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EXCLUDING DISADVANTAGED BUSINESSES

Laws that subsidize small businesses frequently fail to reach the entrepreneurs most in need of governmental support. Small business owners, especially those who are marginalized and discriminated against, are particularly vulnerable in times of market crisis. However, in many instances, laws designed to support small businesses exclude certain disadvantaged businesses from competing in markets by denying government assistance.

This is the first Article to place focus on the ways that well-intentioned laws designed to aid small businesses harm the most disadvantaged ones. It focuses on several examples, including the recently enacted Paycheck Protection Program, federal and state procurement preferences, and social equity programs in recreational cannabis licensing. In each instance, laws designed to support disadvantaged businesses serve to exclude them. For example, the Paycheck Protection Program denied loans to business owners with certain criminal histories. Government procurement programs create exclusionary costs for participation. Finally, state-level social equity programs in recreational cannabis licensing favor already entrenched owners at the expense of communities most impacted by the war on drugs.

*Lawmakers considering preferences for disadvantaged businesses ought to focus on the way the law excludes certain business owners. Government purchasing to favor owners based on sex and race, for *902 instance, which faces strict scrutiny review, ought to continue in ways that include new entrants in industry participation. At the same time, transfers of capital through loans, grants, and the tax code ought to continue and expand to the extent that they remedy exclusion. To operationalize such proposals, economic justice campaigns, which have proliferated in recent years, can, and in some cases already do, advocate for economic development interventions that avoid excluding disadvantaged businesses.*

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***905 Introduction**

In March 2020, the Small Business Administration implemented the Paycheck Protection Program to support small businesses and their workers during pandemic shutdowns.¹ Much publicity about this forgivable loan program stemmed from funds flowing to larger and less deserving companies that had other avenues for capital access.² A less-publicized aspect of the program was that the federal agency conducting the program excluded business owners with certain criminal histories from receiving funds.³ Such an exclusion was more likely to impact Black and Latinx business owners,⁴ who were particularly hard-hit during the early months of the coronavirus pandemic.⁵ Excluding small business *906 owners from accessing federal small business funding is not a new phenomenon.⁶ The Small Business Administration's 7(a) lending program, which was expanded through the Paycheck Protection Program, already restricts owners with criminal histories.⁷ In addition, federal, state, and local preferential procurement programs exclude women- and minority-owned businesses from market participation because of significant certification costs.⁸ Finally, states exclude owners from accessing licenses in certain expanding industries, such as recreational cannabis, unless they are already established with a license to produce and dispense medical marijuana.⁹ These exclusions and restrictions create or contribute to the *907 creation of groups of “disadvantaged” businesses. This Article discusses what disadvantaged businesses are in greater depth later,¹⁰ but as a general matter, disadvantaged businesses are those that do not have the same opportunities as the hypothetical “ideal” business because of various social and economic factors. As a result of these constraints, disadvantaged businesses face more daunting odds of success.

The stakes for de jure exclusion of disadvantaged businesses from government support are high. Small businesses as a group employ roughly half of private sector workers.¹¹ Yet, the start-up rate for new businesses, almost all of which start small, has been declining.¹² Notably, small business ownership continues to lag among Black Americans, Latinxs, and women.¹³ By

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contrast, the market dominance of large companies, referred to by some as “zombies” because of the significant federally backed debt they carry,¹⁴ is increasing.¹⁵ It is becoming the norm that those with wealth and power enjoy government dependence, a form of socialism,¹⁶ while those in need go without.¹⁷ This has far-reaching implications since government economic intervention propping up large, inefficient companies, inhibits competition and stifles innovation.¹⁸

***908** This Article is the first to identify the numerous and pernicious ways that laws enacted to assist small businesses exclude the most disadvantaged ones. It contrasts active exclusionary laws, such as trespass, with those laws and administrative regulations that have the effect of excluding.¹⁹ It also explores other basic forms of exclusion, such as lack of access to capital, that inhibit small businesses from competing. The Article builds on the author's prior work on government interventions to advance economic development through influencing business location decisions,²⁰ attracting place-based investments,²¹ and understanding the impact of race and privilege on community-controlled economic development.²²

There are both economic arguments and arguments tied to racial justice for attacking laws that exclude disadvantaged businesses. From an economic perspective, if women and men participated equally in the economy as business owners, as one report suggests, global economic growth could increase by 3-6%, or between \$2.5 trillion and \$5 trillion.²³ With respect to racial justice, entrepreneurship or small business formation as a means for growing intergenerational wealth is one strategy for addressing income inequality across race.²⁴ The racial wealth gap--the ***909** result of centuries of institutionalized racism²⁵ --hinders entrepreneurs of color from accessing capital.²⁶ As it becomes harder for low-income individuals to enter the middle-class through employment, small business ownership is an alternative pathway.²⁷

By way of background, efforts by Congress to protect small businesses have their origins in anti-chain store activism of the early part of the twentieth century.²⁸ Yet, over time, the actual effects of such programs often result in excluding disadvantaged businesses due to both regulatory limits²⁹ as well as challenging bureaucratic hurdles.³⁰ This should not come as a surprise--facially neutral laws designed to achieve social, economic, ***910** or environmental goals face challenges in creating processes that achieve their intended ends.³¹

In the context of federal, state, and local government procurement preferences for business owners from marginalized backgrounds,³² such programs exclude through high costs of certification and compliance.³³ Critics of these programs often focus on the costs associated with preferencing disadvantaged business owners based on sex and race.³⁴ Such arguments, successfully challenged in the US Supreme Court in *Adarand Constructors, Inc. v. Peña*,³⁵ for instance, focus on the harm faced by White-owned businesses in accessing government contracts.³⁶ If the goal is to do away with exclusionary preferences based on race, the Court has held, then remedies ought not exclude White business owners from preferential programs.³⁷ Justice Thomas, for instance, concurred in *Adarand*, arguing that even well-intentioned government actions to distribute benefits based on race have grave constitutional implications.³⁸

Yet, setting aside *Adarand*, preferential procurement programs fail to work for many small businesses owned by women and people of color. Specifically, participants in preferential procurement programs argue that such participation raises their own costs in obtaining government contracts.³⁹ The costs of compliance exclude many disadvantaged businesses from even applying. Scholars have failed to appreciate the regulatory result from laws designed to aid business owners in need of support. Separately, the author draws data related to a transparency law ***911** showing a city's attempts to encourage contracting with worker-owned businesses, one category of disadvantaged businesses. Original research presented here indicates that despite setting a goal for contracting with such businesses, compliance through self-reporting is meager.⁴⁰

