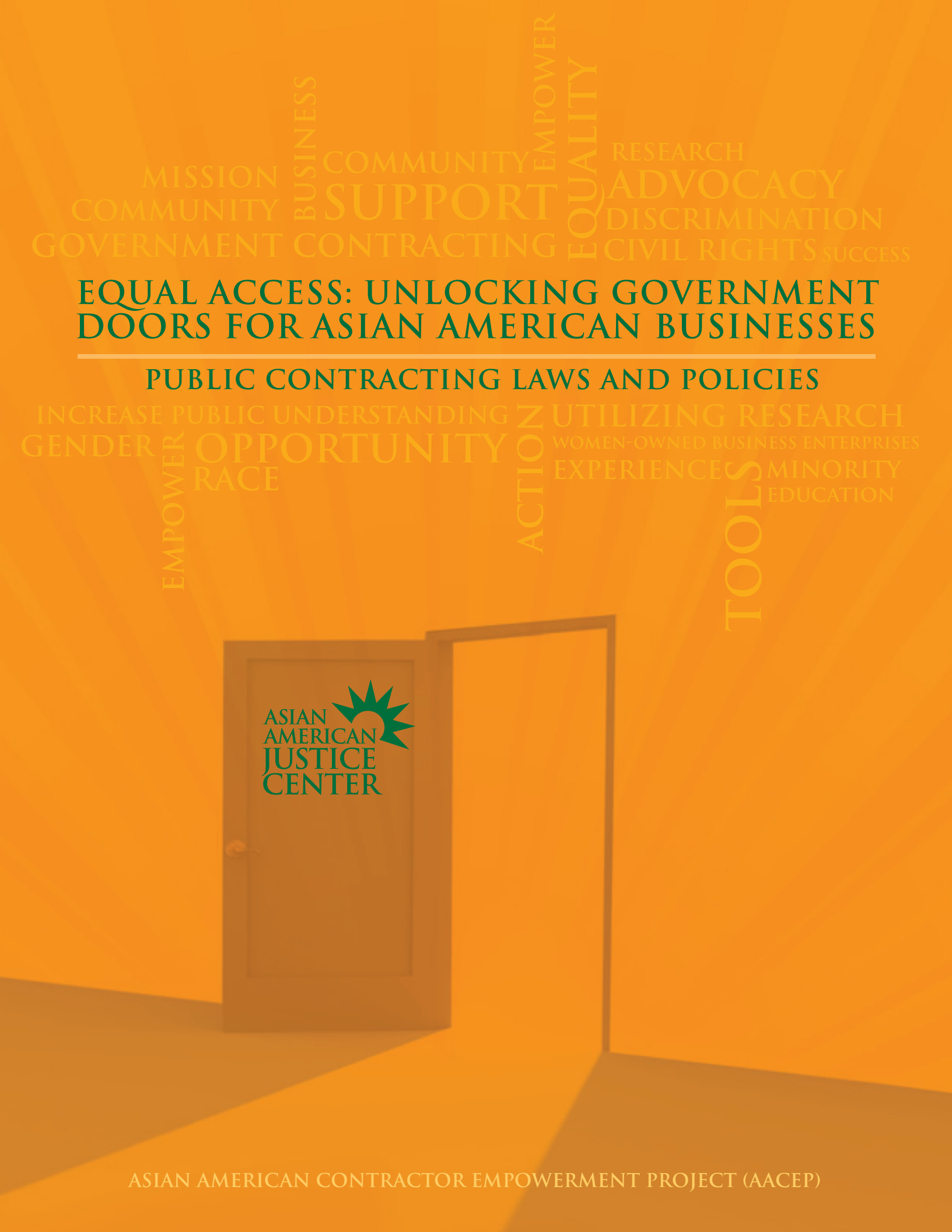

EQUAL ACCESS: UNLOCKING GOVERNMENT DOORS FOR ASIAN AMERICAN BUSINESSES

PUBLIC CONTRACTING LAWS AND POLICIES

ASIAN AMERICAN CONTRACTOR EMPOWERMENT PROJECT (AACEP)

EQUAL ACCESS: UNLOCKING GOVERNMENT DOORS FOR ASIAN AMERICAN BUSINESSES

PUBLIC CONTRACTING AFFIRMATIVE ACTION LAWS AND POLICIES

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ABOUT US

The **Asian American Justice Center** (AAJC) works to advance the human and civil rights of Asian Americans. AAJC is a leading national voice to advance equality for all Americans. AAJC provides balanced, non-partisan analysis, technical assistance, public education and public policy. Our goals are to:

Promote Civic Engagement: AAJC ensures that Asian Americans have the tools and institutional support they need to participate more fully in shaping the policies and programs that affect their communities on a local, regional and national level.

Forge Strong and Safe Communities: AAJC helps build Asian American community leadership, combats hate crimes and promotes productive race relations.

Create an Inclusive Society: AAJC assists Asian Americans to successfully challenge unnecessary barriers and unfair restrictions to equal and fair access to justice and public programs.

AAJC is a leading national expert on issues affecting the Asian American community and one that offers a pan-Asian perspective on issues such as hate crimes and race relations, affirmative action, immigration and immigrant rights, language access, census and voting rights.

AAJC also works with a strong and growing network of nearly 100 community-based organizations. They keep AAJC informed of what is happening in the growing Asian American communities in 49 cities and 23 states and the District of Columbia, as well as partner with AAJC to build strong communities.

AAJC is affiliated with three regional organizations. Together, as partners, they work to advance the human and civil rights of Asian Americans and Pacific Islanders.

The **Asian American Institute (AAI)** was established in 1992 as a pan-Asian not-for-profit organization. The mission is to empower the Asian American community through advocacy, utilizing research, education and coalition building.

Specifically, AAI works to improve cooperation and mutual understanding by bringing ethnic Asian American communities together, raising the visibility of the Asian American community and spotlighting its concerns so that elected officials, policy makers and the general public will understand, gather and disseminate data about Asian American communities.

Asian Law Caucus

Founded in 1972, the mission of the **Asian Law Caucus** (ALC) is to promote, advance and represent the legal and civil rights of the Asian and Pacific Islander communities. Recognizing that social, economic, political and racial inequalities continue to exist in the United States, ALC is committed to the pursuit of equality and justice for all sectors of our society with a specific focus directed toward addressing the needs of low-income Asian and Pacific Islanders.

Since the vast majority of Asians and Pacific Islanders in America are immigrants and refugees, ALC strives to create informed and educated communities empowered to assert their rights and to participate actively in American society. This perspective is reflected in our broad strategy which integrates the provision of legal services, educational programs, community organizing initiatives and advocacy.

ASIAN PACIFIC AMERICAN LEGAL CENTER OF SOUTHERN CALIFORNIA

The **Asian Pacific American Legal Center** (APALC) was established in 1983 as a nonprofit 501(c)(3) and has become the largest organization in southern California that provides Asian and Pacific Islander and other communities with multi-lingual, culturally sensitive services and legal education.

APALC's mission is to advocate for civil rights, provide legal services and education and build coalitions to positively influence and impact Asian Pacific Americans and to create a more equitable and harmonious society.

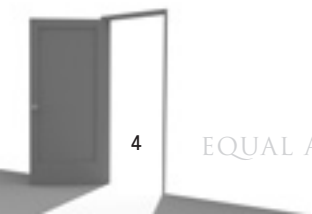
APALC's in-house attorneys and paralegals have developed expertise in a variety of areas, such as immigration and naturalization, workers' rights, family law and domestic violence, immigrant welfare, voting rights and antidiscrimination, and have also worked towards building inter-ethnic relations.

PREFACE

Most Asian immigrants to the United States came in search of the "American Dream," seeking a better life for themselves and their families. Like many minorities, however, they have been denied opportunities and advancement because of race and national origin discrimination. Today, Asian American entrepreneurs have made progress towards fully participating in the mainstream American economy. However, Asian American-owned businesses lag behind their white counterparts, suggesting continuing unequal access to business opportunities.

The Asian American Contractor Empowerment Project (AACEP), funded by the Ford Foundation and administered by the Asian American Justice Center (AAJC), seeks to support objective empirical research that can better inform Asian American stakeholders, decision makers and the general public about issues and concerns relevant to Asian Americans, equal opportunity and governmental contracting. AAJC partnered with the Asian American Institute to analyze how Asian Americans are situated within governmental contracting, specifically with respect to race-conscious strategies used to redress the under-representation of minority-owned enterprises. One such strategy is minority set-aside contracting, a type of affirmative action and broad race-based and outcome-oriented approach designed to reduce racial disparities. Minority set-aside contracting establishes a ceiling on the preferential treatment Asian American firms can receive in order to counteract past and current discrimination in the business arena.

This report explores the present status of Asian American-owned businesses, particularly their participation in government contracting. An examination of minority set-aside contracting programs makes clear the need for increased research regarding Asian American business owners in order to ensure their future inclusion in such programs.



EXECUTIVE SUMMARY

The policy analysis in this report is based on national and local data, with a focus on New York, Los Angeles, Chicago, San Francisco, Seattle and St. Paul. The current analysis examines contracting issues as part of the broader debate over race-conscious policies, as examining set-aside programs in isolation runs the risk of too narrowly defining the real challenge facing Asian Americans and the United States: how to solve racial inequality.

THE IMPETUS FOR RESEARCH

Significant controversy has threatened the inclusion of Asian Americans in set-aside contracting programs:

- *A wave of policy dispute and litigation brought by those charging that race-based policies and programs violate the rights of white males, a phenomenon strategically labeled "reverse discrimination."* Perhaps the most notorious example of this lies in California's Proposition 209, which in 1996 ended the use of affirmative action. Rulings from the U.S. Supreme Court as well as state courts have placed strict requirements on states regarding race-conscious programs, including costly disparity studies which governments do not want to fund, leading some states to completely ban affirmative action programs.
- *The exclusion of Asian Americans despite the inclusion of other minority groups.* Chicago excluded Asian Americans from its contracting program in 2003, citing a lack of empirical evidence to support their participation. Hispanics and African Americans were both included. Asian Americans were subsequently included following new research that provided the requisite evidence.

RESEARCH CONSIDERATIONS

In creating the current report, the researchers bore in mind the following lessons about studying Asian Americans:

- *Overly aggregated statistics, such as national averages, can be misleading*. These statistics fail to reveal the diversity within the Asian American population, and fail to properly contextualize Asian Americans within the regions they live.
- *Use the dominant group as the benchmark of comparison*. Too often, Asian Americans are compared to other minority groups, leading to the superficial stereotype of Asian Americans as the "model minority." In studying how Asian Americans should be situated in minority contracting (and other affirmative action programs), other barriers preventing them from fairly and fully participating should be considered.
- *Look below outcome statistics to examine underlying causal dynamics*. This type of analysis requires using econometric models, which is beyond the scope of this report but will be included in a future report. This report will provide a first-order approximation of a few key cause and outcome relationships.

KEY FINDINGS/OBSERVATIONS

I. Today, the socioeconomic situation for some Asian Americans has improved, but this does not mean that they should be excluded or ignored when it comes to affirmative action. It is undeniable, for example, that Asian Americans and African Americans occupy disparate material positions. This does not mean that Asian Americans are not disadvantaged. A better measure of the economic status of Asian Americans is to compare them to non-Hispanic whites (NH whites) within metropolitan areas. Such a comparison reveals that despite higher education, Asian Americans are not immune to discrimination in the labor market:

    - Asian Americans earn less and are less likely to move into management positions than NH whites after accounting for education and other variables.
    - Potential employers respond less frequently to electronic applications with Asian surnames than with surnames normally associated with NH whites.

II. Legal and political opposition, coupled with cultural barriers, have not extinguished the use of minority set-aside contracting, but they have made it very problematic:

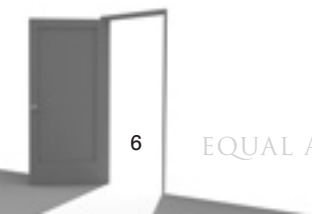
- On one hand, the U.S. Supreme Court noted that public funds should not be used to benefit private prejudices. That is, all public entities, whether state or federal, have a compelling interest in ensuring that public funds are not given to an industry that has discriminated against minority businesses.
- On the other hand, the policy around set-aside programs has become more process-oriented rather than outcome-oriented. Consequently, agencies and firms are only required to show a good-faith effort to implement a race-conscious plan, and there is no penalty for failing to reach the benchmark so long as there is a good faith effort.
- Despite the "compelling interest" against prejudice noted by the U.S. Supreme Court, public entities may only use race-conscious approaches as a last resort, when no other method can be reasonably expected to redress discrimination.

III. Asian American businesses have not been as widely or systemically analyzed as other minority business enterprises (MBEs). Nonetheless, existing findings support the hypothesis that business formation and viability for Asian Americans is sub-par:

- Despite the popular stereotype of Asian Americans having extraordinary entrepreneurial drive, the observed self-employment rate for Asian Americans is below that for NH whites.
- Asian American workers as a whole (both the self-employed and paid employees) earn only 90 cents to every dollar earned by NH white workers.
- Even after adjusting for educational attainment, Asian Americans earn only 86 cents to every dollar they would have earned if they had the same self-employment rates and average self-employment earnings.
- Given that Asian Americans have higher educational attainment, they should be more likely to be in the professional/scientific/technical (PST) services sector than self-employed NH whites – but in reality, the observed percent of Asian Americans in PST services is only 2/3 of the expected percentage adjusted for education. This under-representation is due in part to historical exclusionary practices of unions.

IV. A demographic overview and economic indicators in New York City, Los Angeles, Chicago, San Francisco, Seattle and St. Paul help define the material conditions that determine whether Asian Americans fit within a race-conscious set-aside program, as these cities contain sizeable Asian American populations and represent a diversity of settings. Unfortunately, the census data on Asian American under-performance in the business sector relative to NH whites, by itself, is not sufficient to empirically establish that Asian Americans meet the criteria for inclusion in race-conscious programs.

- Asian Americans are a numerical force only in one city, San Francisco, where they comprise a third of the total population, and a slightly lower percentage of the adult citizen population.
- The number of Asian Americans eligible to vote has been increasing; the challenge now is to transform numbers into voters.
- Asian Americans in all six cities examined are having difficulties translating their education into earnings and are more likely than NH whites to fall below the poverty line. This may be due to the same factors affecting national patterns, including discrimination and cultural-linguistic barriers encountered by immigrants.



V. Overall, the U.S. has backed away from seeking equality of outcome to promoting equality of opportunity. Even then, the meaning of equality of opportunity has been muddled, equating reverse discrimination with discrimination against disadvantaged minorities. Thus, the fate of Asian American businesses is inextricably linked to the fate of race-conscious remedies in local governments. In most cases it is sufficient to examine overall patterns and changes in the use of race-conscious approaches to understand the policies affecting this group.

- It may be more than coincidence that the two cities where minority contracting programs were established through executive power also had African American mayors at the time: Tom Bradley in Los Angeles and Harold Washington in Chicago.
- In this post-*Croson* era, the cities of Los Angeles, Seattle and St. Paul still declare that promoting minority business enterprise participation is important, but they rely on race-neutral approaches.
- San Francisco continues to aggressively fight for race-conscious remedies but the ability to do so is currently limited by California's courts.
- Some cities in the post-*Croson* era have been trying to formulate alternative approaches, including targeted efforts to enhance the competitiveness of MBEs through capacity building, networking with prime contractors, better access to financial markets and technical assistance.

FUTURE RESEARCH RECOMMENDATIONS & PRIORITIES

The policy analysis from this report helps identify three priority topics for the Asian American Contractor Empowerment Project.

- *A better understanding of how the socioeconomic status of Asian Americans is related to race-conscious policies.* Much of the current information depicts Asian Americans in simplistic and stereotypical terms, relying on equally simplistic and highly aggregated data, and thus obscuring a much more complex picture. Even after new data became available, the assertions still lacked a statistical foundation.
- *Improving the analyses used in disparity studies.* Many of the data sets available to researchers contain only a small sample of Asian Americans, making it statistically difficult to determine whether disparity exists. This problem will become more severe because of the new way in which the U.S. Census Bureau collects socioeconomic data for the population. The shift from using the decennial census to the American Community Survey translates into a smaller Asian American sample size.
- *Determining whether race-neutral policies and programs are appropriate.* Thus far, courts have been very flexible on what they accept as evidence of the relative ineffectiveness of race-neutral approaches. In particular, affirmative action proponents point to a dramatic drop in minority-owned enterprise contracts and contract dollars when a city or state terminates or suspends its set-aside program. It is very likely that courts will eventually require more rigorous evaluations of these alternatives. If the goal is to redress racial disparity, the selection should be evidence-based. As more program evaluations occur, it is vital that Asian Americans are included and that the methods are appropriate.

INTRODUCTION

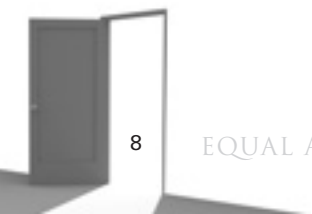
The purpose of this report is to examine how Asian Americans are situated within governmental contracting, specifically with respect to race-conscious strategies used to redress the under-representation of minority-owned enterprises. Minority set-aside contracting is a form of affirmative action—a broader race-based and outcome-oriented approach designed to reduce racial disparities. Active state intervention to produce concrete and tangible results—not just to expand opportunities—was adopted because anti-discrimination approaches alone proved insufficient. Over the last few decades, affirmative action and set-aside contracting have become politically and legally contentious, sparking a wave of litigation brought by those charging that race-based policies and programs violate the rights of white males, a phenomenon strategically labeled "reverse discrimination." These challenges have produced rulings that place strict requirements and conditions that must be satisfied before a State can pursue race-conscious remedies. Some States have gone further by outright banning the use of affirmative action.

An obvious point, but one nonetheless worth stating, is that what is permissible for affirmative action establishes an upper ceiling on the preferential treatment Asian American firms can receive in order to counteract past and current discrimination in the business arena. However, even when minority set-aside contracting exists, there is no guarantee that Asian Americans are included. Participation as a group hinges on whether there is compelling evidence showing that Asian Americans have been discriminated against within the private market and by direct or indirect governmental practices.

A precipitating event for this report was the exclusion of Asian Americans from Chicago's contracting program in 2003, based largely on the lack of empirical support to justify their participation. One major limitation was a paucity of available data, but there were also shortcomings in the analytical methods used. Asian Americans were subsequently reinstated after new research found the requisite evidence. It is also important to note that public interest organizations such as the Asian American Institute played a major role in pushing for the new wave of analyses.

One of the lessons learned from Chicago was the critical need to increase research relevant to Asian Americans. This insight was the genesis for the Asian American Contractor Empowerment Project, which is funded by the Ford Foundation and administered by the Asian American Justice Center. One of the Project's goals is to support objective empirical research that can better inform Asian American stakeholders, decision makers and the general public about issues and concerns relevant to Asian Americans, affirmative action and governmental contracting.

This report is the second of three supported by the Project. The first report focused on developing a research plan using quantitative methods that will be implemented in 2008. (Ong, 2007). This report is a policy analysis. Its purpose is to frame the discussion and set the stage for the proposed 2008 quantitative analysis. The policy analysis is done at both the national and local levels. For the latter, we examined minority contracting in six cities: New York, Los Angeles, Chicago, San Francisco, Seattle and St. Paul. Equally important, the analysis examines contracting issues as part of the broader debate over race-conscious policies. Understanding how Asian Americans are situated vis-a-vis these policies and their associated programs is part and parcel of understanding how Asian Americans are situated in minority set-aside contracting. Examining set-asides in isolation runs the risk of too narrowly defining the real challenges facing Asian Americans and the nation; that is, how to solve racial inequality.



METHODOLOGY

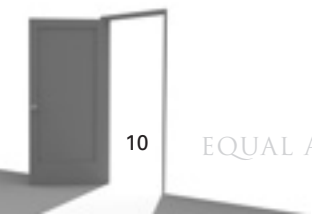
Paul M. Ong designed the methodology for this report. Multiple methods were used for this report, including a review of the literature on affirmative action and minority set-aside contracting. This provides an important background and context to understand the political, legal and conceptual principles that underpin race-conscious economic policies and programs. As we will see later, events have been historically fluid, and what is currently considered politically and legally acceptable has been contested in the past and will continue to be contested in the future. Within the literature review, we pay particular attention to the treatment of Asian Americans, focusing on the extent that they have been included as an eligible population for race-conscious policies. What emerges is a highly complex situation where the position of Asian Americans varies with the type of affirmative action program. Within governmental contracting, as well as in education and employment, material conditions (i.e., educational attainment, earnings and income, level of entrepreneurship, etc.) play a central role in determining inclusion or exclusion in race-conscious programs.

The policy analysis in this report benefits from accurate information that is carefully interpreted. Detailed and timely data is crucial to the political debate and policy discussions. Although this report is not a quantitative study, it does generate new information from the most current available data sets, including the 2005 American Community Survey and the 2002 Survey of Business Owners. Data is more useful when it is transformed into information that is carefully interpreted. This requires compiling and comparing publicly available statistics on Asian Americans and other groups. We supplement this type of information with tabulations of micro-level data sets, which allow us to generate customized statistics not directly available from governmental agencies.

