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## The Anatomy of a Helping Hand: Women-Owned Small Businesses and Federal Contract Procurement

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# THE ANATOMY OF A HELPING HAND: WOMEN-OWNED SMALL BUSINESSES AND FEDERAL CONTRACT PROCUREMENT

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## INTRODUCTION

On February 1, 2011, the U.S. Small Business Administration (SBA) announced that it would implement the new Women-Owned Small Business (WOSB) Federal Contract Program on February 4, 2011.<sup>1</sup> This proclamation adhered to the implementation date promised by the SBA's final rule, which the Federal Register had published in the fall of 2010.<sup>2</sup> The announcement represented the culmination of a slow-moving legislative process that has sought to address the under-representation of women in federal contracting.<sup>3</sup>

Women's relative inability to procure federal funding is not a new concern, nor is it a new aspect of governmental policy: the SBA has a long-standing goal of allocating five percent of federal contracts to women-owned businesses.<sup>4</sup> This aspiration, though admirable, has not yet succeeded. In Fiscal Year 2009, only 3.7 percent of federal contracts were awarded to women-owned businesses.<sup>5</sup>

The government's failure to reach its goal is troubling for several reasons. Although the statistical gap might be explicable if women-

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1. Press Release, U.S. Small Bus. Admin., SBA Announces Contracting Program for Women-Owned Small Businesses (Feb. 1, 2011), *available at* <http://www.sba.gov/content/sba-announces-contracting-program-women-owned-small-businesses>.

2. Women-Owned Small Business Federal Contract Program, 75 Fed. Reg. 62,258 (Oct. 7, 2010) (to be codified at 13 C.F.R. pts. 121, 124, 125, 126, 127, & 134).

3. *Id.*

4. Federal Acquisition Streamlining Act of 1994, S. 1587, 103d Cong. § 7106(a)(2)(A) (1994) (enacted).

5. *The Women's Procurement Program*, WOMEN IMPACTING PUB. POL'Y, 1 (Oct. 7, 2010), [http://www.wipp.org/resource/resmgr/issues/summary\\_wipp.pdf](http://www.wipp.org/resource/resmgr/issues/summary_wipp.pdf).

owned businesses had dwindled over the last decade and a half, the opposite is in fact true.<sup>6</sup> Between 1997 and 2002, “women-owned firms were growing at twice the rate of all other groups,” and of small businesses within the same time frame, “women had the largest growth compared to other groups.”<sup>7</sup> One study offers a startling analogy to foster appreciation for the economic muscle of these ventures: “If U.S.-based women-owned businesses were their own country, they would have the 5th largest GDP in the world, trailing closely behind Germany, and ahead of countries including France, United Kingdom and Italy.”<sup>8</sup> In general, “[t]he proportion of women working in management, business, and finance jobs has increased from 9 percent to 14 percent since 1983.”<sup>9</sup> Why, then, has this enduring group been unable to procure a reasonable portion of available contracts? The incapacity of the government to meet its policy goal cannot be attributed merely to economic factors.

The advancement of women’s economic equality has been an enduring issue in political discourse,<sup>10</sup> and the question of whether and how to provide government set-asides to women bears special relevance in the recent stormy economic weather. On a broad scale, women have managed to hold their own in employment: in 2009, approximately sixty-one percent of women over twenty years of age participated in the U.S. labor force.<sup>11</sup> This holding pattern arises after a prolonged and impressive rise in employment for women over the last fifty years.<sup>12</sup> Men, however, have consistently fared better; although their overall employment has fallen slightly in the past fifty years, it has always remained higher than that of women.<sup>13</sup> Women have historically represented a marginal, though growing, portion of national business, and “in troubled economic times minority business has been traditionally that segment of the economy ‘hit first, hit hardest, and hit longest.’”<sup>14</sup> WOSBs fall into two economically unlucky categories:

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6. CTR. FOR WOMEN’S BUS. RESEARCH, *THE ECONOMIC IMPACT OF WOMEN-OWNED BUSINESSES IN THE UNITED STATES* 1 (2009), available at <http://www.nwbc.gov/sites/default/files/economicimpactstu.pdf>.

7. *Id.*

8. *Id.*

9. U.S. DEP’T OF COMMERCE & BUDGET & EXEC. OFFICE OF THE PRESIDENT, *WOMEN IN AMERICA: INDICATORS OF SOCIAL AND ECONOMIC WELL-BEING* 33 (2011), available at [http://www.whitehouse.gov/sites/default/files/rss\\_viewer/Women\\_in\\_America.pdf](http://www.whitehouse.gov/sites/default/files/rss_viewer/Women_in_America.pdf) [hereinafter *WOMEN IN AMERICA*].

10. See *infra* Part I.C.

11. *WOMEN IN AMERICA*, *supra* note 9, at 29.

12. *Id.* (“The labor force participation rate for women (age 20 and older) nearly doubled between 1948 (32 percent) and 1997 (61 percent).”).

13. *Id.*

14. Maj. Thomas Jefferson Hasty, III, *Minority Business Enterprise Development and the Small Business Administration’s 8(A) Program: Past, Present, and (Is There a) Future?*, MIL. L. REV., Summer 1994, at 1, 2 (quoting H.R. REP. NO. 97-956, at 1 (1982) (internal

they are both minority-owned and small ventures. As a minority, women suffer from the notorious “pay gap,” by which women possessing equal education perpetually earn less than their male counterparts.<sup>15</sup> As small businesses, they possess relatively little capital with which to stay afloat in a tumultuous market.<sup>16</sup>

Small businesses have indeed come forth to report their recent struggles with market tremors.<sup>17</sup> The challenges they face are compounded, somewhat ironically, by the federal government, which has responded to the recession with skyrocketing tax increases.<sup>18</sup> Businesses have reacted by going into survival mode, and their reluctance to increase their work force has perpetuated slow job growth.<sup>19</sup> This chain of events perversely sustains the very inhospitable landscape that both the government and the businesses themselves are striving to move past.

Even companies that have enjoyed relative success feel the pressure: as one business owner reported, “[w]e did well last year, hired two people, but the taxes ate through the income we had.”<sup>20</sup> The federal government is invested in finding ways to break the vicious cycle and buoy these small businesses, intending that they help “jump-start” economic recovery with their profits.<sup>21</sup> Given that the work force behind these struggling business ventures is varied in race, gender, and other attributes,<sup>22</sup> the Program faces a significant question: why do women-owned businesses deserve special treatment?

Promoters of federal programs that aid WOSBs argue that far from allocating set-asides to arbitrary groups, the programs are validated by WOSBs’ economic worth;<sup>23</sup> by protecting their vitality and viability for future growth, the government hopes likewise to stimulate the economy by promoting company expansion and job

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quotation marks omitted)).

15. WOMEN IN AMERICA, *supra* note 9, at 32.

16. U.S. DEP’T OF COMMERCE, ECON. & STATISTICS ADMIN., WOMEN-OWNED BUSINESSES IN THE 21ST CENTURY 1 (2010), *available at* [http://www.dol.gov/wb/media/Women-Owned\\_Businesses\\_in\\_the\\_21st\\_Century.pdf](http://www.dol.gov/wb/media/Women-Owned_Businesses_in_the_21st_Century.pdf) (stating that women-owned businesses start with less capital and often encounter less favorable loan conditions, or are less willing to take on risk by seeking outside capital).

17. V. Dion Haynes, *Small Businesses Feel Squeezed by Obama Policies*, WASH. POST, Sept. 6, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/09/03/AR2010090305391.html>.

18. *Id.*

19. *Id.*

20. *Id.* (internal quotation marks omitted).

21. *Id.*

22. *See infra* Part I.C.