This phenomenon of excluding disadvantaged businesses plays out in regulatory situations as well. For example, in the context of state and local recreational cannabis licensure, exclusion of disadvantaged businesses through law persists despite efforts to include social equity licenses.⁴¹ Since most states that permit recreational cannabis favor existing medical cannabis producers,

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first movers in the legal market for medical cannabis dominate, which limits new market entrants.⁴² In Illinois, for instance, the initial fifty permitted recreational cannabis dispensaries were all previously licensed to distribute medical cannabis.⁴³ In the recreational cannabis market, it appears to hold true that the cost of complying with regulation alone tends to favor existing businesses rather than newcomers.⁴⁴

To operationalize the proposals raised in this Article, the author looks to economic justice campaigns. Anti-racist organizing and civil rights campaigns following the killing of George Floyd by police in Minneapolis have led to societal attention on economic support for Black businesses and communities.⁴⁵ At the same time, campaigns for economic justice, which have proliferated in recent years as a response to income inequality, focus on increasing minimum wages, championing public investment in education and infrastructure, and targeting public transfers to large employers.⁴⁶ Ongoing economic justice campaigns are well-positioned to *912 bring focus and attention to instances where disadvantaged businesses are being excluded from markets by law.

In responding to the law's exclusion of disadvantaged businesses, this Article argues that judges and lawmakers ought to focus on specific instances of exclusion in upholding and enacting economic development laws. In proposing remedies to eliminate exclusion, this Article focuses on incentives, mechanisms for enforcement, and principles to bear in mind. With respect to incentives, this Article suggests ways that mentorship programs as well as grants and loans can remove barriers that exclude disadvantaged businesses. Grant and loan programs ought to be tailored to reach the most disadvantaged businesses.⁴⁷ Prioritizing intermediaries, such as Community Development Financial Institutions, and encouraging such entities to take mission-related risks to expand support to otherwise excluded businesses, is a possible legislative tack. To the extent that affirmative-action programs expand government procurement, such programs should continue and grow in ways that withstand strict scrutiny. Further, lawmakers should consider a tax incentive for private businesses contracting with women- and minority-owned firms.

With respect to enforcement mechanisms, existing anti-discrimination laws should continue to be enforced. In addition, disadvantaged businesses excluded from accessing credit may consider the Equal Credit Opportunity Act as a means for challenging overly restrictive and exclusionary Small Business Administration rules. With respect to guiding principles, lawmakers should focus on inclusivity and competition, correcting past exclusion and sharing power, and observing economic consequences and externalities.⁴⁸

This Article Proceeds in four parts. Part I discusses the importance of disadvantaged businesses and the problem of the racial wealth gap. Part II introduces the data upon which the author's argument is based, namely (1) federal, state, and local efforts to support small businesses, including the Paycheck Protection Program; (2) procurement preferences at all *913 levels of government; and (3) recreational cannabis licensure. Part III introduces a snapshot of economic justice campaigns based on a set of defined criteria. Finally, Part IV offers proposals for eliminating the exclusion of disadvantaged businesses through incentives, enforcement, and a series of guiding principles.

I. Disadvantaged Businesses and the Racial Wealth Gap

Disadvantaged small business ownership is influenced to a large extent by race, class, and privilege--each aspect of which impacts wealth and income inequality. One ought to care about small businesses and the entrepreneurs who own and operate them, given the contributions they make to employees, innovation, and, perhaps counterintuitively, to the development and growth of large businesses. Small business ownership is one important prong that can address income inequality and the racial wealth gap across the nation. To the extent the law excludes disadvantaged businesses from government support, it harms those who are discriminated against based on race and gender.

A. *Why We Should Care About Disadvantaged Businesses*

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Much focus and attention concerning the economy is placed on the stock market.⁴⁹ However, publicly held companies account for fewer jobs and wealth than most might expect. In the United States, over twenty-seven million small businesses generate around fifty percent of Gross Domestic Product.⁵⁰ Small businesses account for over 99% of US businesses and 64% of new jobs created in the United States.⁵¹ For context, the US Small Business Administration, the federal agency Congress tasked with supporting small businesses, defines small businesses as those companies that are independently owned and operated, exert little ***914** influence on their own within an industry, and generally have fewer than five hundred employees.⁵²

Not only are small businesses engines of economic growth, they are indispensable to a strong economy. More specifically, small businesses are crucial in three main areas: (1) creating jobs; (2) sparking innovation; and (3) providing opportunities for women and members of other marginalized groups to achieve economic independence.⁵³ We will take each in turn.

With respect to job creation, although small businesses are more prone to failure than large businesses, on balance they hire more workers, which leads to a net increase in the total number of workers.⁵⁴ Despite volatility, small business employment provides an entry point for many workers, including those who are hired for the first time.⁵⁵ Also, small business employment is a gateway to hiring workers in managerial positions, which are higher paying.

With respect to innovation, small businesses lead the innovation economy. In the area of patent creation, for instance, small businesses generate 26.5 patents per one hundred employees, while large companies generate only 1.7 patents per one hundred employees.⁵⁶ Plus, most large companies, including technology companies such as Amazon, Microsoft, and Apple, among others, all started as small businesses.⁵⁷

Finally, small businesses create opportunities for women and members of other marginalized groups, especially at a time when the ranks of unionized workers are diminishing, and many employers shift to contract work. While White men continue to predominate small business ownership, women and members of other marginalized groups are increasing in terms of percentage of small business owners. In 2017, 1.1 ***915** million companies were owned by women, and 1 million were owned by members of other marginalized groups.⁵⁸

Businesses that are disadvantaged are small, both in number and with respect to the federal definition. But they are also owned by individuals who face discrimination due to a factor beyond their control, such as sex, race, or some other characteristic that they individually cannot change. This Article focuses on disadvantaged businesses because they are ones--frequently most in need of support--facing exclusion because of laws designed to support small businesses.

B. Race, Privilege, Class, and Disadvantaged Business Ownership

Not only are fewer small businesses owned by women and members of other marginalized groups, but those companies are frequently smaller and less wealthy than their White-owned peer companies. In 2014, for instance, one report indicated that 63.4% of White-owned companies reported profitability, while only 57.7% of Latinx-owned companies and 45.6% of African-American-owned companies reported being profitable.⁵⁹ Further, Whites and Asian Americans hold one-third of their assets in businesses and other forms of financial assets, while Latinxs hold 15% and African Americans hold only 8% of their assets in the same types of property.⁶⁰ It ought not come as a surprise, therefore, that Latinxs and African Americans have one-tenth the net worth of White Americans.⁶¹

When families are left out of the small business growth engine, they often struggle to access the middle-class, including the ability to achieve home ownership and build intergenerational wealth. The racial wealth gap negatively impacts entrepreneurs of color who lack access to capital to fund entrepreneurial ventures.⁶²

***916** Professor Lynnise Pantin points out that legislation addressing the racial wealth gap must address the structural barriers that have led to disparities in entrepreneurship.⁶³ Capital access, and specifically barriers to accessing capital, are among some

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the most significant hurdles that must be addressed.⁶⁴ In addition, legal barriers to small business formation and development are legion⁶⁵ and often inhibit business formation by women and members of other marginalized groups who have been institutionally discriminated against.