In studying Asian Americans, it is critical to pay attention to three points. One, overly aggregated statistics, such as national averages, can be misleading. These statistics fail to reveal the diversity within the Asian American population, and fail to properly contextualize Asian Americans within the regions they live. As we will see later, the picture within metropolitan areas differs greatly from that at the national level. The second point is the selection of benchmarks, particularly in terms of choosing the appropriate comparison group. Too often, Asian Americans are compared to other minority groups, and this approach has led to the superficial stereotype of Asian Americans as the "model minority." However, in studying how Asian Americans should be situated in minority contracting (and other affirmative action programs), we should examine whether there are barriers preventing them from being able to fairly and fully participate. For this purpose, we should use the dominant group as the benchmark of comparison. The final methodological point is the importance of looking below outcome statistics to examine underlying causal dynamics. For example, it is useful to examine how human capital (measured by educational attainment) translates into business formation, rather than reporting these two outcomes separately. This type of analysis requires using econometric models, which is beyond the scope of this report but will be included in a future report. For now, we will provide a first-order approximation of a few key cause and outcome relationships.

This study uses two other sources of information. One is disparity studies, which are conducted to determine if a race-conscious policy is justifiable in governmental contracting. These studies are the only readily available source on the actions of Asian American firms bidding for governmental contracts and the rate they are utilized by the state. We also contacted numerous governmental agencies, researchers, and other stakeholders to gather information not available in published form.

The rest of this report is organized into six parts. Part 1 examines the history of race-conscious policies in the United States, from its gains following the civil rights movement to the setbacks resulting from court legislation and policies that have narrowly defined the use of affirmative action today. This section describes policy shifts in the government's efforts to redress discrimination, from anti-discrimination approaches to results-oriented strategies (affirmative action). It also outlines the factors and events that continue to restrict the use of race-conscious and outcome-oriented policies. Part 2 situates Asian Americans in the context of affirmative action. This section examines the perceived and real experience of Asian Americans as "model minorities" and describes the complex ways in which affirmative action relates to Asian Americans in education and employment. A summary of affirmative action policies and cases involving Asian Americans is also included. Part 3 describes the use of affirmative action to redress racial inequality found in governmental contracting through minority contract set-asides. Although rooted in assisting minority based enterprises (MBEs), court decisions and policy changes in the past decades have restricted the legal use of government contract-set asides and established the criteria of "strict scrutiny" when applying race-conscious policies and programs in this area. Part 4 examines the overall status of Asian American businesses and their relationship to minority contract set-asides. Population and business data show that Asian American businesses do not fare better that non-Hispanic (NH) whites. Asian American businesses are also less well positioned to participate in key industries for government contracting. Part 5 provides background information on Asian Americans in the six cities selected for this study. The available data shows that Asian Americans do not perform economically as well as NH whites and are not well positioned to bid for government contracts. Part 6 examines how political, legal and other factors have affected minority contracting policies and programs in our six case-study cities. The analysis reveals some of the commonalities and variations in local responses to court decisions, ranging from abandoning race-conscious remedies to a rigorous defense of the use of affirmative action. Of special interest are the events that led to the exclusion of Asian Americans in Chicago's program and the subsequent reinstatement. The report concludes by identifying three major challenges for future research on Asian Americans, affirmative action and governmental contracting.



PART 1: THE EVOLUTION OF EQUAL OPPORTUNITY

Equal opportunity, or afirmative action, is a part of a historical, social and political movement during the latter half of the 20th Century led by blacks against racism and for socioeconomic justice.[1] The movement saw its greatest victories in the three decades after World War II, and later saw many of those gains reversed in the following three decades. A 1948 presidential executive order ordered the integration of the military. State supported segregation in public schools ended with the 1954 *Brown v. Board Education* ruling. In 1961, a presidential executive order mandated an end to discriminatory employment practices and established the Equal Employment Opportunity Commission. The 1964 Civil Rights Act prohibited discrimination at facilities serving the public, in federally-funded programs, and by both private and public employers. A year later, the Voting Rights Act was enacted to protect the rights of minorities to participate in elections. In the past five decades, presidents from both parties played a role in promoting civil rights, although often for their own political gains. These gains were made palatable by a robust and expanding economy, which minimized inter-group conflicts over resources. This is not to minimize the struggles and sacrifices of those in the civil-rights movement, but it is important to recognize that the cost of societal change was covered by a growing economic pie.

The gains, however, did not come without considerable resistance. Below the surface of what appeared to be steady progress were hard fought battles on both sides. Those who stood to lose the most were many whites vested in the racial privileges and power provided by the old racial order, and they were not reluctant to use violence to intimidate minority activists and their allies. Ironically, it was the image of racist violence in the mass media that turned many Americans against the most overt forms of racism. Opposition to civil rights was also not limited to overt bigots. While many Americans disavowed the most visible manifestation of racial hatred, a majority felt that things were "moving too fast." The type of changes embraced by minority activities was seen as being too radical. The conditional and sometimes reluctant support of civil rights by the majority resulted in incremental and slow pace of change, and this, in turn, produced a growing frustration within the civil rights movement. Black and minority expectations for equality rose faster than the progress. The struggles for integrating schools and public facilities and equal voter rights gave way to a call for economic justice, particularly against persistent and pervasive poverty.

Affirmative action emerged as a race-conscious and result-oriented policy, in part because of the limitations of the anti-discrimination major approach. which can be classified as being. As the name implies, the latter approach is designed to fight discriminatory acts and practices. In practice, it is a policy meant to assist victims of specific, unfair and racially motivated or biased decisions in employment, housing, financing and other economic spheres. For example, President Kennedy's 1961 Executive Order was strictly anti-discriminatory in nature, with the goal that promoting, hiring and terms of employment are practiced "without regard to race, creed, color or national origin." While the intent was to redress the discrimination experienced by blacks and other minorities, the protection extended to anyone who suffered from racial discrimination. In one form, the burden falls on the victims because they must make a claim, and this occurs after the fact. Consequently, there are numerous barriers related to legal and personal costs, gathering evidence, and potential future retaliation. A claim made by a singe individual, moreover, does not cover systematic practices that adversely affect non-claimants. Of course, there could be a deterrent effect against discriminatory behavior, but that is contingent on the size of the sanction as well as the aggressiveness of government in pursuing significant penalties.

Another form of anti-discrimination policy includes those related to unfair and biased and institutionalized practices. Examples of institutionalized discrimination include tests and criteria that are not related to the actual job duties and requirements but are biased against minorities, thus effectively denying them an equal chance of being hired.[2] Actions against discriminatory practices can be initiated through class action law suits or by governmental agencies with the authority to do so. This institutional approach to anti-discrimination goes further than individual claims of discrimination because it can directly eliminate barriers to all members of a group potentially subject to biased practices.

1. For background information on affirmative action, see Ong (1999), Leiter and Leiter (2002), Anderson (2005), Kennedy-Dubourdieu (2006), and Kellough (2006).
2. See *Grigg v Duke Power Co*, 1971.

The anti-discrimination approach is an attempt to create "equal opportunities" for disadvantaged minorities. It focuses on specific events where behavior is overtly racist, or where narrowly defined institutionalized practices can be shown to have no legitimate function and systematically disadvantages one group. The strategy is also reactive; that is, it takes action after an act or event, with the aim of rectifying the wrong. Attacking institutionalized patterns goes further because it eliminates discriminatory practices. In this sense, it removes a barrier, thus potentially creating more opportunities. Whether or not this has a measurable effect on the outcome is not known or guaranteed.

Anti-discrimination policy can be effective under certain circumstances. This is particularly true when such events and practices are the dominant source in producing racial inequality. This has to be coupled with vigorous enforcement and penalties that are sufficient such that the laws operate as a deterrent threat.[3] Unfortunately, anti-discrimination policy is not always effective because the forces and factors producing inequality are often subtle and not explicitly racial, but rather are the result of a complex chain of cumulative, systemic and reinforcing effects. (Kang and Banaji, 2006; Blasi and Jost, 2006) Housing and school segregation, unconscious prejudices and stereotypes, racially based networks, differential access to markets and seemingly race-neutral public policies all contribute to structured racial inequality. The implication is that anti-discrimination efforts, while desirable and perhaps even necessary, were not sufficient in addressing racial disparities.

The more complex reality of how racial inequality is produced led to President Johnson's famous speech on the inherent and pervasive disadvantage faced by blacks. He stated in 1965 at Howard University:

> "You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, `You are free to compete with the others,' and still justly believe that you have been completely fair."

Framing the issue this way required a shift in the current policy—from one attacking overt discrimination to approaches designed to more directly produce equitable outcomes. Government's role would go beyond dismantling barriers to offsetting the handicap. In President Johnson's words, "We seek not just freedom but opportunity-not just legal equity but human ability-not just equality as a right and a theory, but equality as a fact and as a result." The focus shifted to equality of outcome.

Affirmative action became the core approach to promoting the equality of outcome (or equality of results). Of course, result-oriented policies are not new, and this approach has earlier roots dating back to Reconstruction and the New Deal. The implementation of the 1933 Unemployment Relief Act, for example, included a requirement that federal contractors hire black workers. (Anderson, 2005) In contemporary times, affirmative action took form in the latter part of the 1960s. President Johnson's 1965 Executive Order required federal contractors to develop plans to increase the number of prospective minority employees in all aspects of contracting and employment. In 1969, the Nixon administration devised the "Philadelphia Plan" requiring federal contractors to establish hiring goals and timetables. In subsequent years, the affirmative action approach was applied to educational institutions and public contracting, and was also adopted by many private firms in relation to their work force and business-to-business activities.

Clearly, affirmative action programs are race-conscious, both in terms of identifying the groups that are under-represented as well developing remedies to improve their status. Because it is difficult to pinpoint the causal sources of disadvantages encountered by racial minorities, affirmative action strategies opt for corrective actions that counterbalance diffused but harmful societal factors that produce inequality. This is akin to treating the symptoms in medicine, a strategy that is used when the causes are not known or cannot be directly attacked. It may be a "second best" solution, but it is also a potentially useful, effective and feasible alternative under certain circumstances. Moreover, because it is also difficult to determine which member of a minority group has been harmed, the corrective actions are extended to all members of that group. The public health analogy would target a subpopulation for treatment because a problem is concentrated within that group.[4]

3. In economic terms, this means that the expected cost of being punished is greater than the gain from discriminating. The expected value is a product of the chances of being caught and convicted times the penalties.
4. See Cunningham, Loury, and Skrentny (2002) for a similar public-health related analogy.

Two controversial aspects of affirmative action are how far the policy should go in terms of achieving a desired outcome and if its coverage should be based on race. Clearly, it is possible for government to eliminate some forms of group disparities through the creation of group-based slots. For example, a university can reserve a predetermined number of admission slots for under-represented groups. Such a strategy has been used in the United States and beyond. India, for example, has tried this approach as a way to eliminate the deep inequality inherent in its caste system. (Deshpande, 2006) An example in the United States is the effort to integrate public schools by reassigning students such that the racial composition of the student body for all schools is identical for a given school district. However, history has shown that simple redistribution of privileged positions is impractical in many cases, as well as highly controversial. Consequently, in order to minimize political fallout, most affirmative action programs were not strictly based on a quota system. This tactical and pragmatic approach goes back to the Philadelphia Plan, when its architects used the term "goals." (Anderson, 2005) Since then, most affirmative action have used "aspirational goals" that serve as a guideline and as a benchmark to measure progress. The programs that used harder numerical targets or reserved slots for minorities would become political and legal lightening rods, as we will see later.

The other highly controversial aspect of affirmative action is participation by membership in eligible racial groups. As a "second best" solution, this approach can err in including individuals who are not disadvantaged (or at least highly disadvantaged) or in excluding individuals who are disadvantaged. Moreover, as discussed a little later, this raises the question about whether race can be used to correct racial inequality.

The controversy around affirmative action is not just conceptual. An important societal and political consequence of affirmative action is creating race-conscious conflict by redistributing opportunities, although this was often more symbolic than real because changes occurred at the margins. At any given site, there were real and perceived winners and losers. Although the proponents justified this by arguing that affirmative action is just offsetting unfair advantages enjoyed by the majority, this did not assuage their opponents.

Concerted opposition emerged soon after the spread of affirmative action, with opponents arguing that the race-conscious nature of affirmative action policy was unconstitutional. In particular, it was argued that the programs discriminate against white males (reverse discrimination), who should enjoy equal protection under the Constitution and civil rights laws. The battleground of choice at that time was the courts, with numerous cases filed dating back to 1970. The first major defeat for affirmative action proponents came in 1978 in *Regents of University of California v. Bakke*, when the Supreme Court ruled against the affirmative action program used by U.C. Davis' medical school, which set aside slots for minorities. (Douglas, 1998) The Court stated that the program violated Title VI of the 1965 Civil Rights Act and the Fourteenth Amendment by denying admission to a white male applicant, Allan Bakke, while academically less qualified minorities were admitted.

The Court, however, did not rule that all affirmative action approaches are unconstitutional. Instead, race can be used as one flexible factor in the admissions process if the state has a legitimate interest in promoting racial diversity in the student body. In the 1980s, the Court allowed for voluntary affirmative action programs, but also ruled against preferential protection for minorities in layoffs and imposed a greater burden of proof to justify affirmative action. Further restrictions came in the early 1990s in cases involving minority contract set-aside programs, which will be discussed in detail later.

One of the most important developments during this period was the adoption of what is known as "strict scrutiny." Under this legal standard, government must demonstrate that past governmental action contributed to the specific inequality in question, that there is a compelling government interest to remedy the wrong, and that the program is narrowly tailored to solve only the problem in question. (The next section provides more detail, particularly its application to minority set-aside contracting.) In the 1996 *Hopwood v. Texas* case, similar requirements were imposed on admissions programs in higher education, restricting the use of race to only when it is necessary to remedy past discrimination by the school itself. Moreover, the courts raised the question whether promoting diversity within a student body is a compelling state interest, thus making it more difficult to correct any racial imbalance in higher education.

In two 2003 rulings involving the University of Michigan, the Supreme Court again questioned the legitimacy of affirmative action admissions programs. In the case involving undergraduate admission, the Court ruled against the university because it used race as an inflexible numerical approach, even though race was only one of many factors. On the other hand, the door was not completely closed[5]. The Court also ruled in favor of the law school's admissions program because it relied on individual review rather than the more mechanical method used in the undergraduate admission process[6]. Race was used, but in a much more flexible fashion along with other factors[7]. Moreover, the Court found that the school had a compelling interest in promoting racial diversity both within the school and the profession.[8]

The movement against anti-affirmative action has been made possible in large part because of the ability of conservative Presidents to appoint like-minded individuals to the US Supreme Court and to key Cabinet and administrative posts. President Reagan used his executive powers to oppose affirmative action and other race-conscious policies. This was accomplished in part by selective appointments to key positions in the Civil Rights Division in the U.S. Departments of Justice and Education, the U.S. Commission on Civil Rights and the Equal Employment Opportunity Commission. This pattern continues today, where even the enforcement of anti-discrimination laws has been weakened.

Perhaps the most important set of presidential appointments have been to the U.S. Supreme Court, which now has a conservative majority. As described above, it has increasingly constrained when and how affirmative action can be used. The tide has turned so much that the attack has broadened to an effort to push back the clock on other civil rights gains. One example is the 2007 ruling against voluntary school desegregation plans in Seattle and Louisville[9]. While the ruling did not entirely prohibit the use of race as one factor in efforts to promote diversity, its application has been severely narrowed to limited efforts through gerrymandering, rather than extensive reassignment of students by their race. The restrictions may make it extremely difficult to break the nexus between housing segregation and school segregation, thus crippling any meaningful effort to integrate schools. This is pushing society back to separate and unequal worlds in one of our most basic institutions, public education.

Opposition to affirmative action has also appeared at the ballot box as referendums and initiatives that prohibit the use of race-based policies and programs. (Kellough, Chapter 3, 2006; Americans for a Fair Chance, 2005) While there is a mixed record in voting outcomes, the numbers of states with such restrictions has increased and will likely to continue to do so. Perhaps the most well known of these is California's 1996 Proposition 209, the "California Civil Rights Initiative," which turned the civil rights argument on its head. (Chavez, 1998) The proposition stated, "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." The intended purpose of the proposition was to end the use of affirmative action, and it passed with over 54 percent of the public vote. The proposition prohibits the state and its local jurisdictions from using most affirmative action programs.

The California proposition was followed by similar efforts in other locations. (Americans for a Fair Chance, 2005) In 1997, the voters in the City of Houston defeated Proposition A, which also sought to end affirmative action. One of the most intriguing aspects of that election was the debate over how the initiative should be worded. The proponents of the prohibition wanted the following wording: "The city of Houston shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, ethnicity, or national origin in the operation of public employment and public contracting." The mayor, an opponent of the initiative, and the city council altered the wording to state: "Shall the Charter of the City of Houston be amended to end the use of Affirmative Action for women and minorities in the operation of City of Houston employment and contracting, including ending the current program and any similar programs in the future?" (The initiative was defeated.) The war over semantics points out two competing

5. See generally *Gratz v. Bollinger*, 539 U.S. 244 (2003).
6. See generally *Grutter v. Bollinger*, 539 U.S. 306 (2003).
7. Id.
8. "… Diversity promotes learning outcomes and better prepares students for an increasingly diverse workforce, for society, and for the legal profession." The same argument was made with respect to preparing business, military and political leaders. U.S. Supreme Court, Reporter of Decisions, 2003.
9. See generally *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S.___(2007)(holding that school boards did not present compelling state interest that would justify assignment of school seats on basis of race).

principles, both of which are supported by the majority of the public. On the one hand, there is strong support for anti-discrimination policy as well as opposition to preferential treatment based on race. At the same time, a majority was also willing to support a program that attempts to redress past and current racial inequality.[10] This implied that while it was important for government to be "color blind" in principle, there was also a pragmatic accommodation for affirmative action under existing conditions. This meant that the outcome of the battle at the ballot box hinged partly on how the issue was cased.

Learning from the defeat in Houston, subsequent anti-affirmative action efforts carefully guarded the way they structured their wording. This led to some success. Washington State passed Initiative 200 in 1998, effectively stopping the state and its local jurisdictions from using affirmative action. A similar initiative was proposed on the Florida ballot but failed to reach the state's voters; instead, Governor Jeb Bush issued an executive order in 1999 ending the use of affirmative action in government employment, contracting and education. In 2006, Michigan voters supported Proposal 2, the "Michigan Civil Rights Initiative," which amended the state constitution to prohibit the use of affirmative action programs based on race as well as ethnicity, national origin or gender. This law may prevent the University of Michigan from using race as a factor to achieve diversity, a practice that the Court allows under some tight restrictions. The effort to use the ballot box continues, as opponents of affirmative action hope to put the initiative on the 2008 ballot in at least eight states: Arizona, Colorado, Missouri, Nebraska, Nevada, Oregon, South Dakota and Utah. (American Civil Rights Coalition, 2006)

Not all of the civil rights gains won in the three decades after World War II have been eliminated, but the ever increasing legal restrictions on affirmative action have seriously undermined the ability to end racial injustice and inequality. Affirmative action is not completely dead, but it is clear that it is extremely difficult to pursue race-conscious and outcome-oriented policies.

10. See the Houston Area survey, 1982-Present. http://cohesion.rice.edu/centersandinst/has/hasreport.cfm?doc_id=3852

PART 2: ASIAN AMERICANS AND EQUAL OPPORTUNITY

Situating Asian Americans within equal opportunity has been problematic since at least the 1960s, and is even more complicated today. Much of the complexity is embedded in the way race-conscious policies are framed. Equal opportunity and affirmative action were developed in response to the plight faced by African Americans and to the demands of the black-led civil rights movement. Much of this nation's race-related policies have been dominated and shaped by a black-white paradigm, and it is not easy to position Asian Americans within this framework.[11] The simplicity of a black-white paradigm lies in the interlocking of a racial order that is replicated across disparate arenas—from education to work to capital accumulation. Prejudice and discrimination are pervasive, and the consequences are glaring. By most indicators of social economic status (SES), the gap between the two races is wide and deep, and persistent. The divisions are also highly visible in its spatial manifestations, particularly in terms of housing and school segregation. (Massey and Denton, 1994; Wilson, 1990; Orfield and Lee, 2005; Ong and Rickles, 2004)

This stark bipolar racial structure is the foundation for policies to correct racial inequality, and the ubiquity of the problem allows for uniformity at a broad policy level. The same fundamental reasons given for the need for affirmative action in employment can also be applied to education and government contracting. That is, the more proactive, race-conscious and result-conscious approach is needed because the disparities are so profound that anti-discrimination laws alone are not sufficient. Of course, not everyone agrees on this prescription, as evident in the heated political conflicts and numerous court challenges, but the point here is that the black-white paradigm allows for a certain consistency in formulating a policy response.