23. Press Release, U.S. Small Bus. Admin., SBA Proposes Women-Owned Small Business Rule to Expand Access to Federal Contracting Opportunities (Mar. 2, 2010), *available at*, [http://www.wipp.org/resource/resmgr/procurement\\_committee/news\\_release\\_10-05.pdf](http://www.wipp.org/resource/resmgr/procurement_committee/news_release_10-05.pdf).

creation.<sup>24</sup> This Note will first examine the substance of the SBA's most recent women-oriented legislation, including its aims, supporting data, early reactions to its methods, and the SBA's responses to these comments. It will then discuss the history of women's role in the U.S. economy, including past legislation that has sought to aid women and case law that has established the constitutional justification for government set-asides. Finally, this Note will address the economic utility of providing help to WOSBs and the forecast for the most recently implemented program that seeks to supply this much-needed and much-deserved aid.

## I. LEGISLATION

### A. *Women-Owned Small Business Federal Contract Program*

On October 7, 2010, the Federal Register published the SBA's final rule.<sup>25</sup> The rule seeks to "level the playing field" for women in the federal contracting arena, thereby acknowledging that an unfair disparity has existed for many years and that past legislative efforts have not adequately addressed the problem.<sup>26</sup> The SBA commenced implementation of the final rule on February 4, 2011, assuring that the Program would "be fully implemented" within the coming year "with the first contracts expected to be awarded by the fourth quarter of fiscal year 2011."<sup>27</sup> At the time of this Note's completion, shortly after official implementation, the practical effects of the Program remain to be seen.<sup>28</sup>

The final rule had been preceded by a proposal, published in March, followed by a two-month period in which the SBA solicited public comments.<sup>29</sup> By May 3, 2010, the SBA had received 998 comments, "virtually all [of which] supported the rule, commended SBA for its efforts, and urged the agency to expeditiously promulgate final regulations since WOSBs have been waiting eleven years for the program."<sup>30</sup> The large volume of responses indicates widespread

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24. Haynes, *supra* note 17.

25. Women-Owned Small Business Federal Contract Program, 75 Fed. Reg. 62,258 (Oct. 7, 2010) (to be codified at 13 C.F.R. pts. 121, 124, 125, 126, 127, & 134).

26. *Id.*

27. Press Release, U.S. Small Bus. Admin., *supra* note 1.

28. There has, however, been some internet commentary in late 2011 expressing frustration at the Program's slow-moving nature. See Lourdes Martin-Rosa, *Women-Owned Small Businesses Still Not Getting Their Fair Share of Government Contracts—Here's How to Change That*, GOVWIN (Dec. 13, 2011, 12:17 PM), [http://govwin.com/lourdes\\_blog/womenowned-small-businesses-still-not/332143](http://govwin.com/lourdes_blog/womenowned-small-businesses-still-not/332143) (urging WOSBs "to step up to the plate" and identify themselves as qualified to participate in the set-aside program).

29. Women-Owned Small Business Federal Contract Program, 75 Fed. Reg. at 62,258.

30. *Id.*

relief in the WOSB community, which has endured years of awaiting such changes, and the SBA is cognizant of this mindset.<sup>31</sup> SBA Administrator Karen Mills, speaking in conjunction with the rule's proposal, succinctly stated its economic and social purposes:

Women-owned small businesses are one of the fastest growing segments of our economy, yet they continue to be under-represented when it comes to federal contracting . . . . Across the country, women are leading strong, innovative companies, and we know that securing federal contracts can be the opportunity that helps them take their businesses to the next level, expand their volume and create good-paying jobs. This proposed rule is a step forward in helping ensure greater access for women-owned small businesses in the federal marketplace.<sup>32</sup>

The rule, by implementing new changes, hopes to finally meet Congress's more than sixteen-year-old objective of allocating five percent of federal contracts to women-owned businesses.<sup>33</sup>

Congress had addressed the lack of progress, and even regression, regarding this goal as far back as 2000, noting that between 1997 and 1999, federal procurement by women-owned businesses decreased by a shocking thirty-eight percent.<sup>34</sup> This decrease occurred despite the fact that women-owned business comprised "a vital element in the unprecedented growth and productivity of the American economy" in the 1990s, and despite the fact that "[n]early half of the businesses owned by women provide[d] goods and services to the federal government."<sup>35</sup>

The Committee on Small Business gave several reasons, based on testimony, for the lagging percentage of procurements for women. One was that "[c]ontract bundling, or the consolidation of smaller contract requirements into larger contracts, makes it difficult for women-owned small businesses to file responsive bids to bundled solicitations."<sup>36</sup> Although the practice of bundling has striven to simplify and streamline the acquisition of contracts when necessary,<sup>37</sup> its

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31. *See id.*

32. Press Release, Small Bus. Admin., *supra* note 23 (internal quotation marks omitted).

33. Federal Acquisition Streamlining Act of 1994, S. 1587, 103d Cong. § 7106(a)(2)(A) (1994) (enacted).

34. H.R. REP. NO. 106-879 (2000), *available at* <http://thomas.loc.gov/cgi-bin/cpquery/T?&report=hr879&dbname=106&>.

35. *Id.*

36. *Id.*

37. EXEC. OFFICE OF THE PRESIDENT, CONTRACT BUNDLING: A STRATEGY FOR INCREASING FEDERAL FUNDING FOR SMALL BUSINESS 3 (2002), *available at* <http://oamp.od.nih.gov/ProgramNotes/ContractBundling/contractbundlingreport.pdf> [hereinafter CONTRACT BUNDLING].

problematic effect on smaller, more vulnerable businesses has long been acknowledged.<sup>38</sup>

Another reason for WOSBs' lack of success is that the federal government, in adopting efficiency-motivated practices for procurement, "also may perpetuate the use of well-known firms that are not women-owned businesses."<sup>39</sup> The Committee stressed the negative impact of these practices on women, stating that "the drive for efficiency in procurement often places Congressionally-mandated contracting goals for small businesses in general, and women-owned businesses in particular, in jeopardy."<sup>40</sup> The current rule seeks to mend these discrepancies by allowing previously disadvantaged businesses to tap into the resources of the federal government.<sup>41</sup> The SBA has evidently decided that, given the dire effects of bundling on smaller businesses and WOSBs in particular, the economic community is better served by protecting the smaller parties' interests above procurement efficiency.

The rule does not offer across-the-board protection for women-owned businesses. Its first major change is to identify eighty-three industries associated with the under-representation of WOSBs; of these eighty-three, thirty-eight represent areas of "substantial" under-representation.<sup>42</sup> For this subset, the SBA may waive the requirement that WOSBs be "economically disadvantaged" in order to be eligible for assistance.<sup>43</sup> The SBA selected these industries by implementing a study, commissioned by the RAND Foundation, in which both the share of contracts awarded and the dollar value awarded to WOSBs were analyzed; the SBA then used this analysis to determine "a disparity ratio" between WOSBs and other contract awardees.<sup>44</sup>

This methodology is decidedly more forgiving than the one used in an earlier version of the rule, involving a separate RAND study, which calculated disparity based on the "share of contracting dollars"

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38. Letter from Office of Management and Budget to The President (Oct. 29, 2002) in *CONTRACT BUNDLING*, *supra* note 37, at 3 ("American small businesses bring innovation, creativity, competition and lower costs to the federal table. When these businesses are excluded from federal opportunities through contract bundling, our agencies, small businesses and the taxpayers lose.").

39. H.R. REP. NO. 106-879, available at <http://thomas.loc.gov/cgi-bin/cpquery/T?&report=hr879&dbname=106&>.

40. *Id.*

41. Women-Owned Small Business Federal Contract Program, 75 Fed. Reg. 62,258, 62,258 (Oct. 7, 2010) (to be codified at 13 C.F.R. pts. 121, 124, 125, 126, 127, & 134).

42. *Id.* at 62,262.

43. *Id.* at 62,258 (internal quotation marks omitted). In order for a WOSB to qualify as "economically disadvantaged," it must be majority-owned by a woman or women whose individual net worth is under \$750,000 and the fair market value of all assets must be under \$6 million. *Id.* at 62,284-85.