Scholars, including Pantin, have criticized recent efforts to reform the startup ecosystem for failing to address structural inequality.⁶⁶ The Obama Administration's effort to reform alternative capital raising initiatives--the Jumpstart Our Business Startups ("JOBS") Act⁶⁷--for instance, failed to address the legacy of racism in the startup ecosystem. Here, an otherwise well-intentioned law has the effect of failing to increase capital access. Specifically, as a result of significant Securities and Exchange Commission regulations, some have argued that it is unlikely entrepreneurs, including entrepreneurs of color, will seek capital through crowdfunding except as a last resort because of the high cost.⁶⁸

In addition, the most recent effort to develop the economies of poor areas-- the Opportunity Zone--likewise fails to address structural racism. The Opportunity Zone was designed as a tool to increase the economic activity of geographic areas that lagged behind other areas following the *917 Great Recession.⁶⁹ However, Opportunity Zones are likely to fail to the extent they do not address the spatial mismatch between the location of low-income workers' residences⁷⁰ and the places of employment for such workers.⁷¹ Finally, one recent report shows that Black entrepreneurs and small businesses were in economic crisis pre-pandemic, in part due to geographic, industry, and asset poverty segregation, causing more severe declines during the pandemic.⁷²

C. Disadvantaged Business Ownership Is One Important Tool in a Holistic Approach to Income Inequality

Economic development for disadvantaged small businesses will not, on its own, solve economic inequality or systemic racism.⁷³ To achieve those goals, we need broad action and reform to law and institutions.⁷⁴ Yet, as some scholars have noted, entrepreneurship can be one aspect in an overall approach to achieving economic justice.⁷⁵ A complete approach must include marginalized communities as active participants in entrepreneurship through varied mechanisms.⁷⁶

Another entry point into the middle-class, and one that is often associated with business ownership, is residential home ownership. Families accumulating and borrowing against real estate equity is one of the most common mechanisms for small business capital raising. *918 Discriminatory federal government programs that increased homeownership among suburban White families exacerbated the racial wealth gap.⁷⁷ With respect to housing, the US Supreme Court has been reluctant to impose judicial remedies, preferring legislative ones.⁷⁸ This jurisprudential phenomenon has implications for small business ownership as well: courts are likely to prefer legislative action over judicial intervention around economic and social matters.

Much in the way that homeownership is an engine for personal family wealth accretion that comes through rising home values, small business ownership provides for intergenerational family wealth development. The rewards of business ownership can be far-reaching. Operating a successful business can provide personal satisfaction. It can also provide lucrative returns for one's family. The sale of a small business can offer income for one's lifetime and assets to pass on to one's children.

II. How Government Interventions to Support Small Businesses Exclude Disadvantaged Ones

A. Financial Assistance

With the rise of industrialization in the mid-1800s, states and cities began to invest in industry. These investments took the form of equity purchases in canal and railroad corporations,⁷⁹ and issuing debt instruments, the sale of which supported bridge and other ironworks construction.⁸⁰ As the economy grew, and the rise of industrialization shifted commerce away from small family farms, governmental interventions in markets to support small businesses shifted as well.

*919 1. History of Small Business Administration

General support for economic development, and support for small businesses in particular, changed in the early twentieth century following the rise of chain stores.⁸¹ The Robinson-Patman Act of 1936⁸² --“the ‘Magna C [h]arta’ of small business”⁸³ -- attempted to protect small retailers in the face of large chain store bulk buying and other discounting practices.⁸⁴ The Act, which focused on preventing unfair competition from chains, as opposed to independent stores, suffered from what Frederick Rowe described as a “chronicle of conflict, compromise and confusion.”⁸⁵

In the early 1930s, the federal government, under President Franklin Delano Roosevelt, formed the Reconstruction Finance Corporation to offer bailout funding during the Great Depression to banks and financial institutions, railroads, and the agricultural industry.⁸⁶ The Reconstruction Finance Corporation expired on June 30, 1954, which led members of Congress to consider another support mechanism as a replacement.⁸⁷ During World War II, the federal government was able to see how big businesses were easily putting smaller businesses out of work. Larger industries were able to increase their workload to easily meet wartime demands, while small businesses could not do so.⁸⁸ Since the federal government had consistently been supportive of small businesses, the *920 creation of a federal agency directed to serve this sector of the economy fit within this long-term treatment of small businesses.⁸⁹

Against this backdrop, the Small Business Administration was formed when Congress passed the Small Business Act of 1953 specifically to provide federal support to small businesses.⁹⁰ The text of the organic statute speaks of “free competition” being the “essence ... of private enterprise.”⁹¹ It may seem counterintuitive that the federal government, in touting free and open competition, would intervene in the economy and attempt to put a finger on the scale for smaller companies. But given the threats posed to small companies by the scale and consolidation of large ones, Congress acted to encourage and develop “the actual and potential capacity of small business.”⁹² The goals of the 1953 Act were thus clear-to foster small business growth and development.⁹³

Yet, from early on, federal interventions to support small businesses have excluded disadvantaged ones in a number of ways. One key exclusionary method has been limiting capital access solely to US citizens.⁹⁴ Since immigrant borrowers are such an important part of the economy, limiting capital access to those who are vulnerable due to citizenship is potentially harmful to economic stability of the families relying on income from immigrant-owned businesses.