Within this dichotomous racial framework, most policy makers have opted to include Asian Americans in race-conscious policies. For example, "Orientals" were included in the implementation of the 1969 Philadelphia Plan, which required federal contractors to set goals and timetables to hire underrepresented minorities. Since then, this practice has been widely adopted by federal agencies, as well as local and state governments. Nonetheless, there have been objections to including Asian Americans.[12] In 1967, for example, there was an unsuccessful effort to exclude "Orientals" from a form used to collect data related to the enforcement of equal employment opportunity. (Hammerman, 1988) Among the most vocal objectors are LaNoue and Sullivan (1998), who termed this phenomenon as a problem of over-inclusion. Skrentny (2006) attributes the inclusion to decisions made by a "policy-elite" without much supporting evidence but rather "the policy-elite perceptions that Asian Americans … were morally and definitionally analogous to blacks…" (2006, p. 1777). A lack of an empirical justification has a number of potential ramifications. This was apparent in the *Croson* case, where the Court ruled that "random inclusion" of groups with no history of being discriminated against makes a race-conscious program suspect[13].

Those objecting to the inclusion of Asian Americans argue that the data support their position.[14] For example, Graham states the following in reference to the Philadelphia Plan:

> "Thus, in the same year (1969) that the Nixon administration, through the affirmative action requirements of the Philadelphia Plan, committed the federal government to a norm of proportional representation for minority groups in the workforce, the census data showed that Japanese and Chinese Americans, although racial minorities suffering severe historic discrimination in America, were economically successful." (1998, p. 906)

This assertion about conditions in the 1960s, however, is specious, based on historical hindsight and on a view that may be tainted by the recently perceived contemporary socioeconomic success of Asian Americans. At the time when the Philadelphia Plan was devised, the available data did not show that Asian Americans were "economically successful." This can be seen in the published data from the 1960 Census (U.S. Census Bureau, 1963) for

11. Much of the discussion of Asian Americans and affirmative action is based on an update of two earlier publications, Ong (2003) and Ong (2004). For a more general discussion about the need to go beyond the black-white paradigm, see Edley (1996).
12. Similar objections have been raised regarding the inclusion of other groups, such as American Indians.
13. *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).
14. One could make an argument for inclusion based on the history of anti-Asianism, which is well documented. (See for example, Chan, 1991.) However, affirmative action is not a program to compensate for past wrongs. Historical racism is relevant when its legacy contributes to contemporary inequality. Whether that is the case for Asian Americans is an empirical question.

California, the state with the largest concentration of Asian Americans. At that time, Asian males earned considerably less than their white counterparts. In fact, Filipinos earned less than African Americans, and Chinese earned only slightly more than African Americans.[15] While Japanese did better than the other two Asian ethnic groups, they still lagged behind whites. Data from the 1970 Census were not available until 1973, well after the implementation of affirmative action. Even then, the data show that Chinese males still lagged behind whites, and Filipinos lagged behind both whites and African Americans. (U.S. Census Bureau, 1973) The available empirical data do not show that Asian Americans were "economically successful" at the time when affirmative action was established.

Today, the socioeconomic situation for some Asian Americans has improved, but this does not mean that they simply should be excluded or ignored when it comes to affirmative action. It is unmistakable that Asian Americans and African Americans occupy disparate material positions. This can be seen in the SES statistics in Table 1, which come from the 2005 American Community Survey (ACS).[16] In terms of educational attainment among those of prime-working age (25 to 64), Asian Americans are less likely to have less than a high school education and nearly three times as likely to have a college degree compared to African Americans. In many ways, Asian Americans also perform better in the labor market; that is, they are less likely to be unemployed, are more likely to be in high-status occupations, and have higher average earnings. This translates into having household and family incomes that on the average are twice as high as African Americans, a considerably lower poverty rate.[17] This does not mean, however, that Asian Americans are not disadvantaged or should be automatically excluded from the discussion and debates about affirmative action.

Table 1: National SES Statistics, 2005

	African Americans	Asian Americans	NH Whites
Educational Level 25-64			
Less than high school diploma	15.80%	11.40%	7.90%
High school graduate	34.00%	16.00%	28.70%
Some college or associate's degree	31.80%	20.50%	30.70%
Bachelor's degree	12.40%	30.80%	20.90%
Graduate or professional degree	6.10%	21.20%	11.80%
Enrollment 19-24 years old			
College or graduate school	30.20%	59.80%	40.80%
Labor Market Outcomes			
Unemployment Rate	13.20%	5.80%	5.50%
Management, professional, and related	26.30%	47.00%	37.70%
Mean FT/FY Earnings, Male	$41,418.00	$63,036.00	$62,724.00
Mean FT/FY Earnings, Female	$34,368.00	$46,984.00	$42,192.00
Income Statistics			
Median household income	$30,939.00	$60,367.00	$50,622.00
Median family income	$36,075.00	$69,159.00	$62,300.00
Per capita income	$16,676.00	$27,201.00	$29,025.00
Persons below poverty line	25.60%	11.50%	9.00%

15. Median incomes for these groups were: $4,388 for Japanese Americans, $3,803 for Chinese Americans, $2,925 for African Americans, and $5,109 for whites. There was less inter-racial disparity among females, who earned less than half of their male counterparts. The racial variation in female earnings is due in part to differences in the level of labor market attachment.
16. The table is based on both published aggregated statistics from the ACS and on tabulations by the authors of the 1 percent of public-use micro-sample (PUMS).
17. The federal poverty line (FPL) is adjusted for inflation and family size. For 2004, the FPL for a family of 4 living in one of the 48 contiguous states or the District of Columbia is $18,850.

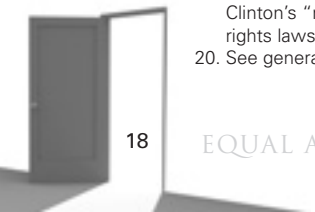
The issue of whether Asian Americans encounter racial discrimination and racial inequality should not be measured against the plight faced by African Americans. Instead, as stated at the beginning of this section, it is a question of whether or not Asian Americans have been treated fairly by the dominant society. Empirically, it is a question of how well Asian Americans fare relative to non-Hispanic whites (NH whites). A first cut of the SES indicators suggest that the answer is "yes," but this is a superficial indicator. This can be readily observed in the educational statistics, which show that Asian American adults have higher levels of educational attainment, and this pattern is likely to be replicated in subsequent generations based on the pattern of school enrollment. Moreover, Asian American students are more likely to attend schools, colleges and universities that are highly ranked academically. (Ong, 2003) Their educational performance has been the basis for the widely held perception of the group as a "model minority." Asian Americans also have higher SES statistics relative to NH whites in terms of labor market outcomes and income.

Yet, the aggregated statistics are misleading. The higher educational attainment is rooted in this nation's immigration laws and policies, which have led to selective migration of the highly educated Asians. (Liu, Ong, and Rosenstein, 1991; Ong, Cheng, and Evans, 1992; Ong and Liu, 2000) Consequently, this high level of educational attainment should not be equated to having privilege within American society or this nation's educational system. As we shall see later, Asian Americans are not treated equally or fairly. The income statistics are also misleading. Asian Americans are highly concentrated in large metropolitan areas with high cost of living, which the economic market offsets by compensating high earnings.[18] A better measure of the economic status of Asian Americans is to compare them to NH whites within metropolitan areas. As we shall see later, the data for our case-study cities show that Asian Americans do not fare as well as NH whites in large metropolitan areas. Finally, it is important to note that despite higher education, Asian Americans are not immune to discrimination in the labor market. In fact, the statistical evidence shows that they earn less and are less likely to move into management than NH whites after accounting for education and other characteristics. This will be discussed in more detail later.

While this report focuses on minority contracting, it is useful to briefly examine how Asian Americans are situated in affirmative action policies and programs in the field of education and employment. The short response is that there is no simple answer.[19] The variation in socioeconomic outcomes shapes how Asian Americans are related to affirmative action. In education, where Asian Americans have been relatively successful, the issue is whether they should be subject to caps, and how such restrictions are related to equalize opportunities for other minorities. In the labor market, Asian Americans have had conditional success but continue to encounter discrimination, and the issue is whether concerns such as the glass ceiling merit proactive intervention.

As a general rule, Asian Americans are not included in affirmative action programs in public education. Their inclusion in the past proved to be problematic, and this was certainly the case in the *Bakke* case involving the minority admissions program operated by the medical school at the University of California at Davis in which the U.S. Department of Justice questioned the inclusion of Asian Americans[20]. There have also been efforts to include specific Asian American ethnic groups that were under-represented. Filipinos, for example, had been included by the University of California, but were dropped in the mid-1980s. In more recent years, programs such as those at the University of Michigan have not included Asian Americans in their affirmative action or diversity programs.

18. Large metropolitan areas are able to maintain their size because of greater economic efficiency and productivity associated with agglomeration. However, because they are large, the cost of living is correspondingly high, particularly in terms of housing and transportation (commuting). In equilibrium, two individuals with the same skills are just as well off in a smaller city as in a large metropolitan area.
19. More broadly speaking, Asian Americans also occupy a unique position in this heated political debate and have been ideologically on both sides of the political divide, with some adamantly supporting and others vehemently opposing the policy. The socioeconomic status of Asian Americans points to complex hierarchy rather than a simple dichotomous order. The status of Asian Americans moves us away from this duality to a more nuanced paradigm with Asian Americans occupying a middle position between blacks and whites. Because Asian Americans remain significantly disadvantaged in some arenas, they have a plausible claim for inclusion in race-conscious programs. Edley (1996), the chief architect of President Clinton's "mend it, don't end it" approach to affirmative action, provides two additional reasons: Asian Americans are a protected group within civil rights laws, and they continue to face discrimination.
20. See generally *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).



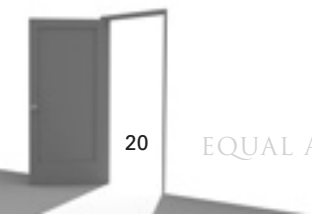
A difficult issue for Asian Americans is the use of caps or upper limits imposed on their enrollment, especially to the top academic schools. One notable case involved the practices during the 1980s at the two flagship campuses of the University of California: Los Angeles and Berkeley. (Wang, 1988; Nakanishi, 1989) Both campuses had lower admission rates for Asian Americans than for other major groups, with many Asian American applicants being passed over when less qualified applicants were admitted. In particular, less qualified white applicants gained entry, which raised the issue of potential systematic institutional practices that created *de facto* discrimination. The problem was investigated by both the federal government and the state's Auditor General, both finding fault with the universities. The issue was resolved explicitly at Berkeley, where the Chancellor eventually admitted that the process was biased against Asian Americans, and resolved tacitly at UCLA through a change in the process. The controversy in the public universities has subsided, but there is evidence of continuing use of practices of limiting Asian American enrollment through stricter standards. (Kidder, 2006)

The issue of restrictive quotas also materialized in public K-through-12th grade schools, and the most notable case involved San Francisco. (Poon, Terriquez and Ong, 2007) Like most urban school districts, blacks were highly segregated into low performing schools within the San Francisco Unified School District (SFUSD). As a part of a court-ordered integration plan, the district established enrollment caps of 45 percent on most schools and 40 percent on magnet schools for any of nine named ethnic groups. These restrictions affected Chinese students because they comprised the largest ethnic group. In particular, it limited their numbers in the better academic schools, particularly at Lowell, a nationally ranked high school. In the mid-1990s, Chinese comprised slightly over 40 percent of Lowell's student body, and to keep within the maximum, the admission criterion for Chinese was raised above other groups. The restriction and the higher admission standards were not well received by many Chinese parents, eventually leading to a lawsuit against the district to end what was termed discriminatory quotas (*Ho v. SFUSD*, filed in 1994 and settled in 2007). The court ruled in favor of the plaintiffs, forcing the district to abandon the cap for Lowell and to develop race-neutral criteria to maintain diversity.

The situation in the employment arena is less controversial for Asian Americans than in education when it comes to race-related issues. The evidence shows that they are disadvantaged despite the high level of education. In other words, Asian Americans are not fully able to translate their credentials into commensurate earnings and occupational status. The earnings effect is well documented, including a detailed econometric analysis based on the 2000 Census. (Mar, 2005) After accounting for a number of personal characteristics (education, years of experience, English language ability, years in the U.S. and citizenship status for immigrants and sex) and controlling for geographic region, the study found that most Asian American males earned considerably less than NH white males. Asian American females earned approximately the same as NH white females, which suggests that both groups experience the same gender bias relative to NH white males. The lower earnings, *ceteris paribus*, can be caused by a number of factors, including unobserved cultural differences that can disadvantage immigrants. However, there is other evidence that points to prejudices against Asian Americans. One study found that potential employers respond less frequently to electronic applications with Asian surnames than with surnames normally associated with NH whites. (Thanasombat and Trasvina, 2005)

An equally important issue for Asian Americans is the "glass ceiling," which refers to a set of barriers preventing many minorities and women from moving into higher management positions. (Woo, 2000) Information from the 2005 ACS shows that Asian Americans are less likely to be in management positions than NH whites (12.2 percent versus 17.2 percent), and this is true even for those who have a college degree. This gap may be related to differences in self-employment rates, where owners of small businesses also manage their firms. Similar patterns of disparity are apparent in 2005 data for firms with at least 100 employees, where only 8.6 percent of Asian Americans are in management positions compared to 13.2 percent of whites. (U.S. EEOC, 2007) The problem is not isolated to just the private sector because Asian Americans are also under represented in government management positions. (Wu and Eoyang, 2006) The odds of being in management hold up after controlling for a number of personal characteristics, revealing an unexplained racial residual effect. One explanation is cultural, both because of behavior on the part of Asian Americans that is perceived as non-assertive and because of biases on the part of employers. (Pham, Hokoyama, and Hokoyama, 2006)

Trying to come up with policy solutions to the labor-market problems facing Asian Americans is not easy. Certainly, the use of anti-discrimination laws, where appropriate, is a potential solution. But one barrier is the reluctance of many Asian American individuals to file a claim. (U.S. EEOC, 2003) There is also a need to attack institutionalized biases. An example is the successful effort to integrate San Francisco's fire department. During the mid-1960s, there were only six Chinese (and one black) among approximately 1,600 firefighters, a number that essentially remained unchanged for a decade. Under a 1974 court order, the department was expected to increase the number of Asian American firefighters to nearly 200. Affirmative action can also improve employment outcomes for Asian Americans. One study found that firms receiving federal contracts (thus having an affirmative action obligation) employed relatively more Asian Americans than non-contracting firms after controlling for other firm characteristics. (Rodgers, 1999) A lingering issue is whether active government intervention is needed to eliminate the glass ceiling. There is no answer at this time, both because of the current precarious situation for all race-conscious policies and because redressing the problems of minorities at the lower end of the economic ladder is more pressing. In other words, while Asian Americans have been partially covered by employment-oriented affirmative action programs, some of their concerns remain unaddressed.



PART 3: MINORITY SET-ASIDE CONTRACTING AND STRICT SCRUTINY

The application of affirmative action to readdress racial inequality within governmental contracting is known as minority contracting set-aside programs. The goal is to increase the number of minority-based enterprises receiving public contracts and contract dollars. The larger economic and societal problem motivating this policy is the glaring racial disparity within the business sector, which is particularly noticeable for African Americans and Hispanics. (Asian Americans are discussed in a subsequent section.) This can be seen in tabulations of the Public-Use Micro Sample (PUMS) for the 2005 American Community survey.[21] While Hispanics comprised 13.6 percent of the population and 12.5 percent of the employed civilian labor force, they comprised only 9.2 percent of the self-employed and earned only 7.0 percent of the self-employment income.[22] The disparity is even greater for African Americans, who comprised 12.8 percent of the population and 10.8 percent of the employed civilian labor force, but made up 5.4 percent of the self-employed and had only a 4.6 percent share of the self-employment income. The same racial inequality can be seen in published data from the 2002 Survey of Business Owners. Among non-publicly held firms, Hispanics owned 7.0 percent of the firms, which received only 2.5 percent of the revenue and paid out less than 2.3 percent of the payroll. For African Americans, the comparable statistics are 5.3 percent, 1.0 percent and 1.1 percent, respectively. Numerous factors account for the disparities in business ownership and viability: barriers in the financial markets, prejudicial consumer behavior, exclusion from mainstream business networks, and other market and societal factors.[23] The state has also played both a direct and indirect role in producing the inequality.

Clearly, decreasing minority disparity in the business sector is an important goal in itself, but doing so also has other positive benefits. Owning a business is a major avenue to asset accumulation, thus increasing the number and viability of minority-owned businesses that address racial inequality in wealth holding (Nembhard and Williams, 2006) Moreover, minority-owned firms are more likely to create jobs for minority workers, thus addressing racial inequality in the labor market. (Boston, 2006; Hum, 2006) One logical way for government to redress inequality in the business sector is to change its own contracting practices. The state could have more direct leverage in altering business practices and changing outcomes by how it uses its power to award contracts. While government contracts are only a small part the private economy, they are not insignificant. The size of federal procurement is enormous, reaching over $412 billion for the 2006 fiscal year. (United States House of Representatives, June 2007) State and local government also have sizeable procurement programs. In fact, businesses are twice as likely to contract with state and local agencies than with federal agencies.[24]

Increasing minority participation in government contracting has its roots in another use of the purse string to affect employment outcomes. As discussed earlier, there were efforts to encourage and later to require government contractors and subcontractors to take affirmative action to increase the number of underrepresented minorities within the firms' labor force, an effort that dates back to at least 1933. (Rogers, 1999; Anderson, 2005) Contract set-aside programs go beyond that focus on employment and are designed to increase the number of underrepresented minority-owned firms (those where a qualified minority owns a major controlling interest) among contractors and subcontractors.

21. The American Community Survey (ACS) is conducted by the U.S. Census Bureau and is a continuous nationwide survey designed to collect detailed demographic, economic and economic information. On an annual basis, the ACS samples 2.5 percent of the population. Aggregated tabulations are released annually, with the statistics available on the Bureau's web site, specifically, its American FactFinder site. The Bureau also makes a 1 percent of public-use micro-sample (PUMS), which allows users to conduct detailed analyses, including user-specified tabulation of the data.
22. For the purpose of this report, a Hispanic person is defined as being of Hispanic origin and who is either white or "other" by race. This definition eliminates the problem of duplicate counts. An African American is defined as a person who is single-race African American or part African American. Data on self-employment income are truncated at the top end, that is, the self-employment income of those making more than the top-end ceiling are given that value.
23. The best source of information comes from the disparity studies that have been conducted over the last decade and a half to either justify or defend minority contract set-aside programs. These studies gather both quantitative and qualitative evidence on the magnitude, nature and causes of minority under representation within the business sector. The studies also have collected information on how the state has contributed directly and indirectly to this problem.
24. According to the 2002 Survey of Business Owners, 2 percent of all businesses derived at least 10 percent of their revenues from federal contracts, and 5.4 percent of all businesses derived at least 10 percent of their revenues from state and local contracts.

For the purpose of this report, the term minority contract set-aside refers to race-conscious policies and programs where a member of a designated minority group is automatically (presumptively) eligible. The policy is result oriented, with the goal of altering the racial distribution of contracts and contract dollars towards greater racial equality. This does not preclude efforts to enhance the capacity and competitiveness of MBEs, and to eliminate discriminatory behavior and practices. The policies and programs attempt to increase the MBE share through various mechanisms, including but not limited to setting a minimum percent of contracts and/or contract dollars to go to MBEs, although not necessarily at a level equal to parity.[25] It is also possible to change the imbalance by giving a discount to bids from MBEs, thus making them more competitive.[26] Another strategy is to provide financial incentives to contractors to use MBE subcontractors. These strategies are justified as ways to offset the disadvantages (lack of a "level playing field") encountered by MBEs.

Set-aside programs can be complemented by MBE targeted recruitment and outreach, and technical and other types of support. As with other affirmative-action programs, set-aside programs have goals that are used to monitor progress and evaluate outcomes. The effectiveness of goals depends on how vigorously they are pursued by the state; that is, the consequences that follow when firms and contracting agencies fail to make progress towards those goals. Set-aside programs are rooted in efforts to assist minority businesses. (Thomas and Garrett, 1999; Larson, 1999; Dale, 2006) Initially, set-aside contracting began in 1953 to assist small businesses in gaining a larger share of federal contracts. The policy was implemented by the Small Business Administration (SBA) through its Section 8(a) program, which included minority businesses. During the 1960s and early 1970s, the program grew and shifted to focus on MBEs. This saw the establishment of the Office of Minority Business Enterprises (OMBE) within the Department of Commerce. The 1977 Public Works Employment Act authorized awarding 10 percent of federal contract funds to MBEs. The wording here is important because the Act established a quantified requirement as a condition for local governments receiving federal funds.[27] The law essentially set aside a proportion of the contract dollars to ensure a minimum end result with the explicit objective to assist racially defined groups. Efforts to help minority businesses continued to expand. In 1978, the SBA was given the authority to act as an intermediary between some federal agencies and small businesses owned by "socially and economically disadvantaged" individuals. The socially disadvantaged were the major racial minorities that had experienced racism and were a protected population within civil-rights laws. Similar set-aside contracting was established and administered separately by the Department of Defense and the Department of Transportation (DOT). DOT is important because the agency's policy affects state and local government and because it has been a major source for highway construction and maintenance, mass transit, and airports. The funds carry with them obligations, including those related to MBEs.[28] According to one estimate, 230 cities had minority set-aside programs in place by 1990, a clear indication of the widespread adoption of this race-conscious strategy. (Graham, 1998)

As mentioned earlier, the courts in recent decades have placed an ever increasing set of restrictions on the use of contract set-asides in response to claims of reverse discrimination. In the 1980 *Fullilove v. Klutznick* case involving the 1977 Public Works Employment Act, the Supreme Court upheld the constitutionality of governmental set-aside programs, but did not come to a decisive decision about the legal standards (tests) that a program must meet. That was established in the 1989 ruling by the U.S. Supreme Court in City of *Richmond v. J. A. Croson Co.*[29], which required local governments with minority set-aside contracting to meet "strict scrutiny," a rather restrictive set of conditions that are discussed later. However, at the time this standard did not apply to federal agencies. In 1990, the Court used an "intermediate standard" when it ruled in favor of a Federal Communications Commission("FCC") program to increase minority representation in broadcasting[30]. This less stringent standard only required that a race-conscious policy serves

25. The City of Houston, for example, had set aside a goal of 20 percent of city contracts for women and minorities. It was alleged that "firms owned by white males are specifically excluded from bidding on that proportion of contracts." http://www.adversity.net/houston.htm.
26. At the federal level, for example, agencies can restrict competition and provide a 10 percent "price evaluation preference" to "socially and economically disadvantaged individuals." (Dale, 2006). An example of this at the local level is San Francisco's program, which is discussed later.
27. "Except to the extent that the Secretary determines otherwise, no grant shall be made under this Act for any local Public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for 'minority business enterprises." 1977 Public Works Employment Act, 91 Stat. 117.
28. State and local governments generally lagged behind the federal government in adopting minority contract set-asides. California, for example, enacted a law to establish such a program in 1988, over a decade after the federal government did.
29. 488 U.S. 469 (1989).
30. *Metro Broadcasting v. FCC*, 497 U.S. 547 (1990).

as an important government objective. Five years later, the Court reversed the direction. In the 1995 ruling in *Adarand Constructors v. Pena*[31], the Court required that federal affirmative action programs must demonstrate a compelling state interest and develop narrowly tailored remedies. In other words, governmental agencies at all levels are now held to the same "strict scrutiny" standard.

