the race-conscious component of their goal—sometimes at even higher levels than before *Western States Paving*.<sup>180</sup> For example, at the

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<sup>175</sup> See *Western States Guidance Response*, *supra* note 88.

<sup>176</sup> *Western States Guidance Notice*, *supra* note 88, at 14,776.

<sup>177</sup> *Id.* at 14,777–78.

<sup>178</sup> *Id.* at 14,778 (“FHWA, FTA, and FAA have all stated that the costs of conducting disparity studies are reimbursable from Federal program funds, subject to the availability of those funds.”).

<sup>179</sup> INSIGHT CENTER FOR COMMUNITY ECONOMIC DEVELOPMENT, *THE EVOLUTION OF AFFIRMATIVE ACTION 10* (2007) (noting that Alaska, Nevada, Oregon, California, and Washington eliminated their DBE race-conscious goals in response to *Western States Paving*), available at <http://www.insightcced.org/uploads/publications/assets/The%20Evolution%20of%20Affirmative%20Action.pdf>.

<sup>180</sup> See *id.* (noting that Washington reestablished its race-conscious goal in 2006 after conducting a “rigorous disparity study”); Jorge Rivas, *Calif. Transportation Dept. to Reinstate Race-Conscious Contract Goals*, COLORLINES.COM (Mar. 9, 2009), [www.colorlines.com/archives/2009/03/calif\\_transportation\\_dept\\_to\\_r.html](http://www.colorlines.com/archives/2009/03/calif_transportation_dept_to_r.html) (reporting that California's Department of Transportation reinstated the race-conscious component to their goal after conducting a disparity study). For a detailed discussion of states' responses to *Western States Paving*, see George R. La Noue, *Western States' Light: Restructuring the Federal Transportation Disadvantaged Business Enterprise Program*, 22 GEO. MASON U. C.R. L.J. 1 (2011). La Noue notes that in the immediate aftermath of the *Western States Paving* decision, nearly all of the states in the Ninth Circuit saw a reduced DBE participation goal. *Id.* at 54 & fig.F. However, since 2009, some states have increased their race-conscious DBE goals. See, e.g., Letter from Marc A. Luiken, Comm'r, Dep't of Transp. & Pub. Facilities, to David Miller, Alaska Div. Adm'r, Fed. Highway Admin. 13 (Dec. 19, 2011), <http://www.dot.state.ak.us/cvlrts/DBE-program.pdf> (showing that Alaska's race-conscious goal increased in fiscal year 2011); *infra* notes 181–83 and accompanying text (demonstrating a higher DBE participation goal in Washington).

time of the challenge in *Western States Paving*, Washington had a DBE participation goal of 14%, of which 5% was the race-conscious component.<sup>181</sup> However, despite the adverse decision, the most recent fiscal year 2012–2014 goal remains 14.06%, and the race-conscious portion has *increased* to 10.33%.<sup>182</sup> The state believes that it is now in compliance with the suggested *Western States Paving* methodology and will adjust its goals again after it receives the final results from a disparity study that it commissioned.<sup>183</sup> Washington adjusted—and, in fact, strengthened—its DBE program as a result of closer court scrutiny and federal support.

A second development after *Western States Paving* shows that the federal government need not always act for policymakers to benefit from the program's structure. The National Cooperative Highway Research Program, which state DOTs formed to coordinate highway research, initiated a recent effort to develop a National Model Disparity Study, which aims to ensure that state DBE programs survive strict scrutiny.<sup>184</sup> Leveraging the results of state experimentation, the group analyzed features of states' disparity studies, identified best-practices,<sup>185</sup> and examined case law to identify specific elements of disparity studies necessary to withstand strict scrutiny.<sup>186</sup> While the effort focuses on the DBE program, the results should assist other state and federal remedial efforts as well.<sup>187</sup> The efforts should result in better practices and methods by which to prove both a compelling interest in and narrow tailoring of remedial affirmative action programs.

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<sup>181</sup> *W. States Paving Co. v. Wash. State Dep't of Transp.*, 407 F.3d 983, 999–1000 (9th Cir. 2005).

<sup>182</sup> WASH. STATE DEP'T OF TRANSPORTATION'S FED. HIGHWAY ADMIN., FEDERAL FISCAL YEAR 2012 THROUGH FEDERAL FISCAL YEAR 2014: INTERIM OVERALL DISADVANTAGED BUSINESS ENTERPRISE GOAL, at 1, 9 (2011), *available at* <http://www.wsdot.wa.gov/NR/rdonlyres/9B8206BF-50A4-419C-B4F4-66F75D73B90F/0/FFY2012FHWAProposedOverallDBEGoalMethodology.pdf>.

<sup>183</sup> *Id.* at 14.