Another exclusionary method has been limiting access to federal small business programs based on criminal justice system involvement.⁹⁵ *921 For example, businesses with an excess of 20% ownership by an individual with a felony conviction are ineligible for most Small Business Administration programs. The Housing and Urban Development Act of 1968 amended the National Housing Act to exclude individuals convicted of a felony in connection with an act of civil unrest from receiving benefits afforded to disaster victims.⁹⁶ The amended law applies to the Small Business Administration with respect to the issuance of disaster loans because this amendment to the National Housing Act uses the phrasing “under any law of the United States providing relief for disaster victims.” Further, 13 C.F.R. § 120.110 states: “The following types of businesses are ineligible [for small business loans]: ... (n) Businesses with an Associate who is incarcerated, on probation, on parole, or has been indicted for a felony or a crime of moral turpitude”

In addition, support for small businesses at the federal level has excluded disadvantaged businesses because of the race of the owner. Throughout the 1900s, the law denied Black banks the resources and capital required to support Black businesses.⁹⁷ At present, business ownership by members of marginalized groups continues to lag behind ownership of White men.⁹⁸

2. State- and Local-Level Financial Assistance

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States and cities also engage in economic development activity to support particular employers or industries. Broadly, this economic development activity occurs in one of several ways. First, some states and localities offer grants or loans to particular industries, or across the small business sector. Second, mentorship programs connect new entrepreneurs with successful ones. Third, states and local governments spend approximately \$68 billion each year on business location incentives, such as job creation tax credits, and even more funds on property tax abatements. Finally, the federal government and states cooperate through offering Small Business Development Centers to provide support and guidance.

Many states and local governments subsidize small businesses and particular industries with many small business operators. For instance, ***922** Alaska offers subsidized loans to bolster commercial fisheries and industries related to commercial fishing.⁹⁹ In addition, Alaska operates a limited-entry permit program for particular areas and types of fish.¹⁰⁰ However, as fishery profitability increases, local permit ownership, including in rural areas, declines.¹⁰¹ As a result, government policy to increase market access by local businesses--likely those disadvantaged with respect to access to capital and other factors--is negatively related to industry profitability.¹⁰²

In another instance, states administer the State Small Businesses Credit Initiative, a \$1.5 billion fund included in the Small Business Jobs Act of 2010.¹⁰³ It is the case that capital made available through the Initiative appears to have reached very small businesses, since 80% of Initiative funds went to businesses with under ten employees.¹⁰⁴ Such a data point suggests that some funds, however modest, do reach very small businesses, but does not indicate the extent to which such businesses are necessarily deserving of governmental support.

With respect to mentorship programs, providing mentoring services from successful businesses to startups appears to be a best practice, especially at the state level. New York, for instance, has launched a mentorship program called Business Mentor NY.¹⁰⁵ A number of states offer mentorship specifically for encouraging procurement.¹⁰⁶

***923** The author has already written at length about state and local business location tax incentives.¹⁰⁷ Suffice it to say that they are used at an increasing clip, with little evidence to support their use.¹⁰⁸ States and cities also seek to support small manufacturers, retailers, and service-sector small businesses. It is not uncommon for subnational governments to spend public resources to facilitate not only infrastructure--roads, bridges, fresh water, and sewer systems¹⁰⁹--but also direct economic infrastructure, such as retail markets.¹¹⁰

Other instances of state and local support for small businesses include grants and loans made available through economic development agencies. Such programs often focus on particularly important and already resource-rich industries, with unclear benefits for disadvantaged businesses. For example, Massachusetts offers companies within its tremendously vibrant life sciences sector incentives to grow and expand facilities.¹¹¹ While diversity is a priority with respect to students in life sciences and other STEM industries, the impact on businesses owned by women and members of other marginalized groups is unclear.¹¹²

***924** In another instance, companies starting-up in Philadelphia can avoid fees and taxes on income and net profits for two years.¹¹³ However, businesses often lose money in the early years of operations. As a result, an early year tax abatement on profits is unlikely to drive business location decisions. The Jump Start Philly program includes exemption from licenses and registration, as well as a job creation tax credit--each of which may be useful for businesses owned by women and members of other marginalized groups.¹¹⁴

Finally, the US Small Business Administration offers assistance in the form of Small Business Development Centers.¹¹⁵ These Centers allow for cooperation between governments at all levels, along with the private sector, and educational institutions.¹¹⁶ Sixty-two Small Business Development Centers exist nationally and across US territories with over 900 service locations.¹¹⁷ As some research indicates, even these lenders and support organizations struggle to communicate with and offer services that reach those most in need.¹¹⁸

3. Disaster Financial Assistance and the Paycheck Protection Program

The CARES Act of 2020 included other examples demonstrating how disadvantaged businesses are often excluded from benefits in times of crisis. For context, the CARES Act was the largest direct economic stimulus in the nation's history. The greatest allocation of dollars for employers was the Paycheck Protection Program, an expansion of the Small Business Administration's 7(a) loan program. The Treasury and Small Business Administration issued rules requiring that for loans to be forgiven under the Paycheck Protection Program, 75% of loan proceeds must go to pay worker salaries, with no more than 25% allocated to other expenses, such as rent, utilities, mortgage interest, and related expenses. *925 Such a requirement is harmful to businesses in high-rent, typically urban parts of the country.

When it was reported that publicly traded companies received Paycheck Protection Program loans, as well as franchises of large restaurant chains, there was governmental and public outcry. Part of the outcry had to do with the belief that such employers were not deserving of governmental support. Precisely these notions of justice and distributional concerns moderated through moral and political views gave rise to changes in the policy. In this instance, the Treasury extended time for businesses to return loans that they had received but no longer decided that they needed.

The Center for Public Integrity's analysis, in July 2020, of recipients of Paycheck Protection Program funds indicated that less than 2% of funds went to Black-owned companies, and 6.6% went to Latinx-owned ones--with more than 83% going to businesses and organizations identifying as White-owned.¹¹⁹ Litigation related to disadvantaged businesses being excluded from participation in the Paycheck Protection Program is ongoing. In one instance, a number of civil legal services firms filed complaints on behalf of a number of business owners to stop the federal government from denying funds to business owners with particular criminal histories.¹²⁰ A federal district court in Maryland found that the CARES Act granted emergency authority to the federal agency to promulgate rules for Paycheck Protection Program. Yet, the court granted injunctive relief to the plaintiffs, requiring the federal agency to extend the deadline to apply for plaintiff borrowers.¹²¹

*926 B. Procurement Preferences

The second primary way that laws designed to support small businesses exclude disadvantaged ones is in government procurement. This Section examines government procurement preferences that often exclude disadvantaged business owners, such as women, members of other marginalized groups, as well as veterans, and employees--despite having a primary purpose of aiding the same groups.

As is not untypical in the law school curriculum, much time is spent exploring the government at all levels as a market regulator. Much less time, however, is devoted to the role of governments as market participant. In fact, governments, through procurement, and other forms of contracting, are significant in the ways that they can move markets. Government procurement of goods and services offer significant opportunities for small businesses to secure contracts, and lead to increased viability of small businesses, including those owned by disadvantaged owners.¹²² Yet, as government at all levels adopted statutory solutions to include racial preferences in procurement--a form of affirmative action--the US Supreme Court intervened holding such racial preferences to strict scrutiny. Such strict scrutiny review places the burden on government to prove that such preferences are necessary and justified by data.