What constitutes "strict scrutiny" can be difficult to pin down. The origins of this legal test can be traced back to the 1944 *Korematsu v. United States* case.[32] This legal test, as it applies to affirmative action, appeared in the *Bakke* case when Justice Powell wrote that a race-conscious program (e.g., an affirmative action admissions program for minorities) must be "precisely tailored to serve a compelling interest." Conceptually, strict scrutiny means that a governmental action, regulation or program must meet high legal standards because of potential violation of a fundamental right of a citizen or group of citizens. Within affirmative action, that potential harm is the violation of the rights of those who are not members of the presumptive class, and in practice, this has meant white males.

A set-aside program is permissible if it can be shown that the state is acting to address a compelling interest, such as a pervasive and significant pattern of racial discrimination. The case is even stronger if the state has played a role in discrimination. Another way of conceptualizing this is framing the question on whether the benefits of the corrective action outweigh the potential harm. To ensure that balanced is maintained, the solution must be specific to the identified problem; that is, it must be "narrowly tailored to serve an overriding state interest." This means that the proposed remedy must be designed to solve a very specific problem and cannot be overreaching. In the context of contract set-asides, the program must include only those who have been disadvantaged by discrimination in the specific industries and in the appropriate geographic market covered by public contracting. This requires, for example, demonstrating that a specific racial group such as African Americans (rather than all minorities) has been discriminated against and experience disparity in contracting for construction (rather than all contracting). While the term "strict scrutiny" along with its components "compelling interest" and "narrowly tailored" is now the standard, the criteria are both fuzzy and changing, and subject to ongoing legal and academic debate. (Henderson, 2001; Garfield, 2004; Riccucci, 2007)

What is interesting about the court rulings is what constitutes state participation in past discrimination against minority business. The courts state that participation includes both direct (active) or indirect (passive) role in discrimination. (Ayres and Vars, 1998) Active participation means that the state or its employees acted in a way that would discourage or hinder fair and equal opportunity for minority businesses to engage in contracting. An example of this is the exclusionary role of a business and network that bridges the public and private sectors and includes whites but not minorities. These networks can include both individuals in the private and public sectors. Unfair practices can also involve discriminatory acts by prejudicial government employees, particularly when the government fails to prevent such acts. However, the government can be at fault even in the absence of such overt acts. Justice O'Connor in *Croson* wrote, "It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from tax contributions of all citizens, do not serve to finance the evil of private prejudices.[33]" In other words, if government gives contracts to an industry that has discriminated against minority businesses, then it is abetting acts that are illegal.[34] There is also an implied moral obligation to remedy the injustice.

31. 515 U.S. 200 (1995).
32. 323 U.S. 214 (1994). In this case, Fred Korematsu challenged President Roosevelt's infamous Executive Order 9066, which led to the wholesale i nternment of Japanese Americans based solely on their ethnic membership. (Robinson and Robinson, 2005) Unfortunately, the Court ruled that the government had a compelling interest (national security concerns) to violate the rights of Japanese Americans, two-thirds of whom were citizens by birth. This was done despite the fact that there was no evidence of any act of sabotage or espionage. The removal and imprisonment of this population is seen as one of the most grievous violations of civil rights in the U.S. Decades later, Korematsu's conviction for disobeying the order to relocate, the precipitating event behind the Supreme Court case, was reversed (1984), and in 1988, Congress apologized for the "grave injustice" of the internment and authorized a $20,000 compensation to the surviving internees.
33. 115 U.S. Ct. at 2117.
34. A similar ruling can be found in *Norwood v. Harrison*, 413 U.S. 455 (1973), which stated that "the Constitution does not permit the state to aid discrimination" (Id. 465-66), and "a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish."

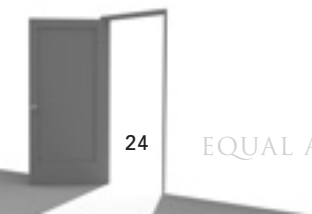
How the legal restrictions have reshaped set-aside policies can be seen in the U.S. Department of Transportation's and Small Business Administration's programs for disadvantaged business enterprises (DBEs). (DOT, 49CFR26.1; SBA, Part 124_8(a)) There is wording related to the original rationale for affirmative action. For example, one of the stated objectives is to "create a level playing field on which DBEs can compete fairly for DOT-assisted contracts." There is even a goal of awarding no less than 10 percent of the contracting funds to DBEs. Nonetheless, there is a shift in emphasis and additions that limits the use of affirmative action. There is no longer the simple race-conscious and result oriented mandate found in, for example, the 1977 Public Works Employment Act.

The policy has become more process oriented rather than outcome oriented. For example, while there are still goals, there is also a prohibition against using a quota, so the 10 percent benchmark is an "aspirational goal". One of the weaknesses of this approach is that agencies and firms are only required to show a good-faith effort to implement a plan, and there is no penalty for failing to reach the benchmark so long as there is a good-faith effort. Unfortunately, it is possible for prime contractors to misuse this escape clause by undertaking only token efforts. (BBC Research & Consulting, 2007, section X, page 3).

Race has taken a lesser role because of the wide adoption of the qualifications originating from the Small Business Administration (SBA). Minority-owned firms are not automatically (presumptively) classified as DBEs. Instead, they have to meet two criteria, being both socially and economically disadvantaged. SBA defines socially disadvantaged individuals as "those who have been subjected to racial or ethnic prejudice or cultural bias within American society because of their identities as members of groups and without regard to their individual qualities." Moreover, the "social disadvantage must stem from circumstances beyond their control." Both DOT and SBA allow the use of membership in certain racial groups to meet this requirement, and the list includes Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, and Subcontinent Asian Americans.[35] The second criterion is that the individual must be economically disadvantaged. Conceptually, an economically disadvantaged individual is one "whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are not socially disadvantaged." In operational terms, this excludes those with personal net worth exceeding $750,000, not counting the value of their primary home. In other words, race is a necessary but not sufficient condition. It is only one factor in determining DBE status.[36] One of the consequences of relaxing the emphasis on race has been a decline in the relative number of minorities, particularly African Americans, in the SBA's 8(a) program. (U.S. Commission on Civil Rights, 2005) Although the increase in the relative number of whites is small, it reflects an important symbolic decline in the centrality of race.

The use of the dual qualification is not, of course, new. This has been used since the 1970s. However, being an economically disadvantaged minority has less significance given the legal and policy changes. This is because race has been relegated to a secondary role in terms of how to structure remedies. Race-conscious approaches can only be used "when no other method could be reasonably expected to redress egregious instances of discrimination." An example of how much federal policy has changed on this point is the position taken by the U.S. Commission on Civil Rights (2005), which argued that federal agencies have not done enough to develop race-neutral programs and too readily adopt SBA's approach. When a race-conscious approach is required, the program must be "narrowly tailored in accordance with applicable law," a guideline taken directly from strict scrutiny.

35. SBA can revise this list when there is a need to include "other minorities found to be disadvantaged."
36. Agencies are also required to have a process in determining (certifying) that a DBE is socially and economically disadvantaged.



In a nod to preventing reverse discrimination, the DOT specifies that programs "…must never exclude any person from participation in, deny any person the benefits of, or otherwise discriminate against anyone in connection with the award and performance of any contract covered by this part on the basis of race, color, sex, or national origin." (DOT, 49CFR26.1; SBA, Part 124_8(a)) While the wording comes directly from those used in earlier anti-discrimination laws, the intent is very different.

The court-derived impact on affirmative action is further complicated in jurisdictions with prohibitions on race-conscious policies and programs (discussed in the previous section of this report). However, federal laws trump state and local laws when contracting involves federal funds. As mentioned earlier, DOT's policy and guidelines are applicable to all state and local governments that receive DOT funding, regardless of whether there is a prohibition against affirmative action. Nonetheless, the presence of state and local restriction can lead to policy confusion and inconsistencies, and a loss of administrative efficiencies, which in turn hamper efforts to address racial inequality in public contracting.

Another barrier to meeting strict scrutiny is the cost of empirically justifying a race-conscious policy and program.[37] This usually takes the form of a disparity study, which examines whether minorities are under represented among businesses in the relevant contracting industries, the nature and role of discrimination in producing any observed inequality, and the degree that government utilizes minority enterprises. If the analyses find that minorities are under-represented in both the private and public sectors, and that the state played either an active or passive role in discriminatory practices, then the government can develop policies and programs to redress the disparity. Preference is given to race-neutral approaches, but if the state can show in a reasonable fashion (that is, it needs not to exhaustively examine all possible alternatives) that race-neutral programs are ineffective, then it can adopt race-conscious remedies. Conducting a disparity study, however, is expensive. Given the data and analytical complexities, the current cost for a single study is at least a quarter of a million dollars, and for most cases, the amount is considerably higher.[38] There may also be additional expenses related to defending the policy and program. However, once demonstrated to standards accepted by the courts, the burden of proof falls on any plaintiff claiming that the program is unconstitutional. (*Concrete Works of Colorado, v. City And County of Denver*, 2003)[39]

The legal and political opposition, along with other barriers, have not extinguished the use of minority set-aside contracting (and other affirmative action programs), but they have made it very problematic. Public agencies and governments must have the political will to establish a race-conscious program and to expend considerable resources to justify and defend race-conscious policies and programs. However, the social cost of failing to do so is high in terms of racial disparity. A review of existing studies found dramatic drops in the relative number of MBEs receiving contracts after the elimination of minority contract set-asides, with decreases ranging from 50 to 99 percent.[40] (Morris, et al. 2006)

37. For additional details, see Ong, 2007.
38. If the contracting funds come from the federal government, then much of the cost to a local or state agency can be covered by funds provided by the federal government.
39. 36 F.3d 1513 (10th Cir. 1994).
40. A similar impact can be seen in California, despite DOT's DBE program. "In the nine years before passage (of Proposition 209, which prohibits the use of affirmative action), minority-owned businesses received an average 16 percent of award revenues for Caltrans construction projects with federal funding. In the nine years after the proposition passed, they received an average 7.9 percent of award revenue." (Marquand, 2006) In the state of Washington, which passed a similar prohibition, DBE participation in transportation related contracts funded by the federal government declined from over 19 percent in 1999 to less than 6 percent in 2006. (Washington State Department of Transportation, 2006)

PART 4: ASIAN AMERICAN BUSINESSES AND MINORITY CONTRACTING

Part 2 of this report examined how Asian Americans are situated within affirmative action in education and employment, revealing a variation and complexity rooted in material conditions. Minority set-aside contracting presents another variation, but unlike education (and to a certain degree employment), Asian Americans have been fairly consistently included. They were included when minority set-asides were established in the 1977 Public Works Employment Act, listed as "Oriental" and when SBA's 8(a) program started focusing on MBEs in 1979. As we will see later, they also have been included in set-aside programs run by cities.

Without dismissing the importance of political and other factors, the question of whether Asian Americans should be included in such programs should take into account the following three fundamental questions:

1. Do they experience discrimination that precludes them from fully and fairly participating in the business sector?

2. If the above is true in any of the arenas, does the unequal and unfair treatment produce measurable and significant group disparity relative to the dominant group?

3. Are the causes or sources of the disparity so diffused, pervasive and complex that reactive anti-discrimination and race-neutral approaches are relatively ineffective in eliminating the inequality?

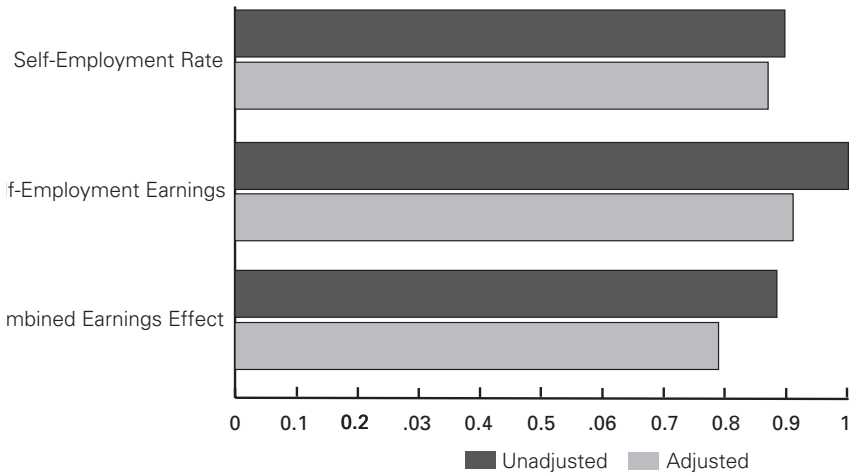
The available empirical evidence and findings from various disparity studies show these criteria are fulfilled. Asian American businesses do not fare better than NH whites (although better than other minorities), the disparity is due in part to discrimination, and the effectiveness of race-neutral policies is problematic. It is important to note, however, that the evidence is fragmented because Asian American businesses have not been as widely or systematically analyzed as other MBEs. This is due to both data limitations and other factors. (Ong, 2007) Nonetheless, existing findings and updates provide a general picture of the status of Asian American business enterprises.

A widely used indicator of business formation is the absolute and relative size of the self-employed and self-employment earnings, which are an indicator of the economic performance of the self-employed and serve as a proxy for the viability of businesses. The following analysis uses data from the 2005 American Community Survey (ACS)[41], and the major results are presented in Figure 1. Despite the popular stereotype of Asian Americans as having extraordinary entrepreneurial drive, the observed self-employment rate for Asian Americans is below that for non-Hispanic whites, 10.8 percent versus 12.0 percent.[42] The parity index is 0.90 (the Asian American rate divided by the NH-white rate). The parity index is lower for the self-employed operating unincorporated firms—0.87. There is also a large range in the self-employment rates of the ten Asian ethnic groups reported by ACS, from a high of 13.6 percent for Koreans to a low of 3.4 percent for Filipinos, using the data on those with unincorporated firms. Only Koreans and Japanese have a parity index greater than 1. The high self-employment rate among Koreans is not seen as an indicator of economic success, but rather the result of limited economic opportunities. (Bonacich and Light, 1988) The self employment rate of Japanese Americans is only slightly higher than for NH whites (7.9 percent versus 7.7 percent), and this ethnic group is the most assimilated among Asian Americans. (The majority of economically active Japanese Americans are third and fourth generation.)

41. The 1 percent of public-use micro-sample (PUMS) for the 2005 ACS is used to examine self employment, which contains over 6,000 self-employed Asian Americans.
42. The class of work is based on the response to the question that asks if the individual during the previous week worked for a private firm, a non-profit organization or government, or is self-employed. The definition of being self-employed includes those who own an unincorporated or incorporated business, professional practice, or farm. For an individual who works more than one job (including self employment), the response refers to the job with the most hours in the previous week. The self-employment rate is defined in percent as the number of self-employed divided by the employed civilian labor force.

Of course, many factors contribute to these differences. One potentially important one is education, because the probability of being self-employed varies with educational attainment.[43] As mentioned earlier, Asian American workers (relative to NH white workers) are disproportionately over-represented at the two ends of the educational attainment spectrum[44], which can produce offset effects. What is important is the net effect. Adjusting for the difference in educational attainment shows a greater gap in the self-employment rate, with the disparity index dropping to 0.86.[45] Among those who are self-employed, average (mean) self-employment earnings for Asian Americans are only slightly lower than for NH whites, a parity index of 0.99.[46] However, adjusting for differences in educational level decreases the index to 0.92.[47]

Figure 1: AsianAM-NHW Parity Analysis, Self-Employment



The differences in the probability of being self employed and average earnings among the self employed combine to limit the total income derived by Asian Americans from entrepreneurial activities. Using the unadjusted difference, the combined effect means that Asian American workers as a whole (both the self-employed and paid employees) earn only 90 cents to every dollar earned by NH white workers. Using the parity indices adjusted for educational attainment, Asian Americans earn only 86 cents to every dollar they would have earned if they had the same self-employment rates and average self-employment earnings. Of course, some of the lower than expected self-employment income is offset by paid employment, but nonetheless, the results are consistent with the hypothesis that business formation and viability is below par for Asian Americans.

The lower viability of Asian American-owned businesses is also apparent in published data from the 2002 Survey of Business Owners (SBO).[48] Asian Americans owned 4.9 percent of the firms other than those publicly held firms, roughly near their proportion of the employed civilian labor force. However, they received only 3.7 percent of the revenues and paid out 3.4 percent of total payroll. Relative to white-owned firms, the Asian American-owned firms performed worse in terms of revenues per firm and payroll per firm. On the average, Asian American firms received only 72 cents for every dollar in revenues received by white firms, and the respective figure for payroll is only 66 cents for every dollar. In other words, Asian American firms are typically smaller than NH white firms.

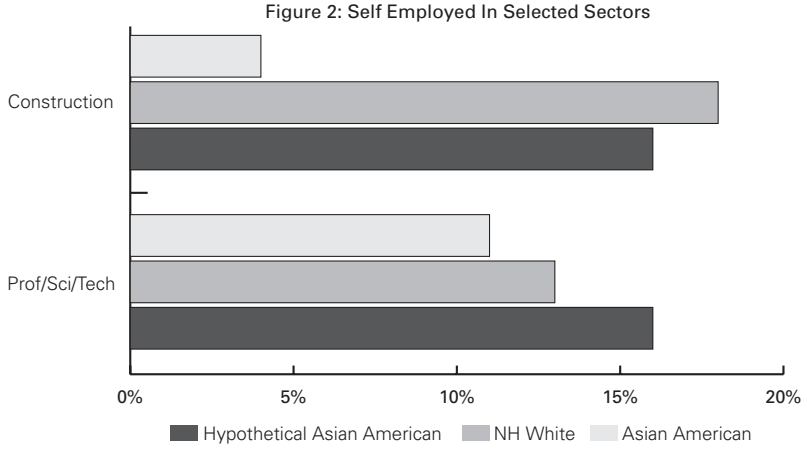
43. For example, those with a professional or doctorate degree are two to three times more likely to be self-employed than those with no more than a high-school degree.
44. Other factors include years of work experience, available assets, access to capital, social capital, the local structure of opportunity (relative competition from large publicly held firms), and nativity. Conducting a full analysis is beyond the scope of this study, but preliminary analysis find that many Asian American ethnic groups have lower self employment rates after accounting for a number of these factors.
45. The simulation uses seven categories based on highest level of educational attainment: without a high school degree, with a high school degree, with some college but no bachelor's degree, with a bachelor's degree, with a master's degree, with a professional degree, and with a doctorate degree. The adjustment is based on estimating what would have been the Asian American self-employment rate if Asian Americans within each educational category had the same self-employment as NH whites. The adjusted parity index is the observed rate divided by the hypothetical rate.
46. Self-employment income is self reported in the ACS and is based on earnings in the 12 months prior to the date of the survey.
47. The simulation for self-employment income uses the same seven educational categories used in the simulation of the self-employment rate. The adjustment is based on estimating what would have been the average (mean) Asian American earnings if Asian Americans within each educational category had the same average earnings as NH whites. The adjusted parity index is the observed average divided by the hypothetical average.
48. The Survey of Business Owners (SBO) and its predecessors (the Surveys of Minority- and Women-Owned Business Enterprises, and Characteristics of Business Owners) are conducted every five years (e.g., 1997 and 2002) as a part of the Economic Census. SBO includes information on firm size (by sales and receipts, and by payroll and number of employees) broken down by industries and by metropolitan areas (and other selective geographies). The SBO also has information on the race and gender of owners, and the Bureau published aggregated statistics by race and gender.

