FOR THE PAST half century, government agencies and the courts have relied on social scientists to define and measure discrimination. The most famous result was the Supreme Court decision in *Brown v. Board of Education*, which cited the work of Kenneth Clark, Gunnar Myrdal, and other social scientists to prove that segregation harmed black children. In countless decisions and reports since, social-science research has been used to attack racial classifications and stereotypes.

Now, in an ironic reversal, the social sciences are being massively employed to protect racial classifications. In the eighteen-month period between January 1991 and June 1992, state and local governments spent more than $13 million on what have become known as “disparity studies.” The federal government’s Urban Mass Transit Authority spent an additional $14 million.

The disparity study is the strange fruit of the most significant civil-rights decision of the 1980s, *City of Richmond v. Croson.*
In 1983, Richmond began to “set aside” 30 percent of its contracts for minority business enterprises (MBEs). Six months later, the J. A. Croson Company was the low bidder on a project to install urinals in the city jail, but was denied a contract because of the set-aside provision. Croson filed suit. After the case bounced around various courts for six years, the Supreme Court ruled 6-3 that the set-aside requirement violated Croson’s 14th Amendment right to equal protection. The Court further declared all use of racial classifications by state and local governments to be subject to “strict scrutiny.” This meant that the kind of racial categories common in affirmative-action programs could only be used to remedy identified discrimination, and then only if the measures were narrowly tailored and employed only after race-neutral remedies had failed. Justice Marshall complained that the decision was a judicial strait-jacket. Justice O’Connor, however, writing for the plurality, noted that Richmond had offered “no evidence that qualified minority contractors have been passed over for City contracts or subcontracts, either as a group or in any individual case.” Nor did Richmond present any evidence about how many MBEs were in the relevant market and how many city dollars they had received. Finally, there was no evidence of discrimination against the various minority groups Richmond had included in its program; for that matter, there was no evidence that Richmond even had any citizens belonging to certain of those groups—Eskimos and Aleuts, for instance.

“Proper findings,” O’Connor declared, “are necessary to define both the scope of the injury and the extent of the remedy necessary to cure its effects.” Without such findings, she noted, MBE programs might be motivated by simple “racial politics.” She then invited jurisdictions to conduct a statistical comparison to see if there was a disparity between the number of qualified, willing, and able MBEs and their utilization in a locality’s contracts. If a significant disparity existed, then “an inference of discriminatory exclusion could arise.”

Croson stands as a challenge to the use of racial classifications in any government program. It has been used to strike down a proposal for all-black-male schools in Detroit and black-only university scholarships in Maryland. But obviously, its greatest threat is to the future of MBE programs using racial classifications.
By 1989, there were 234 minority set-aside programs in states, counties, cities, and special districts across the country. Generally they covered businesses owned by members of the traditional affirmative-action groups (blacks, Hispanics, Asian Americans, Native Americans, Eskimos, Aleuts, and women), but occasionally, as was the case in Atlanta, Georgia, and Dade County, Florida, only blacks were eligible. The programs employed a variety of devices to increase the number of contracts for MBEs and for women business enterprises (WBEs). Some jurisdictions, such as Washington, D.C., had a statutory set-aside, in this case 35 percent. Others, including Hillsborough County, Florida, determined the maximum number of subcontracts that could be created in a particular project and established a goal that as a practical matter required all of the subcontracts to be filled by MBEs or WBEs, if they were available. Still other jurisdictions, such as San Francisco, created bidding preferences for M/WBEs on primary contracts along with goals for subcontracts. Dade County used set-asides, goals, and what it called affirmative-action efforts that required contractors (mostly non-local) to make contributions to black civic and charitable organizations. In addition, a number of federal agencies—including the Federal Aviation Administration, the Urban Mass Transit Administration, the Federal Highway Administration, the Department of Energy, and the Department of Housing and Urban Development—established programs requiring state and local governments to implement M/WBE goals or set-asides as a condition for receiving federal funds.