This Section explores in greater detail judicial interventions to curtail procurement preferences for small businesses owned by socioeconomically disadvantaged owners due to past and ongoing gender-based and race-based discrimination. The past twenty-five years of heightened, strict scrutiny standard of review arising from *City of Richmond v. J.A. Croson Co.*¹²³ and *Adarand* is discussed and analyzed. A key *927 effect of the strict scrutiny standard of review has been excluding certain disadvantaged businesses who are unable to comply with or afford certification. Specifically, preferential procurement programs often have basic requirements that in some instances disadvantaged businesses cannot meet. This Section discusses these instances and explains how laws designed to support small businesses owned by women and members of particular racial groups are harming businesses most in need of support.

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Finally, this Section introduces a dataset of self-identified, worker-owned businesses from which the City of New York has disclosed that, pursuant to local law, it has procured goods and services. This dataset offers some insight into transparency mechanisms at law that can be used to uncover otherwise well-intentioned laws. This Section suggests that transparency laws have use to the extent they indicate the shortcomings of government procurement in actually directing resources to businesses owned by particular owners--in the case of this dataset, employees.

1. Federal

Although preferences for small businesses proliferate federal contracting processes,¹²⁴ so do instances of excluding disadvantaged businesses.¹²⁵ The federal government, which conducts the world's largest preferential procurement program for small businesses owned by disadvantaged groups, does so largely without scrutiny.¹²⁶ Those observers who study preferential procurement note that little is known about the *928 effectiveness of such programs in reducing unemployment for women and members of other marginalized groups, and few studies are available to determine the effectiveness of individual programs.¹²⁷ From an outcomes perspective, this is troubling, especially given the dollar amounts of federal procurement. In fiscal year 2009, for instance, federal contracts with small businesses totaled \$96.8 billion.¹²⁸

Stepping back for a moment, let us consider the challenges and opportunities ripe for excluding disadvantaged businesses in federal procurement. There are two main prongs for analyzing challenges facing all small businesses seeking to sell goods and services to the federal government: (1) cost and complexity, and (2) goal formulation and accountability. The following Sections explore each in turn.

a. Cost and Complexity

Cost, complexity, and other obstacles abound for small businesses hoping to secure a federal contract. Not only are the costs for small businesses to participate in federal procurement high, but also they are rising.¹²⁹ For instance, between 2009 and 2017 the cost increased 72%.¹³⁰ A report by American Express OPEN for Government Contracting found that small businesses owned by members of marginalized groups spent almost \$153,000 per federal contract, and that large businesses have much more success in receiving prime contracts than do their small business-subcontractor counterparts.¹³¹ The US Small Business Administration estimates that businesses spend \$80,000 to \$130,000 to receive their first government contract.¹³² Those businesses unable to access capital sufficient to cover these costs are excluded from the process, and thus the market for federal contracts.

A report from the Department of Defense assessed obstacles faced by nontraditional suppliers, which includes small businesses.¹³³ Interviews with nontraditional suppliers revealed that their barriers include “lack of *929 access to and communication from DoD;” “extensive, complex, and inefficient bid and selection process[es];” “administration and management of contracts that create[s] extra work and delays;” and “lengthy funding time line and final payments that often also involve[] delays and gaps.”¹³⁴ The report identified a longer term goal to “simplify and speed up the final payment processes.”¹³⁵ This is important because “the time between submission and award can be particularly problematic for small and new businesses with less capital to sustain salaries and company operations.”¹³⁶ On the issue of timely payment, Congress adopted the Prompt Payment Act in 1982, which provides that payment is due “30 days after a proper invoice for the amount due is received if a specific payment date is not established by contract.”¹³⁷

To reiterate, cost is one hardship government regulations place on newcomers--“young and inexperienced” businesses trying to enter the market-- because often regulatory costs are unknown.¹³⁸ In a specific example, requirements that businesses share cost or pricing data with the government can lengthen and increase costs of participation in the procurement process and impede

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small business suppliers from winning contracts.¹³⁹ But cost is not the only obstacle for small businesses when it comes to participating in federal government procurement.

Perceived complexity and a sentiment among some business owners, including disadvantaged ones, of a lesser chance of success, is an additional barrier to small business owners seeking to win federal contracts.¹⁴⁰ “[G]overnment contracting rewards those willing and able to endure a path wrought with complexities, like reading and complying with wordy clauses”¹⁴¹ To address this complexity, advisors suggest some qualities that help small businesses receive contracts, which include *930 relevant past performance; a strong financial position evidenced by yearly increases in revenue; access to capital; strategic partnerships; and an organized filing system.¹⁴² Not only must a business comply with the complexity of seeking a government contract, it first must show strong past results, which can be a challenge, especially for businesses owned by disadvantaged owners.

One entry point for small businesses to eventually win a prime contract is to begin as a subcontractor.¹⁴³ In other words, a business can start with subcontracts, demonstrate strong performance and growth, and eventually win a prime contract, the type of contract that is larger in sales revenue and scope. Yet, both the costs of seeking a contract, and the complexity involved in legal compliance, can lead many businesses, especially disadvantaged ones, not to participate because of de facto exclusion.

The National Defense Authorization Act for Fiscal Year 2021 is noteworthy with respect to its efforts to create training materials for disadvantaged businesses. Specifically, section 870 of the Act includes reporting requirements to Congress should a federal agency not meet its requirements in “disadvantaged business utilization.”¹⁴⁴ Further, section 871 requires the Small Business Administration to engage in category management trainings, which is the process by which federal agencies procure goods and services from small and disadvantaged businesses.¹⁴⁵ Monitoring the success of these reporting and training obligations will be helpful in assessing whether such efforts increase procurement from disadvantaged businesses.

b. Goal Formulation and Accountability

With respect to goal setting, the Small Business Act mandates that the President “annually establish Governmentwide goals for procurement contracts” for particular small business concerns¹⁴⁶ and requires minimum *931 percentages of participation goals for these businesses.¹⁴⁷ In terms of achieving these goals, the Small Business Administration is required by statute to achieve these goals.¹⁴⁸ Federal agencies “shall” establish goals for small businesses, Service Disabled Veteran-Owned Small Businesses, Historically Underutilized Business Zones, Small Disadvantaged Businesses, and Women-Owned Small Businesses for prime contracts and subcontracts, and shall create plans to achieve such goals and expand small business participation across industries.¹⁴⁹