Another indicator of business performance is the survival rate. Unfortunately, there are few studies on Asian American firms because of a paucity of longitudinal data. One existing analysis conducted by the SBA shows that Asian American and Pacific Islander establishments with employees have a lower four-year survival rate (1997 to 2001) than non-minority establishments, but the difference is small (72 percent and 73 percent respectively). (Lowrey, 2005) Moreover, among the surviving establishments, Asian Americans had more volatility, having a higher percentage of firms that expanded than for NH whites (32 percent versus 27 percent) and a higher percentage of firms that contracted (23 percent versus 21 percent). Other MBEs performed worse, but the study does not examine how firm characteristics affect the survival rate. An analysis of certified MBEs in California shows that Asian American firms have a higher survival rate than other minority firms (35 percent versus 32 percent for the years between 1996 and 2006), but this study did not control for firm characteristics. (Morris, et al., 2006) One study that does control for firm characteristics finds that the survival rate of Asian American firms in SBA's 8(a) program is not statistically different from that of other MBEs in the program. (Ong, 2001) It is hard to draw anything conclusive from the existing literature, but the existing studies indicate that Asian American firms are not doing better than NH white firms, and perhaps worse.

One reason for the lower formation rate and performance of Asian American firms is less access to the credit market. According the 2002 SBO, 10.2 percent of Asian American firms received a bank loan to start their businesses, as compared to 11.6 percent for NH white firms. The comparable statistics for loans for expansions are 7.3 percent and 9.4 percent, respectively. This lower utilization of loans is due to both lower application rates and higher denial rates. According to data from the 2003 Survey of Small Business Finances (SSBF)[49], 17.3 percent of Asian American businesses applied for a new loan over the last three years, lower than the 21.5 percent for NH white businesses. The average number of applications is .28 for Asian American firms, considerably lower than the .43 for NH white firms. Moreover, 12.3 percent of the Asian American applicants were always denied, higher than the 8.2 percent for NH white applicants.[50] An econometric analysis of SSBF data on firms in the Midwest find that Asian Americans experience higher denial rates after controlling for a number of owner and firm characteristics, and that they pay higher interest rates; findings that the author interpret as evidence of discrimination in the credit market. (Blanchflower, 2007)

While the above analysis provides an important overview of Asian American self-employment and firm performance, their participation in two key industries is more relevant to government contracting: construction and professional/scientific/technical (PST) services. An analysis of the 2005 ACS shows that Asian American firms are

Figure 2: Self Employed In Selected Sectors



49. The SSBF is sponsored by Federal Reserve Board and conducted by the National Opinion Research Center at the University of Chicago. The survey collects information on U.S. businesses with no more than 500 employees), and contains information on firms and owners, including information on the use of financial services. The survey is conducted about once every five years (2003, 1998, 1993, and 1987), and the 2003 data set used in the analysis contains 782 Asian-owned businesses, that is, firms where Asians have a majority controlling interest.
50. Data on interest rates show mixed results. Asian Americans pay higher points to get a loan (1.2 versus 0.3) but lower reoccurring rates (5.8 versus 6.3). An important but unanswered question is whether Asian Americans have higher loan costs after accounting for other factors.

under-represented in these two sectors.[51] (See Figure 2.) Self-employed Asian Americans are less than a quarter as likely as NH white firms to be in construction, and this sizeable disparity does not qualitatively change after adjusting for differences in educational attainment. Self-employed Asian Americans do better in PST services, where the disparity index is 0.83. However, given that Asian Americans have higher educational attainment, they should be more likely to be in this sector than self-employed NH whites. The observed percent of Asian Americans in PST services is only about two-thirds of the expected percentage adjusted for education. In other words, self-employed Asian Americans are under represented in the two key industrial sectors for government contracting.

The reasons for the under representation in the two sectors are numerous. A key one for the construction industry is the disproportionately small numbers of Asian American workers in the industry. Having work experience in construction is critical to moving up to owning a construction firm. However, only 2.4 percent of paid Asian American workers in the private sector are employed in construction, compared to 7.6 percent of NH whites. This under representation is due in part to historical exclusionary practices of unions.[52] In the PST sector, Asian Americans encounter limited access to capital. Data from the 2002 SBO show that 2.7 percent of Asian-American PST firms received a bank loan to start their businesses, less than half of 5.7 percent for white firms. Asian Americans do better in terms of loans for expansions, but still lag behind 3.9 percent to 5.8 percent, respectively.

Asian American firms have a mixed record in terms of participation in government contracting. Some insights can be drawn from 2002 SBO data, which includes statistics on the percentage of firms that derive at least 10 percent of their revenues from public agencies. Within construction, 2.7 percent of Asian American firms fall into this category for federal contracts, and 5.9 percent for state and local contracts. The respective figures for NH white firms are 1.5 percent and 4.9 percent. In PST services, the respective statistics are 3.5 percent and 5.5 percent for Asian Americans and 2.7 percent and 7.3 percent for NH whites. However, these statistics do not provide the full story for two reasons. First, there is no information on revenues coming from public contracts. Because Asian American firms are significantly smaller than their NH white counterparts, it is likely that they have smaller contracts. So, in dollar terms, their share could be smaller. The second reason is that the statistics are only for existing firms. As we have seen, Asian Americans are significantly under represented among firms in these two sectors.

The proposition that Asian American firms are under-utilized is consistent with the findings from a comprehensive meta analysis of dozens of existing disparity studies conducted by the Urban Institute. (Enchautegui, et al., 1997) This study examined utilization rates based on contract dollars. Among firms "ready, willing and able," the median parity index was only 0.31 for Asian Americans for all industrial sectors combined, and 0.46 for the most important contracting sector (construction). Asian American firms were receiving less than half of what was expected. The data also indicate that under-utilization is more severe in jurisdictions without a minority set-aside program. In other words, while race-conscious programs did not eliminate the disparity, they at least attenuated the difference. While the study used data from the early 1990s, the discussion in the next section of the report indicates that this same pattern of under utilization holds today.

In summary, the evidence shows a set of cumulative effects limiting the availability of Asian American firms for government contracting. Economic and social barriers hinder business formation, harm the performance of existing Asian American firms, and restrict their entry into construction and PST services. Future research is needed to better identify the types of barriers, understand how they operate, and quantify their impact. At this time, the available information at the national level does indicate that Asian Americans are severely disadvantaged when it comes to gaining a fair share of government contracts and contract dollars. Moreover, it is important to examine public-contracting issues at the local level because cities are at the center of determining whether minority contracting should continue to be used.

51. This report uses the ACS industry code 0770 to define construction, which is comprised of all construction activities, including cleaning before and after construction. Professional, scientific and technical (PST) services include the industry codes from 7270 to 7490, which covers legal service, accounting services, architectural and engineering services, specialized design services, computer system design, scientific and technical consulting, advertising, veterinary services, and "other professional, scientific and technical services."
52. For general discussion on unions and Asian Americans, see Omatsu, 2002. During the nineteenth century and early twentieth century, Asian Americans were excluded from craft unions because of overt and virulent racism. In more recent decades, Asian Americans (as well of other minorities and women) were excluded by less overt institutional practices, such as the lack of supportive relatives and friends within the unions, who form a critical social and information network that enable individuals to enter the trade. For a discussion on efforts to integrate unions, see Frymer, 2003.

PART 5: ASIAN AMERICANS IN SIX CASE-STUDY SITES

As mentioned earlier, many of the legal challenges to minority set-aside contracting have involved local jurisdictions; therefore, cities must meet "strict scrutiny" (states must have a compelling interest and remedies must be narrowly tailored) before adopting a race-conscious policy and program. Outcomes can vary because of differences in the political inclination and willingness of local officials and agencies to adapt affirmative action to new requirements and defend it against court and political challenges. Moreover, there may be differences in the availability of MBEs and their participation in public contracting, which can determine if there is a material foundation needed to justify the use of a race-conscious policy and program.[53] Given this current reality, it is necessary to examine what has happened at the city level to understand how Asian Americans have fared in public contracting. For this project, six cities were selected with input from the Asian American Justice Center for analysis: New York City, Los Angeles, Chicago, San Francisco, Seattle and St. Paul. They were chosen because they contain sizeable Asian American populations and represent a diversity of settings. The next section of the report examines the policies and programs in these case-study sites.

This section provides contextual information: a demographic overview and economic and business indicators. Demographic composition, particularly the relative size of the major minority groups, can shape societal priorities around race. The relative economic status of groups defines the material conditions that determine whether or not Asian Americans fit within a race-conscious set-aside program. It is important to note that what is presented is a first-order approximation. The information provides an overview of the socioeconomic status (SES) of Asian Americans using information and data available for the report. The following analysis does not meet the legal empirical requirements for strict scrutiny; that is, the analysis is not a disparity study. Conducting such a study is well beyond the scope of and resources of this report. Nonetheless, there is sufficient information to develop the broad contour of how Asian Americans are situated.

Table 2: 2005 Population Figures

	NY City	Los Angeles	Chicago	SF City	Seattle	St. Paul
Total Population	7,956,113	3,731,437	2,701,926	719,077	536,946	261,559
% African American Alone	25.30%	9.90%	34.90%	6.50%	8.20%	13.70%
% American Indian Alone	0.40%	0.40%	0.20%	0.30%	1.20%	0.70%
% Hispanic (white/other)	25.50%	47.00%	27.80%	12.90%	5.30%	7.80%
% Asians Alone	11.60%	11.10%	4.80%	33.10%	14.40%	13.50%
% Part Asian	0.40%	0.70%	0.40%	1.50%	1.70%	0.50%
Asian Inclusive	922,978	415,652	128,650	238,133	77,363	35,324
Asian Indian	24.50%	8.20%	20.20%	3.00%	4.00%	3.10%
Chinese	46.40%	14.60%	25.10%	62.20%	26.90%	3.30%
Filipino	7.10%	30.00%	25.60%	15.10%	28.40%	1.00%
Japanese	2.20%	9.20%	5.50%	5.10%	14.00%	0.50%
Korean	9.60%	23.90%	9.00%	3.90%	4.30%	2.10%
Vietnamese	1.90%	6.30%	4.20%	5.90%	13.70%	6.00%
Other Asian	8.30%	7.70%	10.40%	4.70%	8.80%	83.90%

53. There seems to be an inherent flaw in the Court's criteria under some conditions. Consider a city government run by bigoted officials who have denied MBEs public contracts, thus contributing directly and indirectly to racial discrimination in the business sector. The same individuals would not have any incentives to develop and defend the use of minority set-aside contracting. Moreover, federal requirements are flexible enough to allow the officials to easily meet the "good faith" requirement without having to produce any results. This is equivalent to allowing the "fox to guard the hen house." The problem could also exist even in less extreme situations where the elected officials are apathetic and MBEs receive a disproportionately lower share of public contracts because the city relied on prevailing but unequal conditions in the business market. These officials would have little economic incentives to investigate their own actions, and in fact, they would be dissuaded from establishing and defending a minority set-aside program by the cost barriers associated with "strict scrutiny," even if race-conscious efforts are materially justifiable.

Table 2 presents data assembled from web published statistics from the 2005 American Community Survey (ACS)[54] . The size of the Asian American population ranges from a low of 36,701 in St. Paul to a high of 958,128 in New York City. These numbers are based on inclusive counts, which contain those who are single-race Asians and those who are Asian and some other race. The top half of the table presents the population distribution by major racial and ethnic groups, and there are considerable variations. The Asian American share of the total population ranges from a high of 35 percent in San Francisco to a low of 5 percent in Chicago. In two cities (San Francisco and Seattle), Asian Americans constitute the largest minority population. For St. Paul, the African American population is slightly larger than the Asian American population, both for the inclusive and single-race counts. Latinos have emerged as the largest minority group in New York and Los Angeles, surpassing the African American population. This has paralleled a rise in Hispanic political power in these two cities, as well as increasing tension between blacks and Latinos. (Kaufamn, 2003; Sonenshein and Pinkus, 2005) In Chicago, however, African Americans remain the dominant minority group, both numerically and politically. The four largest cities are now "minority majority" cities, where the combined minority population is over half of the total.

The bottom half of Table 2 lists the ethnic distribution of the Asian American population. What is apparent is that there is considerable variation in the degree of diversity. In two cities, one ethnic group is dominant—Chinese in San Francisco and Hmong in St. Paul. Although the 2005 ACS does not list Hmong separately, the 2000 Census shows that they comprised over two-thirds of the Asian American population in St. Paul. One political advantage of this homogeneity is fewer barriers to organize the population, resulting in a more effective voice. Of course, other factors affect political cohesion, but collective action is more feasible with fewer cultural and linguistic divisions, everything else being equal. (Saito, 1998) In New York, Chinese are a plurality, but there are also large numbers of Asian Indians, Filipinos and Koreans. This allows one group to assume leadership, but at the same time, it must be negotiated with the other groups. Finally, the Asian population is more heterogeneous, that is more evenly distributed among the ethnic groups, in Los Angeles, Chicago and Seattle. This opens up the opportunities and challenges of creating a pan-Asian political movement, which in practice can be very complex. (Yen, 1992)

Within the realm of politics, it is not just the population counts that matter. A critical factor is voting strength, and Asian Americans vary considerably among the six cities. It is impossible to precisely gauge their political potentials because there is no ready and consistent source of information on the number of Asian American voters.[55] A useable but imperfect proxy is the Asian American share of eligible voters, that is, those who are 18 years and older with citizenship. This includes both those who are citizens by birth and naturalized immigrants. As the data from the 2005 ACS show, Asian Americans comprise a larger share of the total population than the population comprised of citizens, a drop off due to a significant number of Asian immigrations who have not naturalized.[56] This pattern also holds among those 18 and older. Asian Americans are a numerical force only in one city, San Francisco, where they comprise a third of the total population, and a slightly lower percentage of the adult citizen population. (See Table 3) Even in that city, Asian Americans have not been a political force until recent years. (Ong and Lee, 2001) In three of the cities, Asian Americans comprise about a tenth of the total population and of those eligible to vote. While this proportion is not insignificant, they nonetheless are not a major political force. One positive note is that the number of Asian Americans eligible to vote has been increasing. While the 2000 Census data and the 2005 ACS data are not completely comparable (the former includes all individuals and the latter excludes those in group quarters), the increase in percentages is real. This has lead to population growth and climbing naturalization rates. (Ong and Lee, 2007) The challenge is to transform numbers into voters.

54. The data were downloaded from the Bureau's FactFinder web site, http://factfinder.census.gov. Two series are used for this analysis, "Detailed Profiles" and "Selected Population Profiles." The latter contains information by race. Statistics are available only for geographies or populations with a minimum of 65,000 persons. The data do not cover those in group quarters. The six cities are ordered by size. In 2006, New York City is ranked first, followed by Los Angeles and then Chicago. The other three are scattered further down the rankings: Seattle at number 26, San Francisco at number 14, and St. Paul at number 67. The Hispanic counts are limited to Hispanics who are either white or "some other race." For African Americans and American Indians, the single-race counts are used. This is done to eliminate duplicate counts. Both the single-race Asian counts and the more inclusive Asian counts are used to give additional information on this population.
55. There is piece-meal information collected by organizations such as the Asian Pacific Legal Center in Los Angeles and AADLEF in New York. See Ichinose (2004) and Magpantry (2004).
56. See Ong and Nakanishi (2003), Nakanishi and Ong (2004), Wong (2004) and Woo (2004) for discussion on the rate of naturalization, voter registration and voting among Asian Americans.

Table 3: Asians Alone as % of Population						
	N.Y. City	Los Angeles	Chicago	S.F. City	Seattle	St. Paul
ACS 2005						
% Total	11.60%	11.10%	4.80%	33.10%	14.40%	13.50%
% Citizens	9.40%	9.60%	3.80%	31.10%	11.30%	10.50%
% 18+ Population	12.00%	12.60%	5.30%	32.90%	14.60%	9.90%
% 18+ Citizens	9.40%	11.20%	4.20%	30.60%	11.10%	6.60%
Census 2000						
% Total	9.80%	10.00%	4.40%	30.90%	13.10%	12.30%
% Citizens	6.90%	8.90%	3.10%	28.20%	9.90%	8.00%
% 18+ Population	10.20%	11.10%	4.90%	29.90%	12.60%	8.40%
% 18+ Citizens	6.60%	10.10%	3.40%	26.80%	9.20%	4.10%

Table 4: MSA Statistics, 2005 ACS						
	Metropolitan Areas					
	New York	Los Angeles	Chicago	S.F. – Oakland	Seattle	Minneapolis - St. Paul
% of MSA Population						
% NH Whites	51.50%	33.30%	56.90%	46.30%	73.00%	82.10%
% Asians Alone	9.00%	13.70%	5.00%	21.90%	10.50%	5.10%
% Part Asian	0.40%	0.80%	0.40%	1.80%	1.40%	0.40%
Asian-NHW Parity Indices						
W/O HS Degree	1.717	1.884	1.064	3.6	2.409	4.388
W/ Graduate Degree	1.142	0.848	1.76	0.761	1.248	1.613
Earnings	0.915	0.747	0.71	0.835	0.88	0.732
Median Household Income	1.049	0.893	0.844	0.911	0.967	0.931
Per Capital Income	0.834	0.679	0.586	0.61	0.745	0.616
Poverty Rate	1.4	1.984	1.766	3.196	1.324	1.443
Contracting Related						
Self-Employment Rate	0.819	0.653	0.875	0.581	0.606	0.55
Employed in Construction	0.438	0.379	0.135	0.433	0.263	0.182
Employed in PST	0.898	0.784	1.132	0.783	1	0.938

Table 4 contains SES statistics for the metropolitan areas containing the case-study cities. We use the metropolitan area for two reasons. First, the Census Bureau does not release readily available data on Asians in all six cities.[57] On the other hand, there is available information on Asian Americans for all six metropolitan areas (also known as metropolitan statistical areas or MSAs). The second reason for presenting data at the MSA level is that many disparity studies have found that this geographic unit approximates the appropriate region defining the market for local government contracting. The top part of Table 4 presents the Asian and NH white share of the total population. In general, the NH white share of the population at the MSA level is larger than their share at the city level because they disproportionately reside outside of central cities. This is not true for Asian Americans in four areas: New York, San Francisco, Seattle and St. Paul, where Asian Americans are relatively more likely to reside within the central city.

Economically, Asian Americans do not perform as well as NH whites. The middle panel contains parity indices that measure the relative performance of these two populations. For educational attainment for the population 25 years and older, a value of more than one means that the percent of Asian Americans in that category is greater than the percent of NH whites in that category, while a value less than one indicates the opposite. A value of one means parity. Four MSAs (New York, Chicago, Seattle and St. Paul) show the bipolar distribution where Asian Americans are more likely to be at the two ends of the educational spectrum. In Los Angeles and San Francisco, Asian Americans are more likely to be at the bottom end than NH whites but less likely at the top end. Nonetheless, a high percent of Asians in both regions have a graduate degree (master's, doctorate or professional) – 14 percent in Los Angeles MSA and 17 percent in San Francisco MSA. They just happen to reside in regions that attract a disproportionately large number of the highly educated.

Asian Americans are not earning as much as NH whites based on education. In all six MSAs, average annual earnings are lower for Asian Americans than for NH whites.[58] Even in Chicago, where educational attainment for Asians is significantly higher than for NH whites, Asians earn only 71 cents to every dollar for NH whites. In other words, Asians are having difficulties translating their education into earnings. This may be due to the same factors discussed earlier for national patterns, including discrimination and cultural-linguistic barriers encountered by immigrants. In terms of median household income, Asians are doing better (in part because there are more workers per household) but still lag behind NH whites except in New York. However, because Asian households tend to be larger, there is a sizeable gap in terms of per capita income. Moreover, Asians are more likely to fall below the poverty line. Taken together, the indices show that Asian Americans as a whole are far from being the "model minority."

The final three sets of parity indices are relevant to public contracting. As mentioned earlier, information on self-employment serves as a proxy to gauge business viability. The data show that Asian Americans are less likely to be self-employed in all six MSAs. It is not feasible at this time to determine what factors contribute to this disparity; however, existing disparity studies indicate that the lower self-employment rate for Asians relative to NH whites persists even after controlling for a number of personal and household characteristics. (Ray, Grossman, and Goldman, 2005) What is relevant to the discussion on minority contracting is the Asian American presence in construction and PST services. The published 2005 ACS information does not break down the self employed by industry, but it does have statistics on the distribution of workers by industry, which shows that Asian Americans are extremely less likely to work in construction. The results for PST services are more mixed.

57. As a general rule to protect confidentiality, the Bureau does not provide information for racial groups with fewer than 65,000 persons, which means no statistics for Asians in St. Paul. Moreover, the Bureau has not posted all possible tabulations. As of mid-August 2007, the Bureau also has not posted data on Asian Americans for Seattle and San Francisco. There is a specialized data set for advanced users that can be downloaded and analyzed by using specialized software. That is beyond the scope and resources for this report.
58. The earnings parity index is based on earnings for full-time, full-year workers and is a weighted average for males (60 percent) and females (40 percent).