44. *Id.* at 62,259.



alone.<sup>45</sup> By including the actual number of contracts in addition to dollar value, the rule attempts to create a more accurate assessment of under-representation, thereby identifying the industries in which WOSBs are in actual need of help.<sup>46</sup>

While the newer method, by combining both factors, addresses the earlier problem of agencies presenting skewed results (i.e., a high number of awards to WOSBs representing a relatively small dollar amount, and vice versa),<sup>47</sup> the National Research Council (NRC) has pointed out several possible points of error in such disparity studies.<sup>48</sup> The first is the fact that businesses may deceptively classify themselves as “women-owned.”<sup>49</sup> Such fraud can occur when businesses transfer ownership to women in order to qualify for the set-asides, or when “front” businesses substantially subcontract away their award to non-women-owned companies.<sup>50</sup> Businesses may also mistakenly, or fraudulently, identify themselves as “small.”<sup>51</sup> The SBA affixes different thresholds for “small” depending on the industry, and shifting factors, such as changes in a company’s staff, make it a difficult quality to pin down.<sup>52</sup> Both human error and deceit therefore represent undesirable and potentially unmanageable factors that feed into the analysis.

Aside from mistakes and willful misrepresentation, “estimates of underrepresentation vary widely when different measures, so-called disparity ratios, are employed.”<sup>53</sup> Where such broad variation exists, the choice of methodology may appear arbitrary or self-serving.<sup>54</sup> Any study the SBA uses to identify the industries of under-representation could therefore lead to protest, either by WOSBs who feel they are being treated unfairly or other businesses that feel they are being inched out of the bidding process by overinclusively protective programs.

The SBA-implemented study identifies a list of industries designated by North American Industry Classification System (NAICS) codes<sup>55</sup> that includes manufacturing and goods and services, such as

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45. Press Release, U.S. Small Bus. Admin., *supra* note 23 (internal quotation marks omitted).

46. Women-Owned Small Business Federal Contract Program, 75 Fed. Reg. at 62,259.

47. NAT’L RESEARCH COUNCIL, ANALYZING INFORMATION ON WOMEN-OWNED SMALL BUSINESSES IN FEDERAL CONTRACTING 42–43 (2005), *available at* <http://www.nap.edu/catalog/11245.html>.

48. *Id.* at 42.

49. *Id.*

50. *Id.*

51. *Id.* (internal quotation marks omitted).

52. *Id.*

53. ELAINE REARDON ET AL., KAUFFMAN-RAND INST. FOR ENTREPRENEURSHIP PUB. POLICY, THE UTILIZATION OF WOMEN-OWNED SMALL BUSINESSES IN FEDERAL CONTRACTING 2 (2007), *available at* [http://www.rand.org/pubs/technical\\_reports/2007/RAND\\_TR442.pdf](http://www.rand.org/pubs/technical_reports/2007/RAND_TR442.pdf).

54. *See id.* at 3–5.

55. Women-Owned Small Business Federal Contract Program, 75 Fed. Reg. 62,258, 62,259 (Oct. 7, 2010) (to be codified at 13 C.F.R. pts. 121, 124, 125, 126, 127, & 134).



“Water, Sewage and Other Systems;” “Residential Building Construction;” “Commercial and Service Industry Machinery Manufacturing;” “Automotive Repair and Maintenance;” “Scientific Research and Development Services;” and “Waste Treatment and Disposal.”<sup>56</sup> The breadth of the list is significant, given that an earlier proposal published in 2007 only recognized a total of four industries engaged in under-representation.<sup>57</sup> These industries included the following: “National security and international affairs; Coating, engraving, heat treating and allied activities; Household and institutional furniture and kitchen cabinet manufacturing; and certain [m]otor vehicle dealers.”<sup>58</sup>

The earlier version and its minuscule list of designated industries had generated fierce protest amongst advocates for WOSBs.<sup>59</sup> One of its critics, Senator John Kerry, called it “a slap in the face to women business owners” and accused the SBA of “cherry picking data” in order to create a highly exclusive program.<sup>60</sup> The bill was further criticized by Representative Nydia Velazquez, then-Chair of the House Small Business Committee: “[t]his proposal would create an initiative benefitting only a tiny fraction of the businesswomen of this country. It is a sad day for the female entrepreneurs of this country when the administration will use whatever means necessary to hinder their participation in the federal marketplace.”<sup>61</sup> The final rule, a drastic departure from the widely unpopular proposal of 2007,<sup>62</sup> was clearly drafted in at least partial response to the violent backlash.

The changes to the new rule have not, however, entirely quelled criticism.<sup>63</sup> The SBA acknowledges that “dozens of comments,” although supporting the dramatic expansion of the list, requested that even more industries be included.<sup>64</sup> Some comments called for all of the NAICS codes to be included, since this would put the women’s procurement program in line with other protective programs.<sup>65</sup>

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56. *Id.* at 62,262.

57. Press Release, U.S. Small Bus. Admin., *supra* note 23.

58. Sharon McLoone, *SBA Upsets Lawmakers with Contracting Plan*, WASH. POST. (Dec. 28, 2007, 3:15 PM), [http://blog.washingtonpost.com/small-business/2007/12/sba-upsets\\_lawmakers\\_with\\_cont.html](http://blog.washingtonpost.com/small-business/2007/12/sba-upsets_lawmakers_with_cont.html).

59. *See, e.g., id.* (quoting various critics of the list of included industries).

60. *Id.* (internal quotation marks omitted).

61. *Id.* (internal quotation marks omitted).

62. *Compare* Women-Owned Small Business Federal Contract Program, 75 Fed. Reg. 62,258, 62,259 (Oct. 7, 2010) (to be codified at 13 C.F.R. pts. 121, 124, 125, 126, 127, & 134) (explaining that there are 83 industries eligible for assistance under the final version of the plan), *with* McLoone, *supra* note 58 (listing the four industries eligible under the 2007 plan).

63. Women-Owned Small Business Federal Contract Program, 75 Fed. Reg. at 62,259.

64. *Id.*

65. *Id.*

The SBA responded that its selected list was the result of a statute-mandated study on under-representation, cited above, and that it has calculated disparity ratios to the best of its ability.<sup>66</sup> As previously discussed, however, the methodology behind these calculations is extremely variable and subject to criticism for unfairness.<sup>67</sup>

Additionally, federal agencies no longer need to meet the “onerous” certification that they have engaged in past discrimination against WOSBs as a prerequisite to utilizing the Program.<sup>68</sup> The SBA’s list of industries, and not the past practices of the agencies themselves, is now deemed a sufficient source of data to determine whether WOSBs are eligible for the Program.<sup>69</sup>

Some commenters protested that, given the controversy surrounding the calculation of the disparity ratio that determined the list of industries, the rule should retain the “[a]gency-by-[a]gency” approach to determine under-representation instead of simply reading from the master list of industries.<sup>70</sup> The SBA responded by once again defending the disparity findings as “viable and appropriate,”<sup>71</sup> and concluding that the chosen methodology meets the intermediate scrutiny standard applied by the Supreme Court to gender-based distribution of benefits.<sup>72</sup>

WOSBs and economically disadvantaged WOSBs (EDWOSBs) may now certify themselves, with the proper documentation, and be certified by third parties in order to be eligible for the Program.<sup>73</sup> This new provision has been lauded in some of the comments: “[o]f the almost 1,000 comments received overall on the rule, most of them commented on the certification,” and “[a]t least one comment stated that it was good that SBA recognized the cost of certification and provided alternative compliance requirements, such as the self-certification.”<sup>74</sup>

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66. *Id.* (“Using the RAND report, SBA identified a viable and appropriate methodology . . . . Accordingly, in view of the statute’s explicit requirements, SBA cannot simply deem a NAICS code eligible under the WOSB Program based solely on a request set forth in the public comments.”).