While the Small Business Administration is required to meet these procurement goals, actually achieving them, and the penalties for failure to do so, are subjects in need of focus.¹⁵⁰ Specifically, there is a lack of accountability for failing to meet the targets. In fact, there is no penalty for falling short of the target percentage.¹⁵¹ There have been years where targets were not met. In particular, procurement targets were routinely unmet for purchasing goods and services from Women-Owned Small Businesses and businesses in Historically Underutilized Business Zones.¹⁵² The Government Accountability Office (“GAO”) has even issued a report stating that the Small Business Administration has not sufficiently addressed previous recommendations from the GAO to fix problems with the Women-Owned Small Businesses and Historically Underutilized Business Zones programs, and to make changes to the procurement scorecard evaluation.¹⁵³

In other words, enforcement of goals for Women-Owned Small Businesses in federal procurement is particularly fraught. For example, the Federal Acquisition Streamlining Act of 1994 amended the Small Business *932 Act to include a 5% procurement goal for small business concerns owned and controlled by women.¹⁵⁴ At the time, there was no set-aside program for Women-Owned Small Businesses.¹⁵⁵ Congress' action to set a 5% aspirational goal amounted to a de-prioritization of Women-Owned Small Businesses in the contracting process.¹⁵⁶

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In 2000, Congress enacted a set-aside program for Women-Owned Small Businesses in the Equity in Contracting for Women Act. Yet, it took ten years for the Small Business Administration to issue its final rule for the program, and the program only took effect in 2011.¹⁵⁷ In the roughly ten years since the program's implementation, the goal has only recently been met, and there have been scholarly proposals to tweak the program to ensure the goal is regularly reached.¹⁵⁸ Some small business owners who stand to benefit from the program have testified to Congress expressing the futility of mere goals and questioning the usefulness of the Women-Owned Small Business program due to lack of any meaningful consequences for not achieving those goals.¹⁵⁹

Consistent with this, there are calls for stricter enforcement, with one scholar suggesting that the government could implement both incentives and penalties to drive agencies to meet the targets each year.¹⁶⁰ The incentives might involve bonuses and recognition, whereas the penalties might involve the government revoking a certain amount of funding from the agency.¹⁶¹

Perhaps the statutory language is to blame for agencies' failures to meet procurement standards. Consistently describing the targets as "goals" in reports and scholarship may undermine the use of "shall" in the *933 statute, which requires agencies to meet those targets. Perhaps commentators should more often call the statutory language "requirements" rather than "goals." Regardless, stricter requirements for meeting these targets is necessary, and the absence of meaningful accountability allows the exclusion of disadvantaged businesses to continue.

To overcome barriers, the Small Business Administration created the 8(a) program to carry out its affirmative action goals. One report indicates that in the area of highway contracting, the 8(a) program has increased state-level contracting with firms owned by individuals from disadvantaged groups, but has done little to increase purchases from women-owned firms.¹⁶²

More criticism stems from research into the mentorship aspects of the 8(a) program. Professor Grant H. Lewis, for instance, argues that the 8(a) program's mentorship aspects fail at improving small businesses owned by disadvantaged owners. Lewis draws this conclusion after analyzing data indicating that businesses participating in the 8(a) program perform no better than do service-disabled, veteran-owned businesses, which receive the same financial benefits of preferential contracting with none of the mentorship or other assistance of the 8(a) program.¹⁶³

Size standards for small businesses determine the largest a business can be to qualify for government contracts that are set aside for small businesses, and they vary between industries.¹⁶⁴ Size standards are established under the North American Industry Classification System ("NAICS").¹⁶⁵ In reaching size standards, the Small Business Administration considers factors like the economic characteristics of an industry, technological changes and competition from other industries, and whether a business concern is dominant in its field.¹⁶⁶ Thus, the Small Business Administration issues numerical requirements for small businesses.¹⁶⁷ In addition to the numerical requirements and the business not being dominant in its field, the business must be for-profit, independently owned and operated, and located and operated in the United States or its territories, with an exception for businesses outside *934 the United States that also operate within the United States and contribute to the economy.¹⁶⁸

Typically, size standards are based on average annual receipts or average number of employees.¹⁶⁹ Annual receipts are calculated by total or gross income plus the cost of goods sold.¹⁷⁰ The number of employees includes those working on any basis: full-time, part-time, or otherwise.¹⁷¹ It is calculated by averaging the number of employees for each pay period over the past twelve months.¹⁷² Additionally, there are criminal penalties for businesses that misrepresent their size status to qualify as a small business.¹⁷³

In sum, the largest size standard of industries based on average annual receipts listed in any sector is \$41.5 million, except for industries like commercial banking, which are within the finance and insurance sector, and have a size standard of \$600 million in assets. The largest size standard based on average number of employees across the industries is fifteen hundred.¹⁷⁴

2. Judicial Intervention to Limit Race-Based Preferences in Procurement

Protected and suspect class preferences in legislation are among the most debated and controversial constitutional topics. The Supreme Court's recent affirmative action jurisprudence in the area of race-based preferences in government is equally politically charged. Starting in the late 1980s, the Court's conservative justices began striking down racial preferences in government procurement.

In *City of Richmond*, for instance, the Court struck down a local plan in Richmond, Virginia, to award at least 30% of city construction contracts to minority-owned business enterprises--those firms with at least 51% ownership and control by Black, Spanish-Speaking, Asian,¹⁷⁵ or Native-American individuals.¹⁷⁶ The City Council Members in Richmond relied *935 on the Court's decision in *Fullilove v. Klutznick*,¹⁷⁷ which upheld a 10% minority-owned business enterprise program against a declaratory action brought by industry associations seeking to invalidate the program.¹⁷⁸ In *Fullilove*, Chief Justice Burger, writing for the majority, concluded that the 10% contracting requirement was constitutional since Congress acted in 1977 through the Public Works Employment Act to remedy prior race-based discrimination that kept minority-owned business¹⁷⁹ from government contracting opportunities.¹⁸⁰

Following *City of Richmond*, the Court held in *Adarand* that race-based procurement programs are subject to strict scrutiny (the highest level of review), requiring the government to show a compelling government interest and a narrowly tailored approach to further that interest.¹⁸¹ In *Adarand*, a company bidding on a highway guardrail subcontract sued to stop a federal transportation program that gave preference to prime contracts awarded to companies working with disadvantaged business enterprises.¹⁸² Disadvantaged business enterprises are defined by both social and economic disadvantage. Social disadvantage relates to individuals "subjected to racial or ethnic prejudice or cultural bias," and economic disadvantage relates to socially disadvantaged individuals whose ability to compete is "impaired due to diminished capital and credit opportunities as compared to others ... who are not socially disadvantaged."¹⁸³