Table 5: Asian-NHW Parity Indices for Self Employed, 2000			
	Earnings	Construction	PST Services
MSA Containing			
New York	.534	.817	.386
Los Angeles	.702	.434	.530
Chicago	.909	.197	.494
San Francisco	.740	.817	.612
Seattle	.919	.311	.534
St. Paul	.954	.263	.494

Although somewhat dated, data from the 2000 Census provides some insights into the relative performance of self-employed Asian Americans and NH whites. Table 5 summarizes the information calculated from the 5 percent Public-use Micro Sample.[59] The first column is the ratio of the average (mean) annual self-employment income for Asian Americans to the average for NH whites. In all six regions, the ratio is below parity, and it is particularly low in the three metropolitan areas with the largest Asian American populations. The second and third columns show the relative odds of being in the two key industries for government contacting, where the calculations show that Asian Americans are far less likely to be in these sectors. The bottom line is that Asian Americans are disproportionately under-represented in the business sector, perform poorly, and are not well-positioned (in terms of industrial sector) to bid for government contracts. It is likely that the same factors that disadvantage Asian Americans at the national level (lower business formation rate even after accounting for individual and household characteristics, barriers to financial markets, and discrimination) also operates at the local level.

The census data on Asian American under-performance in the business sector relative to NH whites by itself, however, is not sufficient to establish empirically that Asian Americans meet the criteria for inclusion into race-conscious programs. A central question is how well they have fared in terms of participating in government contracting. The answer requires two types of information: (1) data on their availability to participate, including their willingness and capacity to participate, and (2) the distribution of contracts and contract dollars by race. Unfortunately, the readily available information is not precise, often incomplete and inaccurate, difficult to access, and costly to use. (Ong, 2007) Assembling a workable data set for just one city takes enormous resources. Fortunately, this has been done in several of the cities through disparity studies, which have been conducted to determine if race-conscious remedies are required and to help formulate "narrowly tailored" responses. The findings provide insights into whether Asian Americans have been able to proportionately participate in government contracting. However, only two of the studies are current and use methodologies that meet current standards.

Unfortunately, we were unable to obtain copies of the disparity studies for Chicago and Seattle, both of which were conducted soon after Croson. However, studies for Cook County (which includes Chicago) and for the State of Illinois find that Asian American businesses were underutilized in one or more government contracting sectors. Similarly, we cannot locate a disparity study for Seattle. An existing study that included King County, which includes Seattle, shows Asian Americans were underutilized in some sectors.

Disparity analyses for Los Angeles and St. Paul are based on dated information. Los Angeles City contracted for a disparity study in the early 1990s but did not publish the results. Information from that effort indicates that Asian Americans were underutilized in city contracting overall but not in construction contracting. (Larson, 1999) An additional analysis from that study for the County of Los Angeles shows that Asian Americans were underutilized in construction contracting. The existing disparity study for St. Paul also relies on rather dated information, for the period from 1990-1994. A review of that study indicates that based on the firms that were interested or attempted to bid for

59. Even this larger data set has sample-size limitations, particularly for the MSAs with small Asian American populations. For the reported analysis, the numbers of self-employed Asian Americans are as follows: 1,549 for New York MSA, 3,128 for Los Angeles MSA, 701 for Chicago MSA, 1,515 for San Francisco-Oakland MSAs, 399 for Seattle MSA and 74 for Minneapolis-St. Paul MSA.

contracts, Asian American firms were underutilized and thus should be included in the city's set-aside program. (University of Minnesota Law School, Institute on Race and Poverty, 1996) The city is currently funding an updated disparity study, but the results will not be available anytime soon.

San Francisco's disparity study is more up to date, and the analysis used contracts from 1998 to early 2003. A summary of the findings shows that Asian American firms were underutilized as prime contractors in all four major contracting categories. (San Francisco Human Rights Commission, n.d.) While Asian Americans made up 13.7 percent of the available contracting firms in construction, they received only 5 percent of the prime contracting dollars. The comparable statistics for purchasing, general services and telecommunications also showed sizeable disparities (availability of 4.2 percent, 2.6 percent and 13.5 percent, respectively, but contract dollar utilization of 1.8 percent, 1.1 percent and 2.9 percent, respectively). Asian Americans do better in subcontracting, but this was accomplished under the City's race-conscious program that included Asian Americans. Moreover, this also reveals that there is a tendency to relegate Asian Americans to the more marginal role of subcontractors rather than prime contractors. This may be due partly to their smaller size, but as argued above, Asian American firms face a number of barriers that hinder their performance and viability, which can constrain their ability to grow in size.

The New York study is perhaps the most detailed with respect to analyzing Asian Americans. (Mason Tillman, 2005). A review of that study produces three important points: that Asian American firms are generally under-utilized, that they are more likely to be small contractors or subcontractors, and that the statistics are subject to more than one interpretation. The degree of underutilization is apparent in the results for prime contracts. For example, while Asian Americans make up 20.4 percent of the available firms in construction, they received only 2.4 percent of the contracting dollars. They did, however, receive 23.8 percent of construction contracts. The enormous disparity between the number of contracts and contracting dollars is due to the fact that the average value of Asian American contracts was less than one-tenth of the average value of contracts for NH males. The other four prime contracting sectors (architecture and engineering, professional services, standard services, and goods) also have the same pattern of disparity between the number of contracts and contracting dollars for Asian American firms. In part, the greater concentration in low-value contracting is a consequence of the larger problem of poor performance of all Asian American firms discussed earlier, which is a product of larger market dynamics and practices. At the same time, government (in this case, New York City) is passively contributing through its unequal distribution of contracting dollars to this disparity by mimicking the racial imperfections of the market.

To account for the lower capacity of Asian American firms (and other MBEs), the New York disparity study examined utilization for prime contracts under $1,000,000 (one million dollars). It should be noted that these relatively smaller contracts account for less than a quarter of the total contracting dollars. Of the five disparity indices for Asian Americans that are in the under-$1M contracting category, only one index has a statistically significant value of less than 1 (indicating under-utilization in construction). A statistical test is used because the observed distribution of contract dollars may be due to random chance. Two had values less than 1 (0.94 for architecture and engineering, and 0.86 for professional services), and the remaining two have values greater than 1 (1.02 for standard services and 1.01 for goods). All four indices, however, are not statistically significant. Although the disparity report is careful in saying that these results should not be interpreted as a lack of discrimination against Asian American firms, one is left with the impression that four of the five tests did not support the argument that discrimination exists. However, this is misleading because the five sectors are not equally important in terms of contracting dollars. Construction accounted for a third of all contracting dollars. An alternative way of evaluating the level of overall Asian American participation is to compare the expected value of contracts for Asian Americans with what they actually received. By combining all five areas, we can also eliminate the problem of statistically insignificant results due to the small number of contracts in subcategories. The result is that Asian American firms received $356.5 million, considerably lower than the expected $543.1 million. An even larger disparity can be seen in subcontracting, where Asian American firms received less than half the amount expected. Clearly, aggregating the data this way is not suitable for formulating narrowly tailored remedies, but it does inform us about the magnitude of the larger societal problem in public contracting. Asian Americans are substantially under-represented in government contracting, which in turn contributes to their poorer performance in the business sector.

PART 6: MINORITY CONTRACTING POLICIES IN SIX CITIES

In this section, we discuss the history of minority contracting in the six case-study cities. The analysis examines the situation before and after *Croson* (1989), focusing on the responses to strict scrutiny.[60] The analysis is historical but not strictly chronological. We highlight some selective events that illustrate commonalties and differences in how cities have reacted to the changing political and legal climate. In reviewing the actions of the six cities, there is one dominant theme related to Asian Americans. As a general rule, Asian Americans are included if a city has a minority contracting program that is within the legislation (ordinances) and if disparity studies support their inclusion. Obviously, if there is no program, then Asian American firms do not receive any preferential treatment as a group. In other words, the fate of Asian American businesses within minority contracting is inextricably linked to the fate of race-conscious remedies in local governments. Consequently, it is important, and in most cases sufficient, to examine the overall patterns and changes in the use of race-conscious approaches to understand and decipher the policies affecting this group. This is not the same as saying that Asian Americans are automatically included because their participation must be based on meeting the criteria imposed by strict scrutiny. Determining that, however, is not always simple, and the events in Chicago demonstrate the pivotal role empirical evidence, or the lack of it, has on the decision. We will examine in detail later.

One commonality is that all of the case-study cities are politically liberal. Three of the cities are listed as among the ten most liberal cities with 100,000 or more persons (San Francisco, New York, and Seattle). (ePodunk, n.d.) All six are also highly ranked as being liberal by the Bay Area Center for Voter Research (2005). Out of 236 cities included in the analysis, San Francisco ranked 9th, Seattle 16th, Chicago 17th, New York 21st, St. Paul 35th and Los Angeles 36th. Democrats also form a substantial majority of the voters in all but one city, San Francisco. There, Democrats constitute a plurality of the City's voters only because there are far more liberal parties pulling away votes. Five of the six cities have elected black mayors in the past, and one currently has a Latino mayor.[61] Five cities currently have mayors who are Democrats, with New York being the exception in having a mayor who recently switched from being a Republican to being an independent.

Although all six cities have a liberal leaning, they adopted minority contracting programs at different times. During the 1980s, five of the six cities had minority set-aside programs in place prior to the *Croson* case. In 1980, the City of St. Paul amended a 1976 ordinance to set up a program for minority-owned (as well as women- and disable-owned) firms, with a set-aside goal of 20 percent of City funds used for goods and services contracts. (City of St. Paul, n.d.) In the same year, Seattle established the Women and Minority Business Enterprise (W/MBE) ordinance, which set a percentage goal for level of minority participation. (Seattle Municipal Archives, n.d.) In 1983, Los Angeles Mayor Tom Bradley issued an executive directive in 1983 to increase the utilization of minority-owned (and women-owned) firms. The directive laid out a number of actions to be taken by the City that concentrated on outreach and assistance to MBEs. The only mandated goal in the directive was a 5 percent preference for small local businesses, with the objective of encouraging more bids from MBEs. San Francisco followed suit a year later when it established the "Minority/Women Business Enterprise Program." (City and County of San Francisco, 2003) In 1985, Chicago's Mayor Washington issued an executive order (EO 85-2) to initiate set-aside programs based on the findings and recommendations from two reports on affirmative action and M/WBE procurement[62]. New York was the only city that did not have a minority contracting program prior to *Croson*. Nevertheless, voters did pass a 1989 referendum approving the establishment of a program to assist MBEs (and WBEs). (Mason Tillman, 2005)

60. *City of Richmond v J.A. Croson Co.* Justices ruled that the City's minority contracting program was invalid and established the constitutional standard of "strict scrutiny" for state and local affirmative action contracting programs. In turn, governments must show evidence of compelling interest to consider race-conscious programs and develop narrowly tailored interventions that address the specific discrimination.
61. Tom Bradley in Los Angeles, 1973-1993; Willie Brown in San Francisco, 1996-2004; David Dinkins in New York, 1990-1993; Norm Rice in Seattle, 1990-1997; Harold Washington in Chicago, 1983-1987; Antonio Villaraigosa in Los Angeles, 2005 to present.
62. See generally *Builders Association of Greater Chicago v. City of Chicago*, 298 F.Supp.2d 725(N.D.Ill.2003).

An interesting pattern is the apparent pivotal role played by black mayors in the development of minority contracting policies. It may be more than coincidence that the two cities where minority contracting programs were established through executive power also had African American mayors at the time: Tom Bradley in Los Angeles and Harold Washington in Chicago. In New York when David Dinkins (who is African American) ran for mayor in 1989, he was also a strong supporter of the referendum to establish a MBE and WBE program. Black mayors may also have had an impact on minority contracting through their ability to move city agencies to better implement policies. This appears to be the case in Los Angeles. Despite the relatively weak language in the executive directive establishing a minority contracting program, there was a marked increase in contracting dollars going to MBEs during the years following the directive. One analyst attributes much of this gain to the strong backing of Mayor Bradley. (Larson, 1999) In other words, implementation is as important as the policy.[63] While it is simple to document the actions of the three black mayors, it may be too simplistic to leap to the conclusion that race membership determines how forceful a mayor is with respect to race-conscious policies. Nonetheless, it would be hard to believe that race had no influence on these outcomes. As we will discuss a little later, there are other events that point to the importance of race, namely how the transition from a black to white mayor is correlated with a change in policy.

The responses to *Croson* in the years immediately following the ruling varied, but overall, cities retreated from having forceful race-conscious policies.[64] At one extreme, the City of St. Paul opted in 1989 to replace its race-conscious program with a race- (and gender-) neutral program for small businesses. (City of St. Paul, n.d.) A year later, it passed an ordinance replacing its Set Aside Program with the Targeted Vendor Development Program, which focused on assisting economically disadvantaged small businesses. Seattle continued its program based on findings of continued discrimination against MBEs (and WBEs), but also placed a tentative five-year sunset on the program unless a review determined that it should continue. (City of Seattle, 1990) Los Angeles modified its program, placing more emphasis on "good faith" rather than results, and stated that even non-MBE and non-WBE would have "an equal opportunity to participate in the performance of all city contracts." (City of Los Angeles, 1989) Interestingly, New York, the last of the six cities to embrace the idea of adopting a minority contracting program, following the passage of the aforementioned 1989 referendum, pushed ahead. In 1992, the City established a 15 percent goal for MBE and WBE participation in construction and an 8 percent goal in goods and services. In addition, it also gave minority and women bidders a 10 percent price preference (a discount that lowers their bids for the purpose of ranking). (Mason Tillman, 2005; PolicyLink, n.d.) If St. Paul was at one extreme in terms of responding to *Croson*, San Francisco was at the other end. The latter not only renewed its commitment to using race-conscious remedies, but increased some of its efforts. (City and County of San Francisco, 2003) For example, it increased a previous 5 percent bid preference for M/WBEs to 7.5 percent because the City found that the previous level was not sufficiently effective in "remedying the exclusion of MBEs/WBEs" from City contracts.

The continued use of race-conscious programs more often than not subjected the cities to reverse-discrimination lawsuits. This happened in Chicago, San Francisco, and New York. New York City lost it case in 1994, and the most recent case involving San Francisco (*Coral Construction v. the City and County of San Francisco*) is currently not fully resolved[65]. Even without losing a case, a lawsuit can impact policy, and Chicago provides an example of this. In 1990, the Illinois Road Builders Association sued the City, claiming that the set-aside program was not supported by evidence of specific discrimination and that the analysis failed to use the actual number of available minority businesses, thus not meeting strict scrutiny. Chicago made the case moot by modifying its ordinance. In 1995, the Builders Association of Greater Chicago sued, challenging the constitutionality of the City's minority contracting programs. During the time that the case was under review, the City became less vigilant in enforcing parts of the program, leading to a decline in MBE participation. (Rogal, 1998) The City came under additional pressure in 2000 when Cook County's M/WBE program was found to be unconstitutional. In reviewing the events around the numerous court cases affecting Chicago and other cities, it becomes obvious that lawsuits have measurable impacts, even if the plaintiffs do not prevail. From an economic perspective, there is another implication. The decision to try to maintain a race-conscious program is in

63. For a classical study on the role of implementation, see Pressman and Wildavsky, 1973.
64. The initial response by many local officials was a declaration of continued support for minority contracting programs. (Tolchin, 1989)
65. See generally *Coral Construction v. City & County of San Francisco* S152934.

practice a choice with litigious consequences. In other words, there is the cost of defending the program. Along with the pressures emanating from *Croson* and its progenies, race-conscious policies also faced political challenges. A change in elected leadership can bring about policy changes, including policies related to race-conscious remedies. Los Angeles and New York experienced a change in mayors in the early 1990s—from progressive black mayors to moderate white mayors. Subsequently, both cities de-emphasized the role of race-based remedies in contracting, but to differing degrees. The retirement of Tom Bradley in 1993 marked the end of a liberal interracial coalition in Los Angeles. In that year's election, politically moderate businessman Richard Riodan beat progressive city council member, Michael Woo. (Sonenshein and Pinkus, 2002) The consequences of this mayoral change on minority contracting were subtle, with one important exception: a refusal to conduct the disparity study needed to justify a race-conscious program. Mayor Riodan did continue the M/WBE certification program and many of the outreach efforts, but it is unclear whether these were a high priority within the administration. At the same time, he supported the goal of using minority firms (and women firms) in the multi-billion dollar Alameda Corridor project, which built an exclusive road way to handle the increasing truck traffic from the City's port and the adjacent Long Beach Port. (Alameda Corridor Transportation Authority, 1999) The project relied mainly on outreach and efforts to encourage MBEs/WBEs to bid and prime contractors to use M/WBE subcontractors. Despite this less aggressive approach, the project was able to reach its goal of awarding 22 percent of its contracting dollars to M/WBEs. (PolicyLink, n.d.) [66] However, it is important to note that this project involved federal funds and involved local and regional agencies beyond the City of Los Angeles. Both factors played a role in shaping the program and its implementation. In the end, the mayor took some credit for the program's accomplishments, asserting that these and other city efforts produced $5 billion dollars worth of contract for minority firms. (Smith, 1998) It is difficult to gauge the validity of this figure or to determine whether MBEs were proportionately utilized, largely because the City has not conducted a disparity study. The bottom line, then, is that Los Angeles moved away from the stronger race-based remedies to milder (and less controversial) approaches.

New York City, on the other hand, witnessed an overt and dramatic shift away from a race-conscious policy. In the 1993 race, Rudolph Giuliani, who lost to David Dinkins four years earlier, reversed the outcome by defeating the incumbent. This marked a shift in political orientation and had implications for minority contracting. In fact, Giuliani campaigned in part on a pledge to end the City's minority contracting program, the very program supported by Dinkins. (Lueck, 1993) Shortly after taking office, Giuliani eliminated parts of the minority contracting program, calling it tantamount to "reverse discrimination." (Edmond and Hayes, 1994) A month later, the New York Supreme Court declared the program unconstitutional, and given the mayor's position, little was done to replace it. In both Los Angeles and New York, the shift in executive policies coincided with a transition from a black to white mayor. This is a reversal of what transpired a few years earlier, when the previous mayors used their position to promote minority contracting. Yet, it would be too simplistic to argue that the policy change is a merely matter of race. A counterfactual example is the case of Chicago. After replacing Harold Washington in 1989, newly elected Mayor Richard M. Daley re-issued the executive order for the City's minority contracting program, and after the *Croson* decision, he put into motion efforts to conduct the required analysis to determine if such a program was still needed. (Sundman, 1993; Rogal, 1998) The resulting Blue Ribbon Report found that the City's existing set-aside goals were "appropriate and sustainable" under strict scrutiny. Here is a case where although leadership passed from a black mayor to a white mayor, there was nonetheless continuity in the City's policy on minority contracting.

As the above discussion of mayoral action implies, an important indicator of where a city and its leader stand on affirmative action in the post-*Croson* era is whether they are willing to conduct the analysis required by strict scrutiny.[67] Funding a disparity study does not guarantee the existence of a minority set-aside program, but not conducting a study would essentially render the question of having a race-conscious program moot. All six cities commissioned a disparity or disparity-type study soon after *Croson*.[68] However, as mentioned earlier, the City of Los Angeles failed to complete

66. According to PolicyLink, the program provided the following services: notification of opportunities, access to U.S. DOT's bonding and capital services, certification assistance, referrals to technical assistance services, and outreach assistance for prime contractors.
67. For local programs that receive federal funds, the need for such studies came after the 1995 *Adarand* case. The public agencies most affected by this are those in transportation and energy.
68. We know about the studies for Seattle and Chicago through secondary sources.

and publish the results, although a version of it was published as an academic study. (Larson, 1999) What is apparent is that conducting such studies is not a one-time activity if a city wants to maintain a race-conscious program well after *Croson*. Clearly, the converse holds. When Mayor Guiliani ended New York's program, he subsequently opted not to conduct a disparity study after the state Supreme Court ruled against the existing one. Without such a study, it is nearly impossible to determine if MBEs were still unfairly disadvantaged. The decision to not conduct the research suggests that the policy position was based on ideology rather than on empirical evidence.

The potential barriers to conducting disparity studies, however, may not simply be a matter of political will. San Francisco provides an example of the multiple studies that a local jurisdiction must conduct to justify and defend its minority contracting program. A few months after the U.S. Supreme Court ruled on *Croson* in 1989, an economic consulting firm completed a study that was used by the City to justify renewing its minority contracting program. (BPA Economics, 1989) In response to the 1996 passage of Proposition 209, which prohibited the use of affirmative action in California, the City hired another consultant to examine the impact of that restriction on minority contracting. (Mason Tillman, 1997) In 2003, the City sponsored three new studies—two by outside consultants and one by its Human Rights Commission. (Godbe, 2003; NERA, 2003) New York, Chicago and St. Paul have funded at least two empirical studies. While these studies are necessary to determine if there is a compelling state interest and to design narrowly tailored remedies, they require a fair amount of funds and other resources (i.e., staff time, etc.). One of the implications is that the strict scrutiny requirements imposed by the courts translate into financial disincentives. Cities such as San Francisco may be willing to bear the cost, but others may decide that it is not worth the price. Even if there is a political inclination to do so, there may be fiscal constraints, particularly on the smaller local jurisdictions.