67. *See supra* notes 47–61 and accompanying text.

68. *The Women’s Procurement Program*, *supra* note 5, at 1.

69. *Id.*

70. Women-Owned Small Business Federal Contract Program, 75 Fed. Reg. at 62,263.

71. *Id.*

72. *Id.* at 62,263–64. The case law will be discussed *infra* Part I.C.

73. *Id.* at 62,268. The SBA has approved four organizations to handle certification, including the El Paso Hispanic Chamber of Commerce, the National Women Business Owners Corporation, the U.S. Women’s Chamber of Commerce, and the Women’s Business Enterprise National Council. *Women-Owned Small Business Federal Contract Program*, U.S. SMALL BUS. ADMIN. (Feb. 1, 2011), <http://www.sba.gov/content/contracting-opportunities-women-owned-small-businesses>.

74. Women-Owned Small Business Federal Contract Program, 75 Fed. Reg. at 62,268–69.

Other commenters worried about sufficient monitoring of the self-certification option, stressing that it should be allowed “as long as documents were provided to verify eligibility.”<sup>75</sup>

The comments reflect an overarching concern about fairness in the certification process. Those focused on the interest of WOSBs call for an easier, more streamlined process, while those concerned with the integrity of the system call for constraints and vigilant screening of who is being certified.<sup>76</sup> A WOSB is identified summarily as a small business concern in which “at least 51 percent [is] owned by one or more women and the management and daily business operations of the concern is controlled by one or more women.”<sup>77</sup> As discussed previously in the disparity study analysis, such broad definitions may allow companies to manipulate the definitions to their own advantage.<sup>78</sup>

In order to ensure that ineligible businesses do not take advantage of the set-asides, the SBA has also implemented several measures to fortify the “eligibility examination procedure,” including requirements of adequate documentation.<sup>79</sup> The rule also enumerates enforcement measures; for example, a finding by the SBA that a business has falsely represented itself to be women-owned, small, or otherwise eligible will result in disbarment.<sup>80</sup> The SBA reserves the right to monitor businesses for such fraud by conducting unannounced site visits.<sup>81</sup> Finally, a contracting officer or third party has the opportunity to appeal the SBA’s finding of eligibility by filing a “status protest” with the Office of Hearing and Appeals.<sup>82</sup>

The rule’s benefits are further tempered by the fact that contract awards have specific limitations.<sup>83</sup> For manufacturing contracts, the contract award price must be equal to or less than \$5 million; for other contracts, the cap is \$3 million, and the price “awarded must be fair and reasonable.”<sup>84</sup> The Program also excludes sole-source contracts, meaning that government “[c]ontracting officer[s] must determine that there is a reasonable expectation that two or more WOSBs will submit offers for the contract [in industries in which they are substantially under-represented].”<sup>85</sup>

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75. *Id.* at 62,269.

76. *Id.*

77. *Id.* at 62,258 (citing 15 U.S.C. § 632(n)).

78. See NAT’L RESEARCH COUNCIL, *supra* note 47, at 42.

79. Women-Owned Small Business Federal Contract Program, 75 Fed. Reg. at 62,276.

80. *The Women’s Procurement Program*, *supra* note 5, at 3.

81. *Id.*

82. *Id.* (internal quotation marks omitted).

83. *Id.* at 2.

84. *Id.*

85. *Id.*

One possible condition, which the SBA explicitly rejects, is the suggestion that specific WOSBs should be limited in how many contracts they receive; the SBA reasons that even if such a rule would hypothetically increase the number of WOSBs who benefit, “it would not serve the purpose of the WOSB Program.”<sup>86</sup> The Program’s underlying policy is to allow WOSBs to compete effectively with other businesses, not for all WOSBs to be on equal footing.<sup>87</sup> Both the ceiling on contract price and the so-called “rule of two,”<sup>88</sup> although adopted by the rule as restrictions on contract procurement, have been attacked by the legislation described below, which was introduced between the rule’s proposal and final publication.<sup>89</sup>

*B. Fairness in Women-Owned Small Business Contracting Act of 2010*

The Fairness in Women-Owned Small Business Contracting Act was introduced on May 24th, 2010, by Senators Olympia J. Snowe (R-ME) and Kirsten Gillibrand (D-NY) through the Senate Committee for Small Business and Entrepreneurship.<sup>90</sup> The Act sought to eliminate the price award caps and to allow the award of sole-source contracts, in which only one business is available for bidding.<sup>91</sup> The pertinent section reads as follows: “(7) SOLE SOURCE CONTRACTS.—A contracting officer may award a sole source contract under this subsection to a small business concern owned and controlled by women under the same conditions as a sole source contract may be awarded to a qualified HUBZone small business concern under section 31(b)(2)(A).”<sup>92</sup>

The HUBZone program refers to “Historically Underutilized Business Zones,” an SBA program that “helps small businesses in urban and rural communities gain preferential access to federal procurement opportunities.”<sup>93</sup> The HUBZone program is often cited by critics of the SBA’s women-oriented measures, along with the program targeting Service-Disabled-Veteran–Owned Small Businesses,

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86. Women-Owned Small Business Federal Contract Program, 75 Fed. Reg. 62,258, 62,274 (Oct. 7, 2010) (to be codified at 13 C.F.R. pts. 121, 124, 125, 126, 127, & 134).

87. *Id.* at 62,258.

88. *Id.* at 62,274 (internal quotation marks omitted).

89. *Id.* at 62,258 (showing the final publication of the rule was released on Oct. 7, 2010); S. 3399, 111th Cong. (2010) (showing that the Senate’s legislation was introduced on May 24, 2010); see Press Release, U.S. Small Bus. Admin., *supra* note 23 (showing that the rule was proposed in March of 2010);.

90. S. 3399.

91. *See id.*

92. *Id.* (internal quotation marks omitted).

93. *HUBZone Certification*, U.S. SMALL BUS. ADMIN., <http://www.sba.gov/hubzone/> (last visited Mar. 30, 2012).

as a proposed model for the WOSB Program.<sup>94</sup> Why, wonder the Program's critics, should these groups receive more advantages than small businesses owned by women, despite the latter group's clear under-representation?<sup>95</sup>

The SBA offers only its standard defense, which is that "the statutory provision creating the WOSB Program does not authorize sole source awards while the statutory provisions creating the other programs do."<sup>96</sup> The proposed bill would then have the potential to overcome this basic obstacle, since the SBA provides no other substantive justification for the absence of the sole-source provision.<sup>97</sup>

The bill received high praise from the organization Women Impacting Public Policy (WIPP): "[e]nactment of this legislation will ensure that the women's procurement program is on equal footing with other programs which enable the federal government to meet its contracting goals with small businesses."<sup>98</sup> The final rule, however, was not able to address either price caps or sole source contracts (which were also submitted in comment-form to the SBA<sup>99</sup>), pointing out that without the statutory go-ahead, its hands were tied.<sup>100</sup> It did, however, recognize that "over 700 comments" protested that the price caps were too low or unnecessary.<sup>101</sup> Likewise, "the statutory provision creating the WOSB Program does not authorize sole source awards while the statutory provisions creating the other programs do. In addition, the statutory provisions creating the WOSB Program specifically state that a contracting officer may use this program only if the 'rule of two' is met."<sup>102</sup>

Another directive of the bill is a mandatory five-year review of the disparity data in order to continually monitor program eligibility.<sup>103</sup> The SBA's final rule acknowledges such a possibility, but unlike the other two issues, neither rules it out nor deems it a required component of the Program: "[r]ather than limiting itself to a particular timetable for updating the eligible industries," the SBA opts to

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94. *See* Women-Owned Small Business Federal Contract Program, 75 Fed. Reg. at 62,274.