Many local programs were imitations of federal initiatives, and included the same groups and used the same preferential devices. Other programs were established in response to local concerns about employment and economic development in minority neighborhoods. In Dade County, for example, a program giving preference to black-owned businesses was part of a package following the 1980 Miami riots. Elsewhere, as with the construction of the Philadelphia Convention Center and the expansion of the Atlanta rapid-transit system, an MBE program was necessary to build the political coalition needed to support public funding. Other programs, such as San Francisco’s, were attempts by new political coalitions to permanently reallocate pub-
lic contracts away from established white-owned companies. These programs were often nothing more than a new form of racial and ethnic patronage. Some programs, finally, were created in response to actual allegations of discrimination, but the charges were remarkably general. No jurisdiction has ever been found guilty of the kind of racial discrimination in public contracting that was once commonplace in employment, housing, education, and voting.

In fact, it was the widespread requirement that public contracts be awarded to the low bidder, a legacy of the Progressive era, that made discrimination in this area difficult to practice. In other areas where racial classifications have been used for remedial purposes, discriminatory practices were at one time relatively overt. In public contracting, however, the standard low-bid process was designed to protect against discrimination or favoritism of any kind. Of course no system is perfect; discrimination could exist within government in the creation of or communication about contract opportunities. But government controls these procedures and could cure these problems without using racial preferences. Outside government, the borrowing, bonding, or licensing processes could also be biased, but governments can remedy discrimination in these areas through direct regulation. Discrimination could also exist in the relationships between primary and secondary contractors, but few jurisdictions have made such discrimination illegal, or established any procedures for monitoring it or for settling conflicts when they occur.

**The disparity-studies gambit**

MBE programs have traditionally provided jurisdictions with a mechanism for economic redistribution that did not require them to accuse anyone of discrimination. *Croson* made this game more complex, since the decision appeared to bar race-conscious remedies unless discrimination was identified. All over the country, jurisdictions began hiring consultants to "prove" the existence of contracting discrimination. But they needed to find this "proof" without actually pointing at any current official or company, since that would raise the issue of sanctions against the discriminator and could lead to a rebuttal. Nor could a jurisdiction's consultant specify the nature of the discrimination
in such a way as to suggest that the existing MBE program was not the right solution.

Since no one had any experience at this task, a wide variety of candidates entered the new market. Some national consulting firms, such as KPMG Peat Marwick, won contracts, while others went to organizations formed specifically for this purpose. Some firms approached the task with a semblance of ideological neutrality, while others, such as the Minority Business Enterprise Legal Defense and Education Fund, had a clear-cut position. But regardless of outward appearances, it was obvious that if a company wished to make a regular business of disparity studies, it could not produce conclusions that would invalidate major parts of existing programs. In this area, you were only as good as the political reception given your last study.

While lawyers, accountants, and others worked on the studies, most of the participants and most of the methods were drawn from the social sciences. Generally this work has not drawn social scientists of particular renown, but such notables as Andrew Brimmer, a professor of economics at the University of Massachusetts and the first black member of the Federal Reserve Board, and Ray Marshall, a professor of public policy at the LBJ School and former secretary of labor in the Carter Administration, teamed up to do Atlanta's disparity study.

The studies vary substantially in length and expense. The Atlanta study is 1,034 pages long and cost $532,000, while San Francisco's disparity study is only fifty-five pages long and cost $50,000. The studies are also very diverse methodologically. Overall, however, they have used three approaches—historical, anecdotal, and statistical.

**Historical approaches**

Understanding discrimination in any field requires an examination of the historical context. But where does one begin, and what evidence is relevant? The 1984 San Francisco M/WBE statute was based on a legislative finding of "historic discrimination against minorities and women, often officially sanctioned and enforced by government from the inception of our Republic to the present." This discrimination was said to be responsible for the "centuries of limited access to the marketplace these groups have suffered." Three years later, the Court of Appeals for the
Ninth Circuit dismissed these sweeping historical claims and ruled that since the city had not found any of its agencies or officials to have discriminated against anyone, the use of racial preferences, supposedly as remedies, was unconstitutional.