Prior to adopting the program to favor socially and economically disadvantaged businesses, Congress investigated and studied disparities in small business ownership and success. In 1978, when federal transportation law was amended to include gender and race in small business contractor ownership, minority-owned businesses comprised 4% of the total number of companies, but only 1% of business revenue.¹⁸⁴ Further, a 1975 report indicated that despite a minority population of 16%, only 3% of businesses in the nation were owned by marginalized *936 individuals.¹⁸⁵ In the area of federal procurement, the disparity continued. In 1986, for instance, businesses owned by marginalized individuals received only 2.7% of federal prime contracts, or around \$5 billion out of \$185 billion.¹⁸⁶

The majority held in *Adarand* that racially based procurement preferences are unconstitutional. According to Justice Scalia, they are un-American.¹⁸⁷ For Scalia, and the other justices concurring in the judgment in *Adarand*, racial preferences are unjustified to solve past discrimination since our society is somehow post-racial.¹⁸⁸

The opinion in *Adarand* has led to two outcomes. On the one hand, plaintiff companies have fought racial preferences in government procurement, both in other federal agencies, as well as the Small Business Administration's section 8(a) program. On the other hand, disparity reports have proliferated, where governments attempt to justify racial preferences in procurement based upon data showing a dearth of contracts going to businesses owned by marginalized individuals.

With respect to challenges to race-based contracting preferences, such challenges have been successful at the federal district court and circuit court levels. In *DynaLantic Corp. v. United States Department of Defense*,¹⁸⁹ for instance, the United States Court of Appeals for the District of Columbia Circuit reversed a lower court ruling and found that a contractor providing flight simulation equipment had standing to challenge the Small Business Administration 8(a) program, in which the Department of Defense was participating.¹⁹⁰ The court in *DynaLantic* found a non-socially and economic disadvantaged business was injured by the 8(a) program because it could not compete on equal footing with businesses participating in the 8(a) program.¹⁹¹ The

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8(a) program was upheld by the district court, though the government did not pass strict scrutiny as applied to the plaintiff in the context of the military simulation and training industry.¹⁹² As part of a 2016 settlement, the Department of *937 Defense agreed not to award prime contracts in military simulation and training through the Small Business Administration 8(a) program for two years.¹⁹³

Counsel for DynaLantic Corporation noted that federal procurement programs that favor contractors based on race must be narrowly tailored. For the government to consider race, it must consider race-neutral alternatives and place limits on racial preferences over time.¹⁹⁴ The Center for Individual Rights argues that the 8(a) program does neither since no business that has participated in the 8(a) program has ever been removed as a preferential contractor despite years of having the preference in place.¹⁹⁵

And yet, the Small Business Administration 8(a) program has withstood facial challenges. In *Rothe Development, Inc. v. Department of Defense*,¹⁹⁶ another defense contractor challenged the 8(a) program on the grounds that the program violated their right to equal protection under the Due Process Clause of the Fifth Amendment, namely, that the 8(a) program's support for "socially disadvantaged" small business owners was unconstitutional on its face.¹⁹⁷ As in *DynaLantic*, arguments for and against government intervention rested on expert evidence concerning discrimination in government contracting.¹⁹⁸ The district court held that, as in *DynaLantic*, the government had satisfied the strict scrutiny requirement by showing a compelling government interest in remedying past discrimination in federal contracting, and that the program was narrowly tailored. The district court laid out the six-factor analysis that comprises narrow tailoring.¹⁹⁹ The court of appeals affirmed the district court's holding, though applied rational basis review, finding that the 8(a) program lacks a racial classification.²⁰⁰

*938 At the state level, Ohio's highest court has upheld the constitutionality of race-based procurement programs. In *Ritchey Produce Co. v. ODAS*,²⁰¹ for instance, the court found that a Lebanese-owned fruit and vegetable wholesaler was properly excluded from the state's minority-owned business certification program.²⁰² The case hinged, in part, on the interpretation of a statutory term and whether it operated to exclude the owner from certification in the preferential contracting program.²⁰³ The opinion of the court went to great lengths to catalogue the legislative findings that support set-asides, including the fact that although 7% of companies were owned by marginalized business owners between 1975 and 1977, less than 0.5% of government contracts were issued to such companies.²⁰⁴

Analyses of *Rothe* focus on its seeming overcomplication of the simple *Adarand* rule.²⁰⁵ Despite the D.C. Circuit's holding in *Rothe* that the 8(a) program lacks racial classification, the government continues to justify the program using disparity reports. Similarly, state and local governments use disparity reports to justify preferential contracting programs.

With respect to disparity reports, following *City of Richmond*, the burden shifted to governments to prove that set-asides and preferences in contracting were justified.²⁰⁶ Disparity studies are research tools that can be used as evidence to support government interventions favoring race-conscious notions.²⁰⁷ For instance, a 1997 study by the Urban Institute reviewing ninety-five state and local disparity studies resulted in a finding of substantial disparities in government contracting.²⁰⁸ Namely, firms owned by marginalized individuals, at the time of the report, earned \$0.57 cents for every dollar they would be expected to receive based on their availability.²⁰⁹

*939 Jurisdictions seeking to continue race-based set-asides have contracted for costly disparity studies showing continued market-based discrimination against women and firms owned by other marginalized individuals.²¹⁰ Disparity studies are significant undertakings. For instance, the City of Winston-Salem, North Carolina, is undergoing a disparity study for the five years between 2013 and 2018.²¹¹ Further, disparity studies can be expensive. The City of Phoenix budgeted \$250,000 for a disparity study that updated a prior study.²¹² Finally, methodologies for administering proper disparity studies differ significantly.²¹³

3. After *Adarand*

After *Adarand*, the Small Business Administration began certifying and ended the self-certification process for Small Disadvantaged Businesses.²¹⁴ Ever since, an almost yearly focus of Small Business Administration reviews has centered on whether the Small Business Administration is effectively ensuring eligible firms are participating in the 8(a) program. In 2001, a GAO review found that the number of firms certified by the Small Business Administration was far less than projected based on the number of firms that had previously self-certified.²¹⁵ The report concluded that the low number of applications for certification was likely due to confusion about how the government would implement the program, the burden of applying, uncertainty about the benefits of certification, and firms not qualifying for certification.²¹⁶