95. *See id.*

96. *Id.*

97. *See id.*

98. Press Release, Women Impacting Pub. Policy, WIPP Applauds Senators Snowe and Gillibrand for Introduction of S.3399—Fairness in Women-Owned Small Business Contracting Act of 2010, *available at* [http://www.wipp.org/resource/resmgr/press\\_releases/wippstatementwomensprocureme.pdf](http://www.wipp.org/resource/resmgr/press_releases/wippstatementwomensprocureme.pdf) (last visited Mar. 30, 2012).

99. Women-Owned Small Business Federal Contract Program, 75 Fed. Reg. at 62,274.

100. *Id.*

101. *Id.*

102. *Id.*

103. Press Release, Women Impacting Pub. Policy, *supra* note 98.

play it by ear, conducting reviews “as accurate and timely data become available.”<sup>104</sup>

This last provision is the only measure over which the SBA has sole discretion, and the SBA expresses a preference for going at its own pace in renewing the accuracy and effectiveness of disparity studies.<sup>105</sup> When called on to address the other two measures dealing respectively with price caps and sole-source contracts, the SBA refrains from overtly recommending congressional action that would allow it to make the necessary changes.<sup>106</sup> Instead, it pointedly references the abundant support for such measures in a detailed review of the submitted comments.<sup>107</sup>

The language of the Notice suggests that the rule drafters would not be opposed to a statutory modification; as WIPP points out, the bill’s measures seek only to put women “on equal footing with other programs which enable the federal government to meet its contracting goals with small businesses” and thus maximize the economy-replenishing force of small businesses as a group.<sup>108</sup> The bill has been referred to the Committee on Small Business and Entrepreneurship, and no new action has been taken since its introduction in May of 2010.<sup>109</sup>

### *C. History of Affirmative Action Preference Programs*

The following discussion reveals that though the government has been concerned with nurturing healthy small businesses for almost a century, only recently has its concern focused on minority-owned businesses. Amongst minority groups, women occupy a special place of uncertainty in case law and legislation. Although the U.S. government has clearly acknowledged the problems facing WOSBs and pledged to provide aid, as discussed in the previous sections, the legislative journey for WOSBs has been arduous, disappointing, and is far from over.

The SBA was created by Congress in 1953, as part of the Small Business Act, for the purpose of protecting small businesses and

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104. Women-Owned Small Business Federal Contract Program, 75 Fed. Reg. at 62,263. The SBA goes further than merely acknowledging the suggested studies, pointing out that “[h]undreds of the comments . . . also stated that the RAND Report data is outdated and should be updated. In particular, the comments suggested the creation of a regular timeline for updates to the RAND Report . . . .” *Id.*

105. *Id.*

106. *See id.* at 62,274.

107. *Id.*

108. Press Release, Women Impacting Pub. Policy, *supra* note 98.

109. S.3399 Bill Summary & Status, All Information, THOMAS (Library of Congress), <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:SN03399:@@L&summ2=m&> (last visited Mar. 30, 2012).



helping them to thrive.<sup>110</sup> Its genesis was preceded by several government agencies, stretching back to the early 1930s, which held the same basic goals and were created partially as a response to economic and wartime stresses on business, including the Great Depression, World War II, and the Korean War.<sup>111</sup> A large part of the SBA's protection of small businesses was motivated by its goal of helping small businesses get "a 'fair proportion' of government contracts."<sup>112</sup>

With the advent of the SBA, the federal government thus commenced a proactive approach to shielding vulnerable businesses.<sup>113</sup> The approach was reinforced by the Investment Company Act of 1958, which allowed "the SBA to license, regulate, and help provide funds for privately owned and operated venture capital investment firms, which provided long-term debt and equity investments to high-risk small businesses."<sup>114</sup> The federal government could justify its special treatment of smaller ventures because "a Federal Reserve Board study . . . determined, in the simplest terms, that small businesses could not get the credit they needed to keep pace with technological advancement."<sup>115</sup> The more small businesses thrived, the more the country would profit, and because the untended market did not provide adequate support for these businesses, legislative action was necessary.<sup>116</sup>

In the 1960s the government shifted its focus from purely economic considerations and began to address opportunities for minorities across all sectors of society.<sup>117</sup> The SBA responded to this shift by creating the Equal Opportunity Loan Program in 1964, with the aim of aiding economically disadvantaged individuals who had been unable to secure financing despite having viable business ventures.<sup>118</sup> The SBA also established set-aside regulations meant to aid "socially and economically disadvantaged' persons" (explicitly including racial minorities such as Hispanics, African Americans, Native Americans, and Asians as "socially disadvantaged" groups).<sup>119</sup> Women, as a group, were notably absent from the list.<sup>120</sup>

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110. NAT'L RESEARCH COUNCIL, *supra* note 47, at 13.

111. *Id.* at 12–13 (discussing the Small Business Mobilization Act of 1942, the Office of Small Business in the U.S. Department of Commerce, and the Small Defense Plants Administration).

112. *Id.* at 13.

113. *See id.*

114. *Id.*

115. *Id.* (footnote omitted).

116. *See* NAT'L RESEARCH COUNCIL, *supra* note 47, at 12–13 (discussing the many federal actions that were designed to aid small businesses).

117. *Id.*

118. *Id.*

119. *Id.* at 14.

120. *See id.*



The Small Business Act was amended in 1978 to instruct, among other measures, that each contracting federal agency must have a Small and Disadvantaged Business Utilization Office to aid in implementing the agencies' goals.<sup>121</sup> The amendment also ordered federal agencies to work to award contracts to minority-owned small businesses and required that they be held accountable to Congress for failing to meet their self-established goals regarding this directive.<sup>122</sup>

Women who did not fit into another racial minority category, however, were not granted the same presumption of social disadvantage as were other groups.<sup>123</sup> Women, a group that had encountered indisputable social disadvantages, consequently fell behind other minorities in federal contracting; they protested the system "on [the] grounds that it was too difficult to become qualified on an individual test basis."<sup>124</sup> Women's grievances were finally addressed by President Carter in 1978 in Executive Order 12138.<sup>125</sup> The Order directed federal agencies "to assist women-owned businesses in federal contracting."<sup>126</sup> The Order was followed by The Women's Business Ownership Act of 1988 (P.L. 100-588),<sup>127</sup> which "provided for assistance to women in starting, managing, and growing small businesses."<sup>128</sup> From the beginning of government involvement in protecting small businesses, women had fought for recognition and inclusion within the group of businesses designated as deserving help.<sup>129</sup> Though they had now won inclusion, subsequent government efforts to actually provide the promised aid consistently fell short of their goals.<sup>130</sup>

The Federal Acquisition Streamlining Act of 1994 (FASA) attempted to address the inadequacy of past measures by including the text "small business concerns owned and controlled by socially and economically disadvantaged individuals, *and* small business concerns owned and controlled by women."<sup>131</sup> This suggested that, although women fall outside of the "socially and economically disadvantaged"

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121. *Id.* at 14–15.

122. NAT'L RESEARCH COUNCIL, *supra* note 47, at 14.

123. *Id.*

124. *Id.* at 15.

125. *Id.*

126. *Id.* "At that time, it was estimated that women-owned small businesses received only 0.2 percent of all federal procurements." *Id.* (citation omitted).

127. *Id.* at 17.

128. NAT'L RESEARCH COUNCIL, *supra* note 47, at 17.

129. *See id.* at 15.

130. *See, e.g.*, U.S. GEN. ACCOUNTING OFFICE, GAO-01-346, FEDERAL PROCUREMENT: TRENDS AND CHALLENGES IN CONTRACTING WITH WOMEN-OWNED SMALL BUSINESSES 5, 7 (2001), available at <http://www.gao.gov/new.items/d01346.pdf> (demonstrating that goals for awarding contracts to WOSBs had not been met).