In fact, evidence of overt government discrimination during the past two decades is very rare. But *Croson* permits race-conscious remedies if a city is even a passive participant in discrimination in the construction industry. Justice O'Connor stated that if a system of racial exclusion was maintained by members of the local construction industry, "we think it clear the city could take affirmative action to dismantle such a system." Evidence of such discrimination, however, has been hard to find. While it surely occurs from time to time, white primary contractors who refuse low bids from qualified MBE subcontractors soon discover that their competitors are able to underbid them. Practicing such bias is very expensive in the rough and tumble world of construction. Some disparity studies, however, have attempted to make a case for contracting preferences because of discrimination in other areas, such as housing, education, and voting. That kind of discrimination was manifest in Richmond, but the Supreme Court declared in *Croson* that past societal discrimination could not justify the use of racial classifications in public contracting.

Seattle's disparity study takes a somewhat different approach. It points out that many construction businesses were built after the owner gained practical experience in the trades. Since employment discrimination in the construction industry, particularly against blacks, has been well documented, this might seem to justify racial set-asides. Most major cities, however, have required some form of "Philadelphia Plan" proportional representation in construction employment since the early 1970s. Furthermore, there is no way to quantify the number of M/WBEs that would exist today "but for" discrimination at some time in the past. As the *Croson* plurality noted, "It is sheer speculation how many minority firms there would be in Richmond absent past societal discrimination, just as it was sheer speculation how many minority medical students would have been admitted to the medical school at Davis absent past discrimination in educational opportunities."
The historical approaches to proving discrimination suffer from a number of additional defects. First, they almost always ignore the impact of immigration on who owns contemporary businesses. In San Francisco, for example, the population of Asians and blacks grew from 4 percent of the total in 1940 to 39 percent in 1990. Naturally, when these groups arrived, they did not find a blank economic slate. The median age of the twenty-five largest construction firms in San Francisco is thirty-five years. None is minority-owned and all were founded before substantial minority populations existed in the city. The oldest San Francisco construction firm, the Bechtel Corporation, was founded in 1898 and is larger than all of the local M/WBE construction companies combined.

Second, since disparity studies are intended to justify the configurations of current M/WBE programs, they do not objectively examine the strengths and weaknesses of the local historical record as they find it. They focus almost all of their attention on discrimination against blacks, where some information usually exists, and then make generalizations about discrimination against other minorities and women, for which there is little or no record. The Seattle study said flatly that creating a specific record for each group was unnecessary, since "research" showed that someone who discriminated against blacks was likely to discriminate against other minorities. It cited no source for that assertion and its own data indicated that blacks reported discrimination twice as often as Asians. None of the studies asked whether Jews or other groups not in current MBE programs might have been harmed by business discrimination.

Anecdotal approaches

If properly gathered and analyzed, anecdotal information about discrimination in public contracting might be valuable, as it has been in other areas where bias has affected decisions. But the data gathered have been seriously skewed.

A common technique has been to use hearings, carefully orchestrated by the bureaucracies operating MBE programs, to collect testimony from MBE owners about discrimination. In San Francisco, hearings went on for days as MBE spokespersons railed about the vicissitudes of doing business. In Baltimore, the chairwoman of the hearings, like some summertime tent evange-
list, urged witnesses to come forward and testify to discrimination so that a record could be established that would withstand a Croson test. But almost never did anyone in either city allege discrimination against any specific city agency or private business. Perhaps this was because the witnesses felt too intimidated to name names. Perhaps it was because in cities where the political consensus has produced an M/WBE program there is little, if any, overt contracting discrimination. Seattle took another tack. Within weeks of the Croson decision, the city attorney had twenty M/WBEs sign forms he had prepared that said, "I believe the refusal of prime contractors, developers and owners, etc. to award contracts or subcontracts to my business for private sector work is due to their racist attitude toward me and toward minority primes and minority persons generally."