Minority contracting programs are also affected by state laws. (Part 1 provides a discussion about the anti-affirmative action movement and its use of the ballot box.) What is relevant here are the initiatives passed in California and Washington, both of which effectively prohibit the use of affirmative action in state and locally funded programs. This clearly influenced Los Angeles and Seattle, which were reluctant to pursue aggressive race-conscious programs. However, San Francisco has continued to be an aggressive supporter of race-conscious contracting despite Proposition 209. (City and County of San Francisco, 2003) This may not be too surprising given its very liberal politics. Moreover, the City is unique among the six cities because it has given its Human Rights Commission a leading role in administrating and defending the minority and women contracting program.[69] This organizational structure is intriguing because it places the program in an agency whose core mission includes promoting racial equality. What this example shows is that it is possible for a local jurisdiction to have the political will to fight aggressively for race-conscious programs. Nonetheless, the City is bound by court rulings. As we documented above, the City has responded in part by conducting the various studies listed above. However, the City is currently under a court ordered temporary injunction in the *Coral* case, and has to adopt a substitute ordinance that is less race-oriented. (City and County of San Francisco, 2006)

As a result of the legal and political constraints on affirmative action, policies and programs to promote greater MBE (and Asian American) participation in governmental contracting is very different today than in 1989, the watershed year marked by the ruling in *Croson*. Since that year, there have been additional restrictions, which are discussed in Part 1 and Part 3 of this report. On the eve of *Croson*, five of the case-study cities had minority set-aside contracting in place, and voters in the remaining city had approved the establishment of a program to assist minority firms. As we have seen, there is considerable variation in how the six cities have responded, due in part to differences in city politics and state laws. There is considerable truth in the old adage that all "politics is local" when it comes to race issues. Today, the minority contracting policies and programs in the six cities are diverse. Cities such as Seattle and St. Paul still declare that promoting MBE participation is important, but they rely on race-neutral approaches. St. Paul's decision is by choice, while Seattle is hampered by I-200, the state initiative prohibiting the State and its cities from funding race-based programs. Perhaps because of Proposition 209, Los Angeles has also taken the "race-neutral" path, and while San Francisco continues to aggressively fight for race-conscious remedies despite Proposition 209, the City's ability to do so is currently limited by the court. To varying degrees, both New York and Chicago include race-oriented approaches in their minority contracting policies and programs.

69. St. Paul did this on a temporary basis.

Some cities in the post-*Croson* era have tried to formulate alternative approaches, some of which are continuations or expansions of pre-existing strategies. This includes targeted efforts to enhance the competitiveness of MBEs through capacity building, networking with prime contractors, better access to financial markets and technical assistance. The cities are also experimenting with indirect (race-neutral) economic development strategies, such as preferential treatment of small and local businesses. Since MBEs tend to be smaller and more likely to operate in central cities, this could open up more opportunities for governmental contracting. The alternatives are substitutes for result-oriented race-conscious remedies. However, what is not clear is the effectiveness of these alternatives. What happened in Los Angeles under both the Bradley and Riodan administrations indicates that similar approaches can have measurable positive impacts if the programs are vigorously implemented. While this may be true, it also relies on elected officials, their legislative staff, and the city bureaucracy to make the programs a top priority. That is highly problematic, thus adding great uncertainty to the final outcome. The shift away from the old style minority set-aside policy also has a broader historical meaning. The United States has essentially backed away from seeking equality of outcome to promoting equality of opportunity. Even then, the meaning of equality of opportunity has been muddled, equating reverse discrimination with discrimination against disadvantaged minorities.

One of the challenges of this study is determining the impacts of the numerous changes in minority contracting on Asian Americans. So far, little has been said about this topic. As stated earlier, this is because their fate is tied to what happens to the use of race-conscious remedies. However, this relationship is not tied in lock-step. The events affecting Asian Americans in Chicago illustrate this point. The trajectory of minority contracting in that city is described above, and the following discussion uses many of the same references cited earlier. Here, we focus on a very specific aspect—exclusion due to the lack of supporting evidence. This phenomenon affects not only Asian Americans but also American Indians, which is the smallest of the usual presumptive racial groups. In 1990, for example, there were only 7,064 American Indians in the city and 11,550 in the metropolitan area. The data used for most analyses is based on a 5 percent sample, and the relevant subgroup is comprised of those who are economically active (in the labor market or self employed). The "narrowly tailored" requirement creates additional demands because there must be detailed statistics for MBEs in the relevant industrial sector. In the end, the combination of a small sample and high data requirements makes an analysis of American Indians in Chicago infeasible. As a consequence, the studies that were being prepared for the 1990 Blue Ribbon Report did not include American Indians. (Bates, 1990; Bates 1991) A subsequent effort to conduct a separate analysis on American Indians proved inconclusive, with the author noting the "very small size of the Native American business community continually frustrated attempts undertaken in this study to investigate [this group]." (Bates, 1993, p. i) The inability to generate supporting evidence had consequences—the exclusion of this group as a presumptive class from Chicago's minority contracting program.

Chicago's decision to exclude American Indians was in part a defensive move. In the 1990 lawsuit filed against the City's program, U.S. District Court Judge Shadur was expected to declare the set-aside program unconstitutional. One of the program's weaknesses was over-inclusion, specifically the inclusion of American Indians without empirical evidence. Rather than jeopardizing the whole program, the City decided to preemptively eliminate American Indians as a presumptive class. Asian Americans faced a similar problem although their situation was slightly better because of their larger population size. Nonetheless, the sample size problem created analytical problems, and research results were less conclusive than for African Americans and Hispanics. (Bates, 1990) Empirically then, Asian Americans were precariously perched on a fence. Despite these limitations, the Blue Ribbon Panel decided to leave Asian Americans in, arguing that "With American Indians it was an easy decision; with Asians it was difficult."

The issue of possible "over-inclusion" reappeared in the 1995 lawsuit against the city of Chicago. Eight years after the Builders Association of Greater Chicago (BAGC) filed the lawsuit, Federal Court Judge Moran found that the city of Chicago had enough evidence to warrant a race and gender-conscious program. However, he noted his concern regarding a dearth of statistical and anecdotal evidence concerning Asian Americans. The City's own expert came to a similar conclusion. One study found "[l]ittle evidence of disparities" for Asian Americans and recommended that this group "not be included as presumptively socially disadvantaged." (Blanchflower, 2004) This conclusion was due in part to the small number of observations; thus "any econometric evidence of discrimination cannot be strong." [70]

70. According to the 1990 Census, 104,118 Asian Americans and Pacific Islanders lived in the City of Chicago, and 229,492 lived in the larger metropolitan areas. This is several times larger than the American Indians but only a fraction of the African American population.

Unfortunately, one outside expert who had presented information on Asian Americans was unable to present the type of quantitative data that would satisfy the court. (Lau, 2002; Lau, 2003) In response to this and other findings, as well as the Judge's comments, the City redrafted the M/WBE Ordinance in 2004, and removed Asian Americans (and Arab Americans) as a presumptive minority group. The City attorneys argued that if Asian Americans were not excluded as a presumptive class, their continued inclusion would have jeopardized the entire MBE program.[71]

This decision raised concerns within the Asian American community. The Asian American Institute and the Association of Asian Construction Enterprises took active roles in pressing the City to reinstate Asian American contractors, and this effort included dispelling the "model minority" myth of Asian Americans. (Quon, 2007) Although the City was reluctant to fund an extensive analysis that would involve gathering new data and hiring an Asian American expert in the study of racial inequality, the City did ask its experts to conduct another wave of analysis. By using alternative approaches in analyzing pre-existing data and by examining additional data sets, this effort produced what appears to be a remarkable turn around in empirical findings. As one researcher noted, "There is a good deal of new evidence … to suggest that Asian-owned firms be brought back into the program." (Blanchflower, 2007) Another researcher found "a huge gap … between the market share of Asian-owned business enterprises and their representation in the business population." (Wainwright, 2007) Finally, there were two other studies covering Cook County and the state of Illinois that produced findings consistent with the new results for Chicago. (Holt, 2007) Based on the new evidence, the City reinstated Asian Americans as a presumptive group in its minority contracting program in 2007. (Quon, 2007) While the events in Chicago ended positively for Asian Americans, not necessarily because they have been included but that they had a fair chance of being fully evaluated for inclusion, it may be a harbinger of similar challenges in the future.

71. While Asian Americans were excluded as a presumptive class, they could still qualify for individual certification.

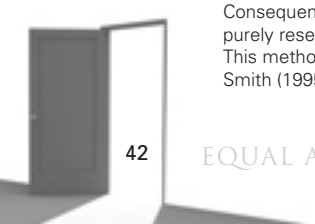
CONCLUDING REMARKS

As stated in the Introduction, one of the goals of the Asian American Contractor Empowerment Project is to support objective empirical research relevant to Asian Americans, affirmative action and governmental contracting. The policy analysis in this report helps identify three priority topics. The first is a better understanding of how the socioeconomic status of Asian Americans is related to race-conscious policies. As documented earlier, arguments to exclude Asian Americans from affirmative action dates back to at least the 1960s and were based on the assertion that this group was economically too successful.[72] They were depicted in simplistic and stereotypical terms, as a "model minority," a perception that is still prevalent today. Unfortunately, much of what is presented are equally simplistic and highly aggregated data, which obscure a much more complex picture. As we have seen, this approach (coupled with historical hindsight) led to conclusions not supported by the data available at the time decisions were made. Even after new data became available, the assertions were without statistical foundation.

One research priority is improving the analyses used in disparity studies. This report and the one containing the proposed research plan (Ong, 2007) have noted some serious data limitations. Some are not unique to Asian Americans, such as the lack of computerized data on the racial distribution of contracts and contract dollars. Other data limitations, however, are specific to Asian Americans. In particular, many of the data sets available to researchers contain only a small sample of Asian Americans, making it statistically difficult to determine how much disparity exists and to identify the causes. This problem will become more severe given the change in the way the U.S. Bureau of the Census collects socioeconomic data for the population. The shift from using the decennial census to the American Community Survey translates into a smaller Asian American sample size. There are also methodological issues of how to model outcomes when the sample size is small.[73] This is evident in what transpired in Chicago. The second wave of analyses that led to reinstating Asian Americans was based on reanalyzing existing data using different approaches. This demonstrates that the previous methods were inadequate. It is likely that additional methodological refinements will be needed.

A second looming research challenge is determining whether race-neutral policies and programs are appropriate. So far, the courts have been flexible on what they accept as evidence of the relative ineffectiveness of race-neutral approaches. Often, the "proof" relies on the results from a "natural experiment."[74] In particular, affirmative action proponents point to a dramatic drop in MBE contracts and contract dollars when a city or State terminates or suspends its set-aside program. However, this is not a complete statistical test because it does not control for other factors (although the drops are usually so dramatic that ending the program is a major contributing factor). Equally important, this does not serve as a test of the effects of the newer race-neutral alternatives that cities have been developing. It is very likely that the courts will eventually require more rigorous evaluations of these alternatives. If the goal is to redress racial disparity, the selection should be evidence-based. As we move down this road of more program evaluations, it is important to ensure that Asian Americans are included and that the methods are appropriate.

72. There has also been an argument that Asian Americans should not be considered because they are a predominantly immigrant population that does not suffer directly from a historical legacy of racism.
73. An example is to use analytical models with samples from more than one region. Race-region interaction variables are included to determine if the patterns in one region differ from that observed for other regions. If there are no residual race-region effects, then the results of the model are applicable to each region.
74. A "natural experiment" is one where there is a policy intervention that provides an opportunity to examine differences before and after the event, or to compare the observations subject to the intervention with observations not subject to the intervention. The problem is that the intervention may be associated with the natural temporal or cross-sectional variation that confounds the comparison. For example, a city that aggressively pushes for a race-conscious program may also be a city where discrimination is not as intensive and pervasive. Consequently, the observed magnitude of the impact of the program can be affected because there is a smaller gap to close. From a purely research perspective, it is desirable to have "randomized experiments," where the treatment or intervention is randomly assigned. This method is widely used in medical clinical trials. For a discussion about the two approaches, see Burtless (1995) and Heckman and Smith (1995).



There are two major barriers to implementing the above research priorities. The first is a lack of research expertise. Many researchers who conduct disparity studies, as well broader studies on affirmative action and racial inequality, are well qualified and trained within their own profession. However, very few have a depth of knowledge on Asian Americans or extensive experience conducting research on this group. Consequently, the tendency is to graph analytical approaches developed for other minority groups to the study of Asian Americans. The appropriateness of this is unknown and should be seriously evaluated. If this prevailing practice is found wanting, alternative analytical approaches need to be developed and utilized. The challenge here is creating the research capacity among Asian American scholars (and scholars of Asian Americans). Capacity building is a long-term agenda, but an important one because public agencies that use race-conscious approaches must update their disparity studies. In other words, there is a need for better research capacity into the foreseeable future.

The second barrier to implementing the above research priorities is a lack of resources. As documented in the report, conducting disparity studies is very expensive, and the cost will climb as the data requirements increase and the analytical methods become more sophisticated. These costs, along with the political and legal liabilities, are significant disincentives to maintaining race-conscious policies and programs. One potential casualty of cost minimizing could be inadequate funding for research relevant and appropriate for Asian Americans. (A far larger consequence is that cities would just stop trying). There is also a lack of resources for more basic research on the socioeconomic status of Asian Americans and its relationship to affirmative action.

While the research challenges are daunting, we hope that the reports supported by this Project will help fill some critical holes in the current research on Asian Americans.

REFERENCES

Alameda Corridor Transportation Authority, "Alameda Corridor Honors Contributions of Disadvantaged Firms on Rail Cargo Project," press release, June 17, 1999, http://www.acta.org/Releases/releases_0.html>http://www.acta.org/Releases/releases_0.html, downloaded August 28, 2007.

American Civil Rights Coalition, "Ward Connerly Announces Exploratory Efforts in Eight States for Civil Rights Initiatives," news release, Sacramento, CA, December 12, 2006.

Americans for a Fair Chance, "Anti-Affirmative Action Threats in the States: 1997-2004," June 2005, http://fairchance.civilrights.org/the_facts/reports/aa_state_2005.pdf, downloaded August 17, 2007.

Anderson, Bernard E., "The Ebb and Flow of Enforcing Executive Order 11246," *American Economic Review*, Vol. 86, No. 2, May 1996, pp. 298-301.

Anderson, Terry H., "The Strange Career of Affirmative Action," *South Central Review*, Vol. 22, No. 2, 2005, pp. 110-129.

Ayres, Ian and Fredrick E. Vars, "When Does Private Discrimination Justify Public Affirmative Action?", *Columbia Law Review*, Vol. 98, No. 7, November 1998, pp. 1577-1641.

Bagenstos, Samuel R, "The Structural Turn And The Limits Of Antidiscrimination Law," *California Law Review*, Volume 94, Issue 1, 2006, pp. 1-48.

Bates, Timothy, "Preliminary Report to the Mayor's Blue Ribbon Panel on Minority and Women Business Enterprises," unpublished paper, January 1990.

Bates, Timothy, "Discrimination and the Capacity of Chicago Metropolitan Area Minority and Women-Owned Businesses," unpublished paper, August 1991.

Bates, Timothy, "A Preliminary Examination if Native American-Owned Small Businesses Operating in Metropolitan Areas Generally and Chicago Specifically," unpublished paper, September 1993.

Bates, Timothy, "Discrimination and the Capacity of Chicago-Area Minority-Owned Businesses to Participate in Public Procurement: Preliminary Report," unpublished paper, January 1998.

Bates, Timothy, "Minority Business Access to Mainstream Markets," *Journal of Urban Affairs*, Vol. 23, No. 1, 2001, pp. 41–56.

Bates, Timothy, "Response to the Initial Reports (dated July 3, 2002) of the Plaintiff's Expert, Dr. George La Noure, on Defendants' Pre-Enactment and Post-Enactment Evidence, and the Initial Report of the Plantiff's Expert, Professor John E. Lunn," in Builders Association of Greater Chicago, Plaintiff v. City of Chicago, Defendant, September 2002.

Bates, Timothy, "Discrimination In The Chicago-Area Construction Industry Handicaps Minority-Owned Firms," *Review of Black Political Economy*, Vol. 33, No. 4, May, 2006, pp. 7-26.

Bay Area Center for Voter Research, "New Study Ranks America's Most Liberal And Conservative Cities," Aug. 11, 2005, http://votingresearch.org, downloaded August 25, 2007.

BBC Research and Consulting, "The Multi-Jurisdictional Disparity Study of Minority/Women Business Enterprises: City of Saint Paul," No. 625, September 1995.

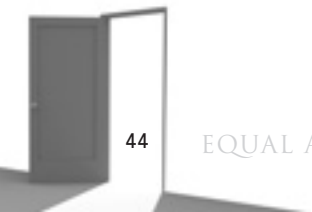
BBC Research & Consulting, "Availability and Disparity Study," prepared for California Department of Transportation, June 29, 2007.

Blanchflower, David G., Phillip B. Levine, and David J. Zimmerman, "Discrimination in the Small-Business Credit Market." *The Review of Economics and Statistics*. Vol. 85, No. 4, 2003, pp. 930-943.

Blanchflower, David G., "Statistical Evidence of Discrimination in the Chicago Construction Industry," unpublished paper, April 28, 2004.

Blanchflower, David G. and Jon Wainwright, "An Analysis of the Impact of Affirmative Action Programs on Self-Employment in the Construction Industry," Discussion Paper No. 1856, Institute for the Study of Labor (IZA), Bonn, Germany, November 2005.

Blanchflower, David G., "An evaluation of whether Asian-owned firms should be included in the City of Chicago's aspirational goals program in construction," unpublished paper, April 09, 2007.



Blanchard, Lloyd, Bo Zao, and John Yinger, "Do Credit Barriers Exist for Minority and Women Entrepreneurs?", Center for Policy Research, Syracuse University, 2005.

Blank, Rebecca M., Marilyn Dabady, and Constance F. Citro, eds., *Measuring Racial Discrimination*, Washington, DC: The National Academies Press, 2004.

Blasi, Gary and John T. Jost, "Symposium On Behavioral Realism - System Justification Theory And Research: Implications For Law, Legal Advocacy, And Social Justice," *California Law Review*, 2006, Vol. 94, No. 4, pp. 1119-1168.

Bonacich, Edna and Ivan Light, Immigrant Entrepreneurs: Koreans in Los Angeles, 1965-1982, Berkeley, CA: University of California Press, 1988.

Boston, Thomas D., "The role of Black-Owned Businesses in Black Community Development," in Paul Ong and Anastasia Loukiatou-Sideris, editors, *Jobs and Economic Development in Minority Communities*, Temple University Press, 2006, pp. 161-175.

Bowen, William G. and Derek Bok, The Shape of the River: *Long-Term Consequences of Considering Race in College and University Admissions*, Princeton, NJ: Princeton University Press.

BPA Economics, Inc., "Statistical Support for SF's MBE/WBE/LBE Ordinance," May 1, 1989, Revised May 15, 1989.

Burtless, Gary, "The Case for Randomized Field Trails in Economic and Policy Research," *The Journal of Economic perspectives*, Vol. 9, No. 2, Spring 1995, pp. 63-84.

Chan, Sucheng, *Asian Americans, An Interpretive History*, Independence, Kentucky: Twayne Publishers, 1991.

Chavez, Lydia, *The Color Bind: The Campaign to End Affirmative Action*, Berkeley, CA: University of California Press, 1998.

City of Chicago, "Report of the Blue Ribbon Panel to the Honorable Richard M. Daley, Mayor of the City of Chicago," March 29, 1990.

City of Los Angeles, Office of the Mayor, "Executive Directive No. 1-B, City of Los Angeles Minority and Women-Owned Business Enterprise Program," March 29, 1983.

City of Los Angeles, Office of the Mayor, "Executive Directive No. 1-C, Implementation of Executive Directive 1-B," March 6, 1989.

City of Seattle, "An Ordinance amending the Women's and Minority Business Utilization ("WMBE") Ordinance," Council Bill Number: 108042, Ordinance Number: 115239, 1990.

City of Saint Paul, "History of the Vendor Outreach Program," n.d. Document in author's file.

City of Saint Paul, "Agreement # 02- Between the City of Saint Paul and MGT of America," 2006.

Cunningham, Clark D., Glenn C. Loury, and John David Skrentny, "Passing Strict Scrutiny: Using Social Science To Design Affirmative Action Programs," *Georgetown Law Journal*, Vol. 90, 2002, pp. 835-882.

Dale, Charles V., "Minority Contracting and Affirmative Action for Disadvantaged Small Businesses: Legal Issues," Congressional Research Service, The Library of Congress, February 24, 2006.

Desphpande, Ashvini, "Affirmative Action in India," in Elaine Kennedy-Dubourdieu, *Race and Inequality: World Perspectives on Affirmative Action*. Burlington, Vermont: Ashgate Publishing, 2006, pp. 77-101.

Douglas, John Aubrey, "Anatomy of Conflict, The Making and Unmaking of Affirmative Action at the University of California," *The American Behavioral Scientist*, Vol. 41, No. 7, 1998, pp. 938-959.

Edley, Christopher, *Not All Black and White, Affirmative Action and American Values*. New York: Hill and Wang, 1996.

Edmond, Alfred and Cassandra Hayes, "Bad economics in the Big Apple: New York Mayor Rudolph Giuliani kills a program designed to give 20 percent of city contracts to minority- and women-owned companies," *Black Enterprise*, April 1994.