131. Federal Acquisition Streamlining Act of 1994, S. 1587, 103d Cong. § 7106(a)(1) (1994) (enacted) (emphasis added).

category, they still occupy a special space in which there is an assumption that aid is justified.<sup>132</sup>

Regarding women specifically, the Act includes the following: "The Government-wide goal for participation by small business concerns owned and controlled by women shall be established at *not less than 5 percent* of the total value of all prime contract and subcontract awards for each fiscal year."<sup>133</sup> This ambition has thus far proven sadly unrealistic.<sup>134</sup>

Subsequent legislation sought to aid both small businesses generally and women's businesses as a subset. The Small Business Reauthorization Act of 1997 (P.L. 105-135) mandated that nearly a quarter of federal contracts should go to small businesses and provided that contracts would not be "bundled" (as previously discussed, the term refers to smaller contracts being grouped into larger clusters), so that smaller firms would not have opportunities to bid.<sup>135</sup>

Ten years ago, the Small Business Reauthorization Act of 2000, reacting to the fact that the five percent goal had not yet been met, authorized a set-aside program specifically for WOSBs.<sup>136</sup> The Act also promoted program fairness by requiring an SBA-administered study of each industry to determine whether women were under-represented.<sup>137</sup> The government has thus far recognized the problem of under-representation, pledged procurement goals in response, and implemented legislation in an effort to meet its goals.<sup>138</sup> The past ten years have demonstrated that this final action, crucial to the actual success of WOSBs, has been the most difficult to execute.

Two Supreme Court decisions address the government's ability to establish race-based programs, the treatment of which may be contrasted with WOSB programs. The first, *City of Richmond v. J.A. Croson Co.*, dealt with Richmond's requirement that city construction contracts subcontract at least thirty percent of the contract amount to "Minority Business Enterprises," the definition of which included exclusively race-based minorities<sup>139</sup> (defined as "Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts").<sup>140</sup>

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132. *See id.*

133. *Id.* § 7106 (a)(2)(A) (emphasis added) (internal quotation marks omitted).

134. *See, e.g.*, U.S. GEN. ACCOUNTING OFFICE, *supra* note 130, at 5, 7 (recounting the percentage of contracts awarded in the first four years following the Act's implementation, and the pessimism of government agencies as to whether the five percent goal could be met).

135. NAT'L RESEARCH COUNCIL, *supra* note 47, at 17.

136. *Id.* at 17-18.

137. *Id.* at 18.

138. *Id.* at 17-18 (listing government responses to the problem of under-representation of women in business).

139. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 477-78 (1989).

140. *Id.* at 478 (internal quotation marks omitted).

The Court concluded that state and local governments were constrained to an equal protection “strict scrutiny” test in developing such programs.<sup>141</sup> Under this two-pronged test, “racial preferences must serve a ‘compelling interest’ and be ‘narrowly tailored’ to meet that need.”<sup>142</sup> The Court warned against liberal use of race-based programs, characterizing it as “a highly suspect tool” with “a danger of stigmatic harm” that could “promote notions of racial inferiority.”<sup>143</sup> It went on to criticize the “gross overinclusiveness” of the thirty percent mandate and to state that it could not possibly be construed as a narrowly tailored response to past discrimination.<sup>144</sup>

Regarding contracts, the Court proposed the following test for discrimination: “Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality’s prime contractors, an inference of discriminatory exclusion could arise.”<sup>145</sup>

If the SBA were constrained by such strict scrutiny in its gender-based policy, it would have passed the test; as the text of the final rule shows, the SBA has taken great pains through its statistical studies to justify the “under-represented” label when it is applied to women in certain industries. “Women” as a category is more general and far less arbitrary than the eligible minorities listed in the law in *City of Richmond v. J.A. Croson Co.*<sup>146</sup> Finally, the national five percent goal for women is intuitively more reasonable than a local thirty percent requirement.<sup>147</sup>

The second case, *Adarand Constructors, Inc. v. Peña*, expanded the strict scrutiny test to apply to federal agencies.<sup>148</sup> In that case, a subcontracting construction company submitted the lowest bid but was overlooked in favor of a company certified as a small business being managed “by ‘socially and economically disadvantaged individuals.’”<sup>149</sup> The Court explained that “[f]ederal law requires that a subcontracting clause . . . state that ‘[t]he contractor shall presume

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141. NAT’L RESEARCH COUNCIL, *supra* note 47, at 18 (internal quotation marks omitted).

142. *Id.*

143. *J.A. Croson Co.*, 488 U.S. at 493.

144. *Id.* at 506.

145. *Id.* at 509.

146. *Id.* at 485 (“[T]he statistics comparing the minority population of Richmond to the percentage of prime contracts awarded to minority firms had little or no probative value in establishing prior discrimination in the relevant market . . .”).

147. *See id.* at 510 (concluding that because “the city has not ascertained how many minority enterprises are present in the local construction market nor the level of their participation in city construction projects,” it could not logically apply the 30 percent mandate for minority projects).

148. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

149. *Id.* at 205.

that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, or any other individual found to be disadvantaged by the [Small Business] Administration.”<sup>150</sup>

The lowest-bidding company challenged the U.S. Department of Transportation’s contract program, arguing that its race discrimination violated the Constitution’s Equal Protection Clause.<sup>151</sup> The Court agreed that the Program was constitutionally suspect and remanded the case, stating that “[t]he question whether any of the ways in which the Government uses subcontractor compensation clauses can survive strict scrutiny, and any relevance distinctions such as these may have to that question, should be addressed in the first instance by the lower courts.”<sup>152</sup>

The decision resulted in a government-wide review of all race-based programs, acting with the directive “to ‘mend it [affirmative action] not end it.’”<sup>153</sup> Race-based legislation has taken center stage, in court and in Congress, in the rhetoric on law that addresses minorities. Women, although a minority group in their own right, are treated separately (and hesitatingly) in both arenas.<sup>154</sup>

Gender-based programs, in contrast with the previously discussed cases, must only meet an “intermediate scrutiny” standard of review as set forth in *United States v. Virginia*,<sup>155</sup> in order to pass constitutional muster.<sup>156</sup> The facts of *United States v. Virginia* may not be on point, but deal generally with the constitutionality of gender-based programs. The question at issue was whether a military school that had historically restricted admission to male candidates was constitutionally permitted to continue its gender-exclusive policy.<sup>157</sup>

The Court, considering that “[n]either the goal of producing citizen-soldiers nor [the school’s] implementing methodology is inherently unsuitable to women,” decided that the gender-based policy put women at a disadvantage and was unconstitutional.<sup>158</sup> The Court accepted as “well settled” that it “evaluate[s] a statutory classification based on sex” by an “intermediate scrutiny” standard.<sup>159</sup> In the intermediate scrutiny analysis, the government’s purpose does not

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150. *Id.* (second and third alterations in original) (citing 15 U.S.C. § 637 (d)(2)–(3)).

151. *Id.* at 205–06.

152. *Id.* at 238–39.

153. NAT’L RESEARCH COUNCIL, *supra* note 47, at 19 (alteration in original).

154. *See id.* at 21 (describing how courts treat women differently as a minority category).

155. *United States v. Virginia*, 518 U.S. 515 (1996).

156. NAT’L RESEARCH COUNCIL, *supra* note 47, at 22.

157. *Virginia*, 518 U.S. at 520, 531.

158. *Id.* at 520, 556–58.

159. *See id.* at 570.

need to be “compelling,” only “important,” and “narrowly tailored” is downgraded to “substantially related.”<sup>160</sup>

The Court found that the school’s policy did not pass this weaker test,<sup>161</sup> but expressed some doubt towards the distinction.<sup>162</sup> As the NRC indicates, “lower court decisions applying the equal protection doctrine to government contracting have not yet clarified precisely how the [strict scrutiny and intermediate scrutiny] standards differ.”<sup>163</sup>

The Court in *United States v. Virginia* agreed, hinting that it considered the tests to be somewhat, and perhaps mostly, arbitrary: “These tests are no more scientific than their names suggest, and a further element of randomness is added by the fact that it is largely up to us which test will be applied in each case.”<sup>164</sup> Legal analysis suffers from the same vagueness as legislative text: women are different, but we are not quite sure how.