A 2012 study by the Small Business Administration's Office of Inspector General found that the thirty-day period for a reviewer to determine whether to keep or terminate an 8(a) firm's participation in the *940 program was too short.²¹⁷ The study found that by making quick decisions, reviewers may be retaining ineligible firms.²¹⁸ Another study, in 2014, reported that lack of controls led to ineligible firms receiving 8(a) and Historically Underutilized Business Zone set-aside contracts, resulting in incorrect reporting.²¹⁹

Other recent studies from 2016 through 2018 focused more specifically on eligibility requirements.²²⁰ Those studies found that the agency did not timely remove ineligible firms and did not investigate or account for all complaints on an 8(a) firm's eligibility.²²¹ The agency's Office of Inspector General issued eleven recommendations in 2018, some of which include conducting continued eligibility reviews for ineligible firms still in the 8(a) program and establishing clear policies to address complaints on 8(a) eligibility in a timely manner.²²²

*941 4. State and Local

State and local governments using their purchasing power to advance social, economic, and other political goals is by no means new. After *Fullilove*, many states and cities aggressively enacted the sort of percentage contracting preferences for owners of businesses previously discriminated against based on race. To aid states and cities in this process, the American Bar Association, in 1979, issued *The Model Procurement Code for State and Local Governments*.²²³

Following *Adarand*, however, nineteen states have eliminated set-asides for businesses based on race or gender of the owner.²²⁴ Government-sponsored set-asides continued to be questioned, including through voter referenda in California in 1996, Washington in 1998, and in other states.²²⁵ Nevertheless, state and local governments continue to offer a range of contracting opportunities to small businesses.

The US Department of Transportation is one of the largest funding sources for state and local preference programs for disadvantaged business enterprises.²²⁶ Since transportation is typically one of the largest state budget expenditures, these transportation contracts present sizable opportunities for disadvantaged businesses. Contracts issued through the Federal Highway Administration, for instance, directed between \$2.3 billion and \$2.8 billion to disadvantaged business enterprises in 2006.²²⁷

a. Trends in State and Local Procurement

A recent survey of procurement offices of twenty-eight states and the District of Columbia reveals several trends in procurement.²²⁸ Specifically, the survey found that states are using the following tools to improve *942 procurement: (1) increasing the use of data and analytics to improve processes; (2) focusing on best-value strategies and not merely prioritizing

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price; (3) implementing solution-oriented approaches that result in more responsiveness from vendors; (4) forging closer relationships with vendors; and (5) using new contracting strategies to increase effectiveness.²²⁹ In particular, a number of states, including Georgia, Massachusetts, Michigan, Minnesota, New York, Ohio, and Utah use pools of prequalified vendors to improve, among other things, the inclusion of economically disadvantaged companies in procurement.²³⁰

The next Section discusses a particular example of how one city is providing disclosure around the employee- and worker-owned companies from which it purchases goods and services.

b. New York City Local Law 22 of 2015

In 2015, New York City enacted a transparency requirement that it reports annually on the worker-owned cooperative business that it contracts with for goods and services.²³¹ Businesses owned by their workers are one example of disadvantaged businesses, since employee-owned firms often struggle with accessing traditional credit. The requirement was enacted in local law as part of a multi-year effort to form new worker-owned businesses.²³² Reports from the Worker Cooperative Business Development Initiative, a network of cooperative support organizations,²³³ indicate that cooperative businesses face a number of issues in formation and operation. These issues include difficulty in *943 understanding city procurement information, in winning their first contract, and in accessing capital to grow their businesses.²³⁴

In 2017, the first year that the City reported on the number of worker cooperatives with which it contracted, twelve entities self-identified as being worker-owned. The author obtained data in the form of the entity names of the twelve businesses from staff at the Democracy at Work Institute, an organization that supports the formation of worker cooperatives, and the New York City Network of Worker Cooperatives, an industry trade group.²³⁵ The author analyzed the entity forms for each of the twelve entities selected when they formed their respective entities. In addition, the author checked to see whether any of the twelve entities hold themselves out to the public as worker-owned cooperatives. Notably, only one of the entities that was reported holds itself out to the public as a worker-owned company.²³⁶ None of the other entities either adopted a cooperative entity form or hold themselves out to the public as being worker cooperatives.²³⁷

There are additional annual reports available. Those reports show that the total dollar amount of contracts with worker cooperatives has increased. However, it is unclear whether the types of businesses that are actually owned by their workers or employees has increased.

C. Licensing: Recreational Cannabis and Social Equity

As of the start of April 2021, fifteen states and the District of Columbia have legalized recreational cannabis.²³⁸ Three states, *944 Washington, Colorado, and Illinois, have social equity programs to ensure that, when deregulation occurs, small business owners have equal access to the market.²³⁹ Since states that permit recreational cannabis frequently began by permitting use for medical reasons, first movers have a significant advantage over upstarts, including those owned by marginalized individuals.²⁴⁰

Much of the attention surrounding social equity in the recreational cannabis market is framed around steps regulators can take to address racial discrimination.²⁴¹ In March 2020, the Washington legislature signed social equity legislation that sets aside licenses for applicants who meet one of several criteria: showing “they live in a disproportionately impacted area, were convicted of a cannabis crime or had someone in their family convicted.”²⁴² The Washington example shows the movement toward implementing social equity. In Colorado, in June 2020, the legislature amended their existing accelerator program to place focus on social equity for recreational cannabis owners with social equity in the very title.²⁴³ An applicant will be eligible in this social equity program if one of the *945 following eligibility criteria are met: the applicant lived in an economically disadvantaged community for at least fifteen years between 1980 and 2010; the applicant or one of their immediate family members has been arrested or convicted for a marijuana offense; or the applicant's income is at or below a certain amount.²⁴⁴

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In Denver, where one study showed that almost 75% of owners with licensed cannabis businesses are White, the market has favored existing medical cannabis producers and retailers.²⁴⁵

In Illinois, where recreational cannabis became legal in 2020,²⁴⁶ the social equity program offers reduced application fees, technical support, and provides loans to entrepreneurs meeting certain criteria.²⁴⁷ Additionally, 25% of the tax revenue from cannabis sales is directed to a grant-funding program,²⁴⁸ which to date amounts to around \$52 million.²⁴⁹ The COVID-19 pandemic has led to a slower rollout of social equity licenses.²⁵⁰ Since all of the fifty Illinois dispensaries were previously medical sellers, inclusiveness in the ownership of upstart recreational sellers is lagging.²⁵¹

A technical glitch prevented diverse owners in Los Angeles from obtaining licenses.²⁵² A social equity industry association sued.²⁵³ The parties settled, and Los Angeles doubled the number of licenses available for social equity applicants