Enchautegui, Maria, Michael Fix, Pamela Loprest, Sarah von der Lippe, and Douglas Wissoker, "Do Minority-Owned Businesses Get a Fair Share of Government Contracts?", Washington, D.C.: The Urban Institute, 1997.

ePodunk "Most Liberal Places," http://www.epodunk.com/top10/liberal/index.html, n.d., downloaded August 25, 2007.

Espenshade, Thomas J. and Chang Y. Chung, "The Opportunity Cost of Admission Preferences at Elite Universities," *Social Science Quarterly*, Vol. 86, No. 2, 2005, pp. 293–305.

Espirtu, Yen, *Asian American Panethnicity: Bridging Institutions and Identities*. Philadelphia: Temple University Press, 1992.

Frymer, Paul, "Acting When Elected Officials Won't: Federal Courts and Civil Rights Enforcement in U.S. Labor Unions, 1935–85," *American Political Science Review* (2003), 97: 483-499

Garfield, Leslie Y., "Back to Bakke: Defining the Strict Scrutiny Test for Affirmative Action Policies Aimed at Achieving Diversity in the Classroom," *bepress Legal Series*, Working Paper 131, http://law.bepress.com/expresso/eps/131, February 11, 2004.

Giloth, Robert and Kari Moe, "Jobs, Equity and the Mayoral Administration of Harold Washington in Chicago," *Policy Studies Journal*, Vol. 27, 1999.

Godbe Research, "Telephone Survey," Survey of certified MBEs and WBEs, summarized in City and County of San Francisco, April 2003.

Graham, Hugh Davis, "Unintended Consequences: The Convergence of Affirmative Action and Immigration Policy," *The American Behavioral Scientist*, Vol. 41, No. 7, 1998, pp. 898-912.

Hammerman, Herbert, "'Affirmative-Action Stalemate': A second perspective," *The Public Interest*, Fall 1988, pp. 130-35.

Heckman, James J., and Jeffrey A. Smith, "Assessing the Case for Social Experiments," *The Journal of Economic perspectives*, Vol. 9, No. 2, Spring 1995, pp. 85-110.

Hendrickson, Robert M., "Rethinking Affirmative Action: Redefining Compelling State Interest and Merit in Admission," *Peabody Journal Of Education*, Vol. 76, No. 1, 2001, pp. 117–135.

Holt, Colette, "Amendment to City of Chicago's M/WBE Construction Ordinance," correspondence to Hon. Bernard L. Stone, January 30, 2007.

Hum, Tarry, "New York City's Asian Immigrant Economies: Community Development Needs and Challenges," in Paul Ong and Anastasia Loukiatou-Sideris, editors, *Jobs and Economic Development in Minority Communities*, Temple University Press, 2006, pp. 176-212.

Ichinose, Daniel, "Polling AAPI Voters," AAPI Nexus, Vol. 2, No. 2, Summer/Fall 2004, pp. 67-85.

Ishimura, Stuart J., "Employment Discrimination and Asian Americans," *AAPI Nexus*, Vol. 3, No. 2 Summer/Fall 2005, pp. 1-15.

Kang, Jerry and Mahzarin R. Banaji, "Symposium on Behavioral Realism - Fair measures: A behavioral realist revision of 'Affirmative Action'", *California Law Review*, Vol. 94, No. 4, 2006, pp. 1063-1118.

Kaufmann, Karen M., "Cracks in the Rainbow: Group Commonality as a Basis for Latino and African-American Political Coalitions," *Political Research Quarterly*, Vol. 56, No. 2, 2003, pp. 199-210.

Kellough, Edward J., Understanding Affirmative Action: Politics, Discrimination, And the Search for Justice. Washington, D.C.: Georgetown University Press, 2006.

Kennedy-Dubourdieu, Elaine, Race And Inequality: World Perspectives on Affirmative Action. Burlington, Vermont: Ashgate Publishing, 2006.

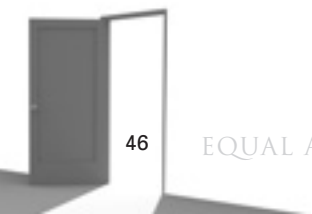
Kidder, William, "Negative Action Versus Affirmative Action: Asian Pacific Americans are Still Caught in the Crossfire," unpublished paper, 2006.

Klineberg, Stephen L. and David A. Kravitz, "Ethnic Differences in Predictors of Support for Municipal Affirmative Action Contracting." *Social Science Quarterly*, Vol. 84, 2003, pp. 425-440.

L.A. confidential - interview with Los Angeles mayor Richard Riordan by Scott S. Smith – Interview Entrepreneur, November 1998.

LaNoue, George and John Sullivan, "Deconstructing affirmative action categories," *The American Behavioral Scientist*, Vol. 41, No. 7, 1998, pp. 913-926.

Larson, Tom, "Affirmative Action Programs for Minority- and Women-Owned Buinesses," in Impacts of Affirmative



Action, edited by Paul Ong, AltaMira Press, 1999, pp. 133-169.

Lau, Yvonne, "Expert Report of Yvonne Lau," report to the City of Chicago, 2002.

Lau, Yvonne, "Under Attack: Minority Ordinances and Asian American Minority Business Enterprises," Paper presented at the annual meeting of the American Sociological Association, Atlanta Hilton Hotel, Atlanta, GA, August 2003.

Leiter, Samuel and William M. Leiter, Affirmative Action in Antidiscrimination Law and Policy: An Overview and Synthesis, SUNY Press, 2002.

Liu, John, Paul Ong, and Carolyn Rosenstein, "Dual-Chain Migration: Post-1965 Filipino Immigration to the United States," *International Migration Review*, Vol. 25, No. 3, Fall 1991, pp. 487-513.

Lowrey, Ying, "Dynamics of Minority-Owned Employer Establishments, 1997-2001," Office of Advocacy, U.S. Small Business Administration, Washington, D.C., February 2005.

Lueck, Thomas, "Giuliani's Affirmative-Action Plan Steps Up Policy Fight,"

New York Times, October 2, 1993, http://query.nytimes.com/gst/fullpage.html, downloaded August 29, 2007.

Magpantay, Glenn D., "Ensuring Asian American Access to Democracy in New York City," *AAPI Nexus*, Vol. 2, No. 2 Summer/Fall 2004, pp. 87-113.

Mar, Don, "Asian Americans in the Labor Market: Public Policy Issues," *AAPI Nexus*, Vol. 3, No. 2 Summer/Fall 2005, pp. 39-57.

Mason Tillman Associates, Ltd., "MBE/WBE/LBE Progress Reports," (Based on FY 92/3, 93/4, 94/5), Expected August 31, 1997.

Mason Tillman Associates, Ltd., "City of New York Disparity Study," January 2005.

Mason Tillman Associates, Ltd., "Disparity Studies (1991 - 2004)," Prepared for the San Francisco City and County Human Rights Commission, California, 1997, http://www.mtaltd.com/services_capabilities/disparity_studies.html#Cities, downloaded August 29, 2007.

Massey, Douglas and Nancy Denton, American Apartheid: *Segregation and the Making of the Underclass*, Cambridge, MA: Harvard University Press, 1994.

Morris, Monique W., Sirithon Thanasombat, Michael D. Sumner, Sara Pierre, and Jessica Z. Borja, "Free to Compete? Measuring the Impact of Proposition 209 on Minority Business Enterprises," Discrimination Research Center, Berkeley, CA, 2006.

Nakanishi, Don, "A Quota on Excellence? The Debate on Asian American Admissions," Change, November/December 1989, pp. 38-47.

Nakanishi, Don T. and Paul Ong, "Voting: The Biggest Challenge and What Can Be Done," *AAPI Nexus*, Vol. 2, No. 2, Summer/Fall 2004, pp. v-x.

National Economic Research Associates, Inc., "The Utilization of Minority- and Women-Owned Business Enterprises by the City of New York," January 24, 1992.

National Economic Research Associates, Inc., "Disadvantaged Business Enterprise Availability Study." Prepared for the Minnesota Department of Transportation, 2000.

National Economic Research Associates, Inc., "Disparities in Bay Area Private Market," April 2003.

National Economic Research Associates, Inc., "Disadvantaged Business Enterprise Availability Study," Prepared for the Illinois Department of Transportation, 2004.

NERA Economic Consulting, "Race, Sex, And Business Enterprise: Evidence From The State Of Washington," Prepared for the Washington State Department of Transportation, FINAL REPORT—October 20, 2005.

NERA Economic Consulting, "Race, Sex, and Business Enterprise: Evidence from the State of Maryland (Final Report)," Prepared for the Maryland Department of Transportation, March 7, 2006.

Nembhard, Jessica Gordon and Rhonda Williams, editors, *Wealth Accumulation and Communities of Color in the U.S.*, University of Michigan, 2006, pp. 155-172.

Glenn Omatsu, "Asian Pacific American Labor Organizing: An Annotated Bibliography, Part I: Historical Struggles, 1840s – 1960s," UCLA Asian American Studies, 2002, http://www.sscnet.ucla.edu/aasc/classweb/winter02/aas197a/apapart2.html.

Glenn Omatsu, "Asian Pacific American Labor Organizing: An Annotated Bibliography, Part II: Contemporary Struggles from the 1960s," UCLA Asian American Studies, 2002, http://www.sscnet.ucla.edu/aasc/classweb/winter02/aas197a/apapart2.html.

Ong, Paul, editor, *Impacts of Affirmative Action: Policies and Consequences in California*, AltaMira Press, 1999.

Ong, Paul, "Set-Aside Contracting In S.B.A.'S 8(A) Program," *Review of Black Political Economy*, Vol. 28, No. 3, Winter 2001, pp. 59-71.

Ong, Paul, "The Affirmative Action Divide," in James S. Lai and Don Nakanishi, editors, *Asian Pacific American Politics: Law, Participation, and Policy*, Spectrum Series of Rowman & Littlefield, 2003, pp. 377-405.

Ong, Paul, "Asian American Demographics and Civil Rights," *AAPI Nexus*, Vol. 2, No. 1, Winter/Spring 2004, pp. 105-128.

Ong, Paul, "Asian American Businesses and Governmental Contracting: Methodological and Data Issues, and Proposed Research Plan," draft paper submitted to Asian American Justice Center, June 29, 2007.

Ong, Paul, Lucie Cheng, and Leslie Evans, "Migration of Highly-Educated Asians and Global Dynamics," *Asian and Pacific Migration Journal*, Vol. 1, No. 3-4, 1992, pp. 543-584.

Ong, Paul and David Lee, "Changing of the Guard? The Emerging Immigrant Majority in Asian American Politics," in *Asian Americans and Politics: An Exploration*, edited by Gordon H. Chang, Washington D.C. and Stanford, CA.: Woodrow Wilson Center Press and Stanford University Press, 2001, pp. 153-172.

Ong, Paul and Joanna Lee, "Naturalization of S.F. Chinese Immigrants: The Surge in the 1990s," Working Paper, CCPR-002-07, California Center for Population Research, UCLA, 2007.

Ong, Paul and John Liu, "U.S. Immigration Policies and Asian Migration," pp. 45-72, reprinted in Min Zhou and James V. Gatewood, editors, *Contemporary Asian America: A Multidisciplinary Reader*, New York University Press, 2000, pp. 155-174.

Ong, Paul and Don T. Nakanishi, "Becoming Citizens, Becoming Voters: The Naturalization and Political Participation of Asian Pacific Immigrants," in James S. Lai and Don Nakanishi, editors, *Asian Pacific American Politics: Law, Participation, and Policy*, Lanham, MD: Rowman & Littlefield, 2003, pp. 113-133.

Ong, Paul and R. Varisa Patraporn, "Asian Americans and Wealth," in Jessica Gordon Nembhard and Rhonda Williams, editors, *Wealth Accumulation and Communities of Color in the U.S.*, University of Michigan, 2006, pp. 173-190.

Ong, Paul and Jordan Rickles, "The Continued Nexus between School and Residential Segregation," in Symposium, Rekindling the Spirit of Brown v. Board of Education, *African-American Law and Policy Report*, Vol. 6, pp. 178-193; *Asian Law Journal*, Vol. 11, pp. 260-275; *Berkeley La Raza Law Journal*, Vol. 15, pp. 51-66; *Berkeley Women's Law Journal*, Vol.19, pp. 379-394; California Law Review, 2004.

Orfield, Gary and Chungmei Lee, "Why Segregation Matters: Poverty and Educational Inequality," The Civil Rights Project, Harvard University, January 2005.

Pham, Vu H., Lauren Emiko Hokoyama, and J.D. Hokoyama, "Become Visible: Let Your Voice Be Heard," *AAPI Nexus*, Vol. 4, No. 1, Winter/Spring 2006 Essay, pp. 1-11.

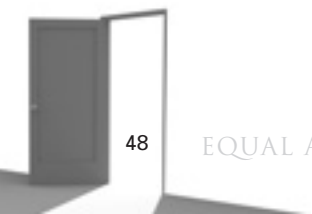
PolicyLink, "Minority Contracting," n.d., http://www.policylink.org/EDTK/MinorityContracting/Challenges.html, downloaded, August 29, 2007.

Poon, Oiyan A., Veronica Terriquez and Paul M. Ong, "Resisting Chinese Exclusion: The San Francisco Consent Decree, Ho v. SFUSD, and School Resegregation," unpublished paper, University of California, Los Angeles, 2007.

Pressman, Jeffrey L. and Aaron B. Wildavsky, *How Great Expectations in Washington Are Dashed in Oakland*, Berkeley, CA: University of California Press, 1973.

Rawls, John, *A Theory of Justice*, Cambridge, MA: Harvard University Press, 1971.

Ray, Rose M., Helene Grossman, and Jeffrey Goldman, "Demonstration of Minority Disadvantage When Minority Populations Are Small," Exponent, Inc., Menlo Park, CA, July 21, 2005.



Riccucci, Norma M., "Moving Away From a Strict Scrutiny Standard for Affirmative Action Implications for Public Management," *The American Review of Public Administration*, Vol. 37, No. 2, 2007, pp. 123-141.

Robinson, Greg and Toni Robinson, "Korematsu and Beyond: Japanese Americans and the Origins of Strict Scrutiny," *Law And Contemporary Problems*, Vol. 68, No. 2, Spring 2005, pp. 29-55.

Rodgers, William, "Federal-Contractor Status and Minority Employment: A Case Study of California, 1979-1994," in Paul Ong, editor, *Impacts of Affirmative Action: Policies and Consequences in California*, AltaMira Press, 1999, pp. 103-120.

Rogal, Brian, "City Set-Aside Program Misses Target," *The Chicago Reporter*, March 1998.

Pressman, Jeffrey L. and Aaron B. Wildavsky, *How Great Expectations in Washington Are Dashed in Oakland*, Berkeley, CA: University of California Press, 1973.

Saito, Leland T., *Race and Politics Asian Americans, Latinos, and Whites in a Los Angeles Suburb*, Champaign, IL: University of Illinois Press, 1998.

Sakamoto, Arthur, Hyeyoung Woo, and Keng-Loong Yap, "Are Native-born Asian Americans Less Likely To Be Managers? Further Evidence on the Glass-ceiling Hypothesis," AAPI Nexus, Vol. 4, No. 1, Winter/Spring 2006, pp. 13-37.

San Francisco Human Rights Commission, "12D.A Ordiance," n.d., http://www.sfgov.org/site/sfhumanrights_page.asp?id=19173, downloaded March 2, 2007.

Seattle Municipal Archives, "Women in City Government, Equality for All?", n.d., http://www.cityofseattle.net/CityArchives/Resources/WomenExhibit/Equality%20for%20All.htm, downloaded August 29, 2007.

Skrentny, John D., "Policy-Elite Perceptions and Social Movement Success: Understanding Variations in Group Inclusion in Affirmative Action," *American Journal of Sociology*, Vol. 111, 2006, pages 1762–1815.

Sonenshein, Raphael J. and Susan H. Pinkus, "Latino Incorporation Reaches the Urban Summit: How Antonio Villaraigosa Won the 2005 Los Angeles Mayor's Race," *PS: Political Science & Politics*, Vol. 38, 2005, pp. 713-721.

Sugrue, Thomas, "The Tangled Roots of Affirmative Action," *The American Behavioral Scientist*, Vol. 41, No. 7, 1998, pp. 886-897.

Thanasombat, Siri and John Trasvina, "Screening Names Instead of Qualifications: Testing with Emailed Resumes Reveals Racial Preference," *AAPI Nexus*, Vol. 3, No. 3, Summer/Fall 2005, pp. 105-115.

Theodore, Nikolas C., "Strengthening Business Opportunities Project, Chicago Urban League, Chicago, Illinois," *International Journal of Public Administration*, Vol. 18, No. 7, 1995, pp. 1115 – 1140.

Thomas, Ward and Mark Garrett, "US and California affirmative action policies, laws, and programs," in *Impacts of Affirmative Action*, edited by Paul Ong, AltaMira Press, 1999, pp. 25-58.

Tienda, Marta and Rebeca Raijman, "Promoting Hispanic Immigrant Entrepreneurship in Chicago," *Journal of Developmental Entrepreneurship*, Apr 2004.

Tolchin, Martin, "Officials in Cities and States Vow to Continue Minority Contractor Programs, *New York Times*, January 25, 1989, City Final Edition, Section A, Page 18.

U.S. Bureau of the Census, "U.S. Census of Population: 1960, Subject Reports, Nonwhite Population by Race," Final Report PC(2)-1C, Washington, D.C.: GPO, 1963.

U.S. Bureau of the Census, "1970 Census of Population, Subject Reports, Japanese, Chinese and Filipinos in the United States," Final Report PC(2)-1G, Washington, D.C.: GPO, 1973.

U.S. Commission on Civil Rights, "Federal Procurement After Adarand," Washington, D.C., 2005.

U.S. Commission on Civil Rights, "Disparity Studies as Evidence of Discrimination in Federal Contracting," Washington, D.C., 2006.

United States House of Representatives, Committee On Oversight And Government Reform, Majority Staff, "More Dollars, Less Sense: Worsening Contracting Trends Under The Bush Administration," June 2007.

U.S. Department of Transportation. "Title 49—Transportation, Subtitle A--Office Of The Secretary Of Transportation, Part 26--Participation By Disadvantaged Business Enterprises In Department Of Transportation Financial Assistance Programs,"

http://www.access.gpo.gov/nara/cfr/waisidx_02/49cfr26_02.html, downloaded August 8, 2007.

U.S. Equal Employment Opportunity Commission, "EEOC and Workplace Partners Launch New Initiative to Protect Employment Rights of Asian Americans," August 1, 2003, http://www.eeoc.gov/press/8-01-03.html, downloaded August 18, 2007.

U.S. Equal Employment Opportunity Commission, "Job Patterns For Minorities And Women In Private Industry, 2005," page last modified on April 19, 2007, http://www.eeoc.gov/stats/jobpat/2005/index.html, downloaded August 18, 2007.

U.S. Small Business Administration, "Part 124_8(A) Business Development/Small Disadvantaged Business Status Determinations," http://www.sba.gov/library/cfrs/13cfr124.html, downloaded August 8, 2007.

U.S. Supreme Court, Reporter of Decisions, ""Syllabus: Supreme Court Of The United States, Grutter V. Bollinger Et Al., Certiorari To The United States Court Of Appeals For The Sixth Circuit, No. 02—241. Argued April 1, 2003–Decided June 23, 2003," http://www.law.cornell.edu/supct/html/02-241.ZS.html, downloaded August 22, 2007.

University of Minnesota Law School, Institute on Race and Poverty, "Final Report," Submitted to the Disparity Study Join Powers Board, 1996.

Wainwright, John, "Asian Business Enterprise Disparities in the Chicago Consolidated Statistical Area," correspondence in author's file, July 30, 2007.

Wang, Ling-Chi, "Meritocracy and Diversity in Higher Education: Discrimination Against Asian-Americans in the Post-Bakke Era," conference paper, UCLA Institute for Social Science, 1988.

Washington State Department of Transportation, "Washington State Department of Transportation's FFY 2007 Overall DBE Goal," pdf document, Created August 10, 2006.

Wilson, Julius Wilson, *The Truly Disadvantaged: The Inner City, the Underclass and Public Policy*. Chicago: University of Chicago Press, 1990.

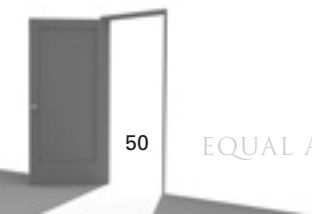
Wong, Janelle, "Getting Out the Vote among Asian Americans in Los Angeles County: The Effects of Phone Canvassing," *AAPI Nexus*, Vol. 2, No. 2, Summer/Fall 2004, pp. 49-65.

Woo, Deborah, *Glass Ceilings and Asian Americans: The New Face of Workplace Barriers*, Alta Mira Press, 2000.

Woo, S.B., "Vote to Empower Yourself, Stupid," *AAPI Nexus*, Vol. 2, No. 2 Summer/Fall 2004, pp. 1-8.

Wu, Jeremy S. and Carson K. Eoyang, "Asian Pacific American Senior Executives in the Federal Government," *AAPI Nexus*, Vol. 4, No. 1, Winter/Spring 2006, pp. 39-50.

Yamamoto, Eric, *Interracial Justice: Conflict and Reconciliation in Post-civil Rights America*, New York: New York University Press, 1999.



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