Anecdotal data is typically used to make a case, rather than analyze a problem. Rarely is any attention paid to such social science fundamentals as sample construction, response rate, and the replication of results. In the $400,000 Dade County study, for example, both questionnaires and interviews were used to gather anecdotes to confirm discrimination in the local construction industry; but only 15 percent of the questionnaires were returned and only black businesses were interviewed. When a white-owned construction company sued the county over its MBE program (a case in which I served as an expert witness for the plaintiffs), it was disclosed at trial that the questionnaires had been destroyed and that assurances of confidentiality had been given those interviewed so that no third party could examine the unedited data. Andrew Brimmer, who conducted the Dade County study as well as the one in Atlanta, also had to concede that he did not have enough information about norms in the contracting industry to know whether anecdotes about slow payment, late notice of subcontracting opportunities, and other difficulties were evidence of racially disparate treatment or were common to all small businesses. Finally, he had to admit that he had no way of verifying whether any of the anecdotes were actually true.

Anecdotal data appear to be carefully selected to confirm the studies' arguments. In Milwaukee, for example, 68 percent of Hispanic contractors and 60 percent of women contractors surveyed did not claim that discrimination affected their businesses. But the study quoted only those owners who did allege discrimi-
nation. Sometimes the authors of studies are forced to add considerable interpretation to obtain the desired conclusion. The Seattle study confessed that M/WBEs were "reluctant to reach general conclusions absent direct evidence of bias, which is seldom available." Consequently the study's authors decided that their own interpretation of events would be authoritative in deciding if an incident was discriminatory.

Anecdotal approaches are popular because their outcomes can be easily controlled. But they are not always very persuasive in the courtroom. In 1991, the Ninth Circuit remanded an MBE case from King County, Washington, back to the district court, with instructions to focus on statistics rather than the boilerplate affidavits Seattle officials had gathered.

Statistical approaches

Statistical proof of discrimination is complex. Reasonable people can disagree about the proper data and tests. Justice O'Connor's opinion in Croson focuses on the importance of finding a statistical disparity between the availability and the utilization of qualified minority contractors willing and able to perform a service. How should this availability be measured? At a minimum, the availability data should take into account the actual geographical area from which the jurisdiction's public contractors are drawn. The data should also be broken down by type of market, and by the various groups the M/WBE program covers. Discrimination against Asians in heavy construction, for example, does not prove that other minorities suffer discrimination in heavy construction. Nor does it prove that Asians suffer discrimination in other markets. Finally, the analysis should take into account Croson's "willing and able" language by considering the capacity of firms to take on jobs of differing sizes. Large firms are better able to bid for large contracts. In the construction market, just 12 percent of the nation's firms have five or more employees, yet their work accounts for 78 percent of total revenues. Since M/WBEs are generally newer and smaller than non-M/WBEs, a failure to take the size of firms into account will exaggerate the availability of M/WBEs.

The task of making availability/utilization comparisons would be easier if there were public sources of data. But although the Census Bureau publishes comprehensive data on minority- and
women-owned businesses every five years, it does not release comparable data on businesses owned by white males. Also, there is the problem of how to categorize large corporations with many stockholders. What is their ethnic or gender ownership?

For all these reasons, many disparity studies have conducted their own surveys of availability, but often this has led to distortions. In San Francisco, although half of the city's contracts go to non-city firms, the availability figures were based on city firms alone, thus exaggerating the percentage of M/WBEs available. This permitted the city to claim ongoing discrimination and led to the setting of unrealistically high utilization goals. The city also double-counted firms owned by non-white women, showing the same businesses available in both the MBE and WBE categories. In Seattle, the survey was based on a response rate of less than 20 percent of the M/WBEs and 2 percent of the non-M/WBEs, but when the study made generalizations it did not include any of the qualifications social scientists would ordinarily attach to so limited a sample.