The parameters are further blurred by the fact that, unlike race-based programs, gender-based programs have relatively “sparse” litigation behind them that could shed light on how procurement programs for women and other minorities might differ.<sup>165</sup> One such case is *Michigan Road Builders Association, Inc. v. Milliken*,<sup>166</sup> in which the plaintiffs challenged the constitutionality of state set-aside provisions for contracts to minority-run businesses and women-owned businesses.<sup>167</sup>

The court decided that both provisions were unconstitutional, applying strict scrutiny to the policy affecting minorities and intermediate scrutiny to that affecting women.<sup>168</sup> On women, the court stated that “[e]ven under this less stringent standard of review, the [policy] cannot withstand constitutional attack since evidence of record that the state discriminated against women is nonexistent. Defendants’ reliance upon general assertions of societal discrimination are insufficient to satisfy their burden absent some indication [of past discrimination against women].”<sup>169</sup>

Although the court leaves no room for doubt in this assertion, it is clearly more comfortable discussing the constitutionality of race-based programs than gender-based ones: “the court spends sixteen of

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160. NAT’L RESEARCH COUNCIL, *supra* note 47, at 22.

161. *Virginia*, 518 U.S. at 519.

162. *Id.* at 567.

163. NAT’L RESEARCH COUNCIL, *supra* note 47, at 22.

164. *Virginia*, 518 U.S. at 567.

165. NAT’L RESEARCH COUNCIL, *supra* note 47, at 21.

166. *Mich. Rd. Builders Ass’n v. Milliken*, 834 F.2d 583 (6th Cir. 1987), *aff’d*, 489 U.S. 1061 (1989).

167. *Id.* at 584.

168. *Id.* at 594–95.

169. *Id.* at 595.

its seventeen-page opinion discussing, analyzing, and deciding whether the race-based minority programs are constitutional; the court spends one page on the issue of gender-based set-aside programs.”<sup>170</sup>

Critics of the “nonexistent” evidence line of reasoning have suggested that it falls below basic principles of fairness for women who seek to prove under-representation and disadvantage, especially if a set-aside program is not already in place: “[i]t appears that a successful case requires pleading with great specificity, and generous supporting evidence, the rather obvious notion that women have been discriminated against throughout the history of the United States.”<sup>171</sup> It has also been suggested that this case demonstrates the problematic practice in which courts group women-oriented legislation together with minority-oriented legislation and give a blanket ruling for both:

Even with the lesser standard of review for gender-based set-aside programs, if the race-based provisions are unable to pass constitutional muster, the unfortunate result is that [the] entire statute is held to violate the Equal Protection Clause. An included gender-based provision might otherwise pass an intermediate scrutiny standard of review if heard separately.<sup>172</sup>

There is also irony in the fact that, “[u]nfortunately for the set-aside laws,” courts may use the same anti-discrimination arguments “that were originally designed to support women’s increased access to society and opportunity” to invalidate the laws by proposing that they discriminate against men.<sup>173</sup>

The Fairness in Women-Owned Small Business Contracting Act of 2010 clearly hopes to address some of the discrepancies that remain between gender-based set asides for federal contract procurement and other programs that provide aid for disadvantaged groups. The language, while keeping women separate from other minority categories, seeks to close the gap in fair treatment between the two.<sup>174</sup> Although the Program is welcomed by WOSBs and their supporters, it is also, as the cases above show, open to constitutional criticism for not being substantially related to an important governmental purpose.<sup>175</sup> The most obviously identifiable governmental purpose relates to the

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170. Michael D. Wright, Note, *Set-Aside Programs for Women-Owned Businesses: Do Women Add Diversity to Society?*, 26 WOMEN’S RTS. L. REP. 181, 190 (2005).

171. *Id.* at 184.

172. *Id.* at 185.

173. *Id.* at 187–88.

174. See Women-Owned Small Business Federal Contract Program, 75 Fed. Reg. 62,258, 62,258 (Oct. 7, 2010) (to be codified at 13 C.F.R. pts. 121, 124, 125, 126, 127, & 134).

175. See *Mich. Rd. Builders Ass’n v. Milliken*, 834 F.2d 583, 595 (6th Cir. 1987), *aff’d*, 489 U.S. 1061 (1989) (requiring laws that single out women to be related to an important government purpose).



remedy of past discrimination, but there are other equally valid motives, both economic and social, for protecting WOSBs.<sup>176</sup>

## II. NECESSITY OF THE PROGRAM

The Program is essential for several reasons. First, it addresses the weaknesses of small businesses in general. Second, it promotes market diversity. And third, studies have confirmed that women-owned businesses are a vital and lucrative sector of the economy. The federal government's protection of said businesses not only defends a vulnerable subset, but extends benefits across all economic regions.

### A. *Market Diversity*

The presence and continued advancement of set-aside programs for minority-owned small businesses, "a severely underutilized national resource,"<sup>177</sup> has been touted as crucial to economic growth because they spur businesses to self-perpetuating expansion: "[t]he opportunities created by set-asides, preferential procurement policies, and similar programs have induced better-educated, younger minority entrepreneurs to create and expand firms in the skill-intensive and capital-intensive lines of business where the presence of minority-owned firms traditionally has been minimal."<sup>178</sup>

The businesses in question are also generally weaker than their larger, better-established counterparts; this opens the door to valid criticism of supportive programs that divert funding from safer, and therefore potentially more profitable, investments: "minority-owned businesses: (1) are less profitable as a group; (2) have an incidence of nonprofitability that is over four times greater than nonminorities; (3) are highly leveraged and thus vulnerable to delinquency on debt obligations, making actual failure more likely; and (4) are a younger group of firms."<sup>179</sup>

The benefits, however, of preserving minority businesses as active economic players outweigh their perceived weaknesses:

The [disadvantaged business] program is essential for the future development of small disadvantaged minority businesses. In most urban and many rural areas of the country, these small and minority owned firms are the primary employers of other

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176. See Hasty, *supra* note 14, at 112.

177. *Id.* at 1.

178. *Id.* at 2–3.

179. *Id.* at 3.



minorities living within these communities. Increasing the viability of these businesses would create more jobs, enhance tax revenues, decrease government subsistence payments, and contribute to an improved quality of life and standard of living for all Americans.<sup>180</sup>

Although these opinions provide convincing support for minority protection, they risk falling into the trap whereby women are discussed in the same breath as race, two categories in which economic and social factors may be very different.

More specific support for women's issues comes from other countries, which have recognized the need to protect women-owned businesses.<sup>181</sup> In his article on the uneasy relationship between "gender" and "diversity" in the United States legal arena, Michael D. Wright cites the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), ratified by the United Nations in 1979.<sup>182</sup> The United States, notably, is not among the 179 nations that have signed onto the convention.<sup>183</sup>

Wright provides opposing viewpoints to illuminate the dialogue that the United States would face if it were ever to ratify the treaty; the first voice is that of U.S. Senator Jesse Helms: "CEDAW 'is a bad treaty; it is a terrible treaty negotiated by radical feminists with the intent of enshrining their radical antifamily agenda into international law.'"<sup>184</sup> The second is that of the Director of International Women's Rights Action Watch: "the participation of women from all regions—and in all their diversity—in the setting of international norms is also critical because of the need for universal minimum standards of human rights. This is so especially in light of the rising fundamentalism in many countries around the world."<sup>185</sup>

Wright also points out that while the United States has wavered on gender-based set-asides, other countries have done more to promulgate similar quotas for women, in both government positions and business opportunities.<sup>186</sup> The United States has been slow to follow, but the international community has plainly opined that women are of enough value as a diverse group to warrant protection in the global economy.<sup>187</sup>

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180. *Id.* at 112 (footnote omitted).