<sup>184</sup> NCHRP DISPARITY STUDY GUIDELINES, *supra* note 140, at 1 (“This Model Study Project is designed to assist state DOTs in meeting the regulatory goal-setting requirements in conformance with strict constitutional scrutiny.”).

<sup>185</sup> *See id.* at 16–28 (providing a review of past disparity studies); *id.* at 29–53 (offering best practices that form the basis for a model disparity study).

<sup>186</sup> *See id.* at 9–16 (analyzing major requirements for disparity studies to withstand constitutional scrutiny).

<sup>187</sup> *See infra* notes 192–93 and accompanying text (discussing reasons why other remedial contracting efforts could benefit from increased clarity about what evidence sufficiently justifies the DBE program).

*B. Resolving Constitutional Uncertainty:  
Three Potential Areas*

The DBE program most effectively contributes toward reducing constitutional uncertainty if the results of constitutional experiments in one state are portable to some or all other states. Program feature portability need not apply to all program characteristics to help clarify remedial affirmative action doctrine. This Part distinguishes those program characteristics that appear portable between states from those that are not.

For example, the numerical specifics of state programs are unlikely to be portable even if upheld in one state. Narrow tailoring requires a closer fit between any remedy and the underlying compelling interest.<sup>188</sup>

However, there are at least three characteristics that are portable between state remedial affirmative action programs, both DBE and otherwise. All three characteristics are general programmatic approaches: the goal-setting methodology; the types of acceptable race-conscious efforts; and the types of justifications for such programs. Resolving the constitutional status of each of these features helps identify a compelling interest or narrow tailoring.

One portable characteristic of the DBE program is the goal-setting methodology. As discussed in Part III.B, significant variation exists in states' goal-setting approaches. In addition, courts provide mixed signals as to whether disparity studies or other significant statistical analyses are required to pass constitutional muster.<sup>189</sup> This is an area in which state legislatures can experiment instead to find a goal-setting process that survives strict scrutiny. If one state identifies a constitutionally acceptable methodology, other states can replicate that methodology, even if those states cannot use the same studies or results. The National Model Disparity Study effort is a good example.<sup>190</sup> Experimentation in the DBE program can also help non-DBE state and federal programs identify the type of goal-setting methodologies needed to survive constitutional challenges.<sup>191</sup>

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<sup>188</sup> See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 226 (1995) (“The [strict scrutiny] test . . . ensures that the means chosen ‘fit’ this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.” (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989))).

<sup>189</sup> See *supra* notes 46–48, 119–22 and accompanying text (demonstrating the lack of clarity on the role of disparity studies in proving a compelling interest or narrow tailoring).

<sup>190</sup> See *supra* notes 184–86 and accompanying text (discussing the Model Disparity Study effort).

<sup>191</sup> Some states set their own goals for DBE or other minority group participation in government contracting. See, e.g., N.Y. EXEC. LAW § 315(5) (McKinney 2010) (requiring each agency to establish annual goals for contracts with minority- and women-owned busi-

Another portable feature is the type of constitutionally permissible race-conscious program. Beyond goal-setting, there is some variation in state programs' use of race-conscious methods. But the variation is probably not significant enough to help courts draw constitutionally meaningful conclusions about what types of race-conscious methods are permissible.<sup>192</sup> Still, variation in state DBE program types can play a role in resolving some constitutional uncertainty. Since race-neutral methods vary from state to state, variation can help courts identify the point at which a state has considered race-neutral alternatives enough to pursue a race-conscious remedy.<sup>193</sup> This example illustrates some of the significant potential of this program to resolve many of the thorny questions in remedial affirmative action jurisprudence.

Finally, the acceptable types of justifications for race-conscious remedial programs are portable between states. For example, the calibration that took place after the *Western States Paving* decision shows that federal control combined with state experimentation can be a powerful tool to refine and improve the constitutional standing of the DBE program and, potentially, other remedial affirmative action programs.<sup>194</sup>

By providing a variety of test cases, the DBE program's state variations help answer open questions on how to establish a compelling interest and justify such remedial programs. The test cases allow courts to assess the extent to which various types of statistical and anecdotal evidence establish a compelling interest and narrow tailoring. Further, state DBE program variations help policymakers and courts identify standards in practice for what evidence is "before Congress," what evidence is "stale," or even what evidence provides a "strong basis" for a compelling interest.<sup>195</sup> The DBE program also facilitates the creation of a common, constitutionally-defensible methodology through which states can make and justify claims of prior or current discrimination. These features create significant inroads

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nesses); N.C. GEN. STAT. ANN. § 136-28.4 (West 2011) (authorizing the state DOT to set aspirational goals for minority-owned business participation in state contracting). Such state efforts benefit from greater clarity on acceptable goal-setting methodologies.

<sup>192</sup> See *supra* notes 145–65 and accompanying text (discussing state variations in implementing the DBE program).

<sup>193</sup> See *supra* note 54 and accompanying text (discussing the requirement for promulgators of affirmative action programs to give good faith consideration to workable race-neutral alternatives).

<sup>194</sup> See *supra* Part IV.A (discussing responses to *Western States Paving*); *supra* Part IV.B (discussing ways in which portable state experimentation can clarify the constitutional standing of other remedial affirmative action programs).

<sup>195</sup> See *supra* notes 38–42 and accompanying text (discussing uncertainty with respect to these issues in current doctrine).

toward resolving the constitutional status of remedial affirmative action programs—both in the DBE program and beyond. Since all remedial contracting affirmative action programs are subject to strict scrutiny, acceptable justifications for any program should be portable to other programs.<sup>196</sup> Even with a limited number of challenges to the DBE program in recent years, policymakers have improved clarity; any future challenges will further clarify this uncertain doctrinal area.

### CONCLUSION

Constrained constitutional experimentation may be able to play a meaningful role in resolving constitutional uncertainty in areas beyond remedial contracting affirmative action. In any area in which Congress hopes to resolve uncertainty, the federal government can create incentives for states to act. At the same time, states may have an interest in maintaining some control and flexibility. Indeed, as long as the Spending Power has not been curtailed too significantly by *National Federation of Independent Business v. Sebelius*,<sup>197</sup> this cooperative federalist structure is ripe to play a significant role in areas as wide ranging as gun control, campaign finance reform, and immigration.<sup>198</sup>

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<sup>196</sup> *Cf., e.g.,* *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007) (establishing that strict scrutiny applies “when the government distributes burdens or benefits on the basis of individual racial classifications”). Moreover, some state remedial contracting efforts even closely parallel the state’s DBE program. *See* *H.B. Rowe Co. v. Tippet*, 615 F.3d 233, 236–37 (4th Cir. 2010) (discussing parallels between North Carolina’s state DOT contracting affirmative action program and the DBE program).

<sup>197</sup> 132 S. Ct. 2566 (2012). *See supra* note 91 (discussing the Court’s opinion that struck down, as a violation of Congress’s Spending Power, portions of a Medicaid program expansion under the Patient Protection and Affordable Care Act).

<sup>198</sup> Important, unresolved constitutional questions implicating federalism exist in areas such as gun regulations, *see* *District of Columbia v. Heller*, 554 U.S. 570, 595, 628–29 (2008) (finding that “the Second Amendment conferred an individual right to keep and bear arms,” and invalidating a ban on handguns in the District of Columbia “[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights”); *Lawrence Rosenthal & Joyce Lee Malcolm, McDonald v. Chicago: Which Standard of Scrutiny Should Apply to Gun Control Laws?*, 105 *Nw. U. L. REV.* 437 (2011) (discussing the uncertain standard of scrutiny applied to evaluate permissibility of gun control restrictions), campaign finance, *see* *Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2814, 2828 (2011) (striking down an Arizona provision that gave “equalizing” funds to publicly-financed candidates when they were outspent by privately-financed candidates); *Citizens United v. FEC*, 130 S. Ct. 876, 913 (2010) (holding that “the Government may not suppress political speech on the basis of the speaker’s corporate identity”); *Davis v. FEC*, 554 U.S. 724, 741–44 (2008) (invalidating the Bipartisan Campaign Reform Act’s “Millionaire’s Amendment,” which increased contribution limits for candidates whose opponents spent above a certain level of their own money on the campaign), and immigration, *see* *Arizona v. United States*, 132 S. Ct. 2492, 2509–11 (2012) finding that federal immigration law preempts several sections of Arizona’s S.B. 1070 but not another section, while discussing the possibility of future substantive constitutional challenges against Arizona in

The use of this power raises many important questions that this Note does not explore further. Constrained constitutional experimentation involves important issues of federalism, forcing courts to assess the scope of Congress's Spending Power, states' rights, and the advisability of cooperative federalism to resolve constitutional uncertainty. This structure also implicates separation of powers between government branches. When Congress encourages states to act to resolve unclear constitutional precedent from the judiciary, Congress also exerts pressure on—or, more charitably, engages in dialogue with—the judiciary so that it can act with greater constitutional certainty. These considerations are especially important if policymakers and courts use the structure of constrained constitutional experimentation to resolve constitutional uncertainty in contexts beyond the DBE program. Yet even if constrained constitutional experimentation is not used more broadly, it has ultimately helped resolve some constitutional uncertainty in remedial contracting affirmative action.

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its implementation of S.B. 1070). Detailed discussion on these issues is beyond the scope of this Note, but the basic point stands: Constrained constitutional experimentation may allow the federal government and states to work together to identify the constitutional bounds of these areas of law.