The basic problem the disparity studies have had to confront, however, is that most M/WBE programs, by using set-asides or by forcing primary subcontractors to use M/WBE subcontractors, have created overutilization of these businesses. The statistical approach has often revealed this embarrassing fact. The studies have responded to this problem in some ingenious ways. In Denver, where the Department of Public Works had set MBE utilization goals at 25 percent, the disparity study found only 6 percent availability. The study's authors argued that "but for" discrimination, MBE availability would be the same as the minority proportion of construction employment in the Denver area—16 percent. That theory did not work well for women, however, who owned more construction firms (12 percent) than their proportion of the construction trade (3 percent), so the study switched gears and argued that 12 percent was the right goal for WBEs. In the Seattle area, where MBE goals had been set at 10 percent to 20.5 percent, the study's authors could only find 8.4 percent MBE availability. Undismayed, they claimed that since M/WBEs said they received relatively more of their revenues from public contracts, they should be considered 50 percent more available for public contracting than non-M/WBEs. The Seattle study also had no data on separate
ethnic groups because the coalition of Puget Sound-area governments financing the study insisted that such information not be gathered. They feared it would show that Asian-American businesses were not underutilized and they were unwilling to take the political heat for excluding them from any future MBE program.

The San Francisco study entailed a separate analysis of fourteen markets and seven different groups for a total of ninety-eight comparisons. In twenty-six categories there were no M/WBEs, although these areas had previously been included in the city's ordinance. In the remaining seventy-two categories, forty-five showed statistically significant underutilization (given the assumptions of the study, which excluded non-city firms from availability and gave no consideration to capacity), nineteen indicated no underutilization, and eight had overutilization. The study is full of statistical anomalies. It showed only two law firms available for city work. It also showed that relative to their number of firms, Hispanics received twice as many construction dollars as Asians, though no one could imagine a theory based on discrimination in San Francisco that would explain that result. It also concluded that there was much more underutilization in primary contracts, where the city controlled every aspect of the process, than in subcontracting, which usually involved negotiations between large primary contractors and smaller M/WBE subcontractors.

Nevertheless, the city, which had an earlier MBE program declared unconstitutional by the Ninth Circuit, solemnly decided that any statistically significant underutilization could be caused only by discrimination. To remedy the "discrimination" where underutilization had occurred, local M/WBEs in those categories were given 10 percent bidding preferences on all city contracts. To make that effective the city also raised the threshold of its charter's low-bid requirement from $50,000 to $10,000,000, meaning that most contracts no longer had to go to the low bidder. These moves tripled the amount of city contracts awarded to M/WBEs in two years, and the new "narrowly tailored" program was able to fend off a preliminary injunction challenge. The M/WBE coalition was unhappy, however, since some of its member groups were left out—the disparity study did not show them as underutilized. Consequently, the city added amendment after
amendment to bring the excluded groups into the program. Indeed, at the insistence of the assistant city attorney who had earlier defended the trimmed-back M/WBE program in court, the city created a new 80 percent goal for legal services, to be divided equally among Asians, Latinos, blacks, and women. That goal, of course, has no relationship to any statistical availability of law firms in San Francisco or anywhere else.

Finally, when a disparity study is done well and includes appropriate data, it may simply be ignored. The Louisiana state study, prepared by a white economist and black political scientist, concluded that when capacity was taken into account, the state did not discriminate against MBEs. Although that might suggest there were not sufficient grounds for a race-conscious program, then-Governor Buddy Roemer reached the opposite conclusion and decided that the study proved the state's MBE program must be preserved.