181. *See* Wright, *supra* note 170, at 182.

182. *Id.*

183. *Id.* at 183.

184. *Id.* at 189.

185. *Id.* (quoting SHANTHI DAIRIAM, BRINGING EQUALITY HOME: IMPLEMENTING THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN 9 (Ilana Landsberg-Lewis ed., 1998)).

186. *Id.*

187. Wright, *supra* note 170, at 189.

*B. Economic Value of WOSBs Validates Government Programs*

The Center for Women's Business Research has published a 2009 study on the special market value of women-owned businesses.<sup>188</sup> According to this study, recent data shows that 28.2 percent of all businesses in the United States are owned by women, accounting for only 4.2 percent of all revenue.<sup>189</sup> This relatively small amount is due to the fact that the majority of these businesses are small, and therefore more likely to be less profitable from an objective perspective.<sup>190</sup> The Center's study reflects, "for the first time, a comprehensive analysis of the economic impact of women-owned businesses in the United States by using primary data collected through direct surveys and government sources."<sup>191</sup>

The study draws its numbers from a comprehensive market analysis, including the effect of the "measure of total sales or revenues generated by women business owners," the "total income generated within the U.S. economy," and the "measure of the number of jobs created."<sup>192</sup> It also examines the "direct impact" (the direct purchase of goods and services by women-owned businesses) and the "indirect impact" (purchases made by business suppliers from other suppliers).<sup>193</sup> The study's conclusion firmly supports the economic importance of WOSBs:

The results of over \$2.8 trillion dollars annually from majority-women-owned firms coupled with the more than 23 million people who are employed directly and indirectly by these firms again proves that women-owned firms are not a small, niche market but are a major contributor and player in the overall economy.<sup>194</sup>

While "diversity" appears to be dubiously ascribed as a compelling defense of women-favoring programs, "profitable" is a more concrete term, and certainly better appreciated from an objective economic perspective. A subset that is responsible for providing roughly sixteen percent of U.S. jobs is worth not only monitoring, but pushing to further achievement.<sup>195</sup>

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188. CTR. FOR WOMEN'S BUS. RESEARCH, *supra* note 6.

189. *Id.* at 2.

190. *Id.*

191. *Id.* at 10.

192. *Id.* at 2.

193. *Id.*

194. CTR. FOR WOMEN'S BUS. RESEARCH, *supra* note 6, at 10.

195. *Id.* at 1.

### III. THE FUTURE OF THE PROGRAM

The economic outlook for the United States is uncertain, and the federal government has responded with measures that are too young to be evaluated for either effectiveness or constitutional durability. The Program represents a step forward specifically for WOSBs, and the current administration hopes to promote small businesses in general: “[federal] agencies will be pushed to increase the number of small businesses hired for contracts.”<sup>196</sup>

On the flip side of this initiative is the administration’s pledge to cut government spending, which naturally will effect the flow of money for all contracts: the government has reported that in the past fiscal year, it has spent \$535 billion on contract-spending, representing a \$15 billion decrease and “the first year-to-year cuts in such costs since 1997.”<sup>197</sup> The government hopes to cut contract-spending by another \$25 billion, with a 2012 fiscal policy that will include “a 10 percent reduction in professional and technical service contracts.”<sup>198</sup>

Small businesses have managed to remove contract bundling from the equation,<sup>199</sup> although the practice aimed merely to promote government efficiency. They may have a tougher time arguing that the policy of saving money is similarly unfair, although it too will empty the pool of funding available to these ventures.

Through its efforts, the government purports to cut unnecessary costs, eliminate redundant contracts, and confront “the trend of uncontrollable growth [in government spending].”<sup>200</sup> The potential trouble for WOSBs lies in the fact that with all the cost-cutting on the horizon, officials are hesitant to say which sectors will suffer the most, whether jobs will be lost, and whether contracts will be cancelled or merely reduced.<sup>201</sup> These reductions have been unprecedented, at least in the last decade, and all contracting businesses are likely to feel a degree of insecurity about their future. With fewer contracts and less money to go around, there may be an increased likelihood that set-aside programs, particularly newer and less well-established ones such as the SBA’s provision for WOSBs, will suffer more protests of unconstitutionality.

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196. Ed O’Keefe, *OMB Reports \$15 Billion in Government Contracting Cuts*, WASH. POST, Feb. 4, 2011, at A20.

197. *Id.*

198. *Id.*

199. *See id.* (stating that “agencies will be pushed to increase the number of small businesses hired for contracts,” an effort likely aimed to curb possible contract bundling).

200. *Id.* (quoting Office of Management and Budget Deputy Director Jeffrey D. Zients).

201. *Id.*

As the case law demonstrates, courts have not presented a united front on how to treat women as a group; the line between strict and intermediate scrutiny is hazy and open to interpretation, as are the components of such tests.<sup>202</sup> Furthermore, it is not clear whether promoting diversity or discouraging discrimination best serves as the “important” government interest that justifies said programs; proving either assertion comes with its own set of problems.

Proponents have met the set-asides with overwhelming approval, and most criticism received by the SBA calls for even greater protections.<sup>203</sup> With time, as the government further reduces its spending and the actual effects of the Program become evident, more serious opposition to the policy might find a voice.

### CONCLUSION

The Women-Owned Small Business Federal Contract Program has nearly a century of history behind its genesis.<sup>204</sup> The history combines a host of legislative, social, and economic factors that have funneled down, in 2011, to specifically address the needs of WOSBs. The government gradually became more involved in protecting small businesses; case law established women as a subset of the population for which special policies might apply, then the Supreme Court affixed an intermediate scrutiny standard to such policies.<sup>205</sup> The legislative branch has enacted laws that seek to acknowledge and establish goals regarding the procurement issue.<sup>206</sup>

In conjunction with this process, the SBA has engaged in a prolonged process of trial and error with commenters to create legislation that will sufficiently address the under-representation of women in a variety of industries. The text of the rule, conscious of its past and future deficiencies, provides an in-depth response to each concern about the Program’s adequacy. The SBA defends the reasoning behind its methodology where applicable, and takes care to emphasize repeatedly the areas in which it does not have the authority to act without a statutory amendment. These problematic

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202. See Wright, *supra* note 170, at 182–83 (discussing different treatments of women as a group by various courts).

203. Women-Owned Small Business Federal Contract Program, 75 Fed. Reg. 62,258, 62,259 (Oct. 7, 2010) (to be codified at 13 C.F.R. pts. 121, 124, 125, 126, 127, & 134).

204. NAT’L RESEARCH COUNCIL, *supra* note 47, at 12–13 (discussing the history of government action regarding small businesses).

205. United States v. Virginia, 518 U.S. 515, 570–71 (1996) (citing Clark v. Jeter, 486 U.S. 456, 461 (1988)) (applying the intermediate scrutiny standard to women).

206. See Women-Owned Small Business Federal Contract Program, 75 Fed. Reg. at 62,258; NAT’L RESEARCH COUNCIL, *supra* note 47, at 12–18 (discussing various laws passed by Congress throughout the years).

areas, showing noteworthy discrepancies between the WOSB Program and similar programs for disadvantaged groups, reflect the complex legislative and judicial development of the “women” minority designation. Although the category indisputably exists, courts and legislators have treated it with comparative hesitancy, vagueness, and uncertainty.<sup>207</sup>

As the Program stands on the brink of performance, the SBA appears to have satisfied most of the earlier draft’s critics. But while the market struggles towards recovery and the federal government continues its precarious balancing act of decreased spending versus small-business protections, pitfalls are likely. Although the Program currently rides high on optimism for its ability to protect the interests of WOSBs, only time will tell whether it will be truly effective and the extent to which others will challenge its enactment.

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207. See Wright, *supra* note 170, at 190.

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