The disparity-study shield

Whatever their flaws as social science, the disparity studies have proved a potent weapon in keeping alive racial classifications in public contracting. White contractors and the various branches of the Associated General Contractors have had a difficult time getting the lower courts to enforce Croson. Although one of the legacies of the civil-rights movement has been the use of class-action suits, which broadened concepts of standing to sue, contractors have discovered novel barriers to pursuing their class-action claims. The Fourth Circuit ruled that a contractors association that included MBEs lacked standing because it could not represent all of its members in an attack on racial contracting preferences. The Eleventh Circuit has limited standing to low-bid contractors denied a contract because of an MBE program. Even when a jurisdiction used set-asides that prevented all non-MBEs from bidding, standing was rejected. (That case, however, will be reviewed by the Supreme Court this term.) The Eleventh Circuit also decided that the additional costs non-MBEs incurred because of MBE program requirements were an economic injury common to all non-MBE contractors and therefore could not be challenged. Other circuits have used more traditional concepts of standing. Until the Supreme Court resolves
these questions, *Croson* cannot be effectively enforced in large parts of the country.

There are considerable risks for an individual contractor challenging an MBE program. The litigation will be long, costly, and of uncertain outcome. The lawsuit may be politically risky as well, since the charge of racism will often be made against the plaintiff. Further, suing a client is always uncomfortable, particularly when that client is the government, which controls so much of the environment in which contractors work. Contractors tell stories of being warned by politicians not to challenge MBE programs. None of the traditional public or private civil-rights agencies has shown any sympathy for the plight of white contractors no matter how legally or economically irrational an MBE program might be. Even when an unusually intrepid white contractor gains standing and works to create a serious lawsuit, jurisdictions have proven adept at protecting their overall program by granting waivers or settling out-of-court before a ruling is made on the constitutional merits. When, after three days of trial, the Dade County study was shown to have serious flaws, the county paid a $490,000 settlement to the plaintiffs so it could continue its program.

Above all, it is the disparity studies themselves that are proving to be the greatest impediment to implementing *Croson*. No matter how poorly done, a several-hundred-page disparity study "proving discrimination" will quiet critics in the political and business community just by its existence. Few will actually read it and fewer still will have the time or tools to analyze it. Once a study exists, the relatively expeditious and inexpensive trial tactic of seeking a preliminary injunction is usually eliminated. A case tried on the merits involving a disparity study will end up as a costly duel of experts, with the jurisdictions having an enormous advantage in intellectual and fiscal resources. If the contractor wins, the jurisdiction may commission a new disparity study and put a program back in place, until challenged again in court. *Croson* may thus end up like *Bakke*—a passionate but unenforceable judicial declaration against the overbroad use of racial classifications.

Only by requiring rigor in disparity studies can we ensure that the 14th Amendment right to equal protection is not buried under reams of paper. Given the economic incentives in this
market, greater rigor is unlikely unless federal courts establish the ground rules for what constitutes social science and what is pseudo-science. These guidelines must consider the measurement of availability and utilization, the significance of the fact that non-MBEs are generally older, larger, and more qualified to handle substantial construction projects, and the credibility of unverified anecdotal evidence.

The current crop of disparity studies is the first generation of what will surely be many Croson-required inquiries into discrimination in public contracting. If conducted objectively these studies will evolve, just as have studies of employment discrimination and environmental impact, into useful tools. Some disparity studies have been good faith, if not fully mature, efforts to grapple with complex issues. There are instances when MBE programs have been adjusted in light of disparity studies showing no underutilization in some areas. But most have sought only to justify the MBE program of their jurisdictional paymaster by scraping together and magnifying every piece of data pointing to discrimination, without applying any of the conventional social-science tests to determine validity.

The cost of exaggerating discrimination

More is at stake here than just the fair awarding of public contracts, important as that goal is. Flawed disparity studies have inflated and distorted the presence of discrimination; as a result, they may well worsen racial polarization. This ultimately harms persons from both majority and minority groups, and endangers the whole political community.

As our country becomes more racially and ethnically diverse, the task of defining discrimination will become more complex, and the need to attack bias vigorously will grow. Disparity studies, in their current form, serve this purpose poorly, undermining both good scholarship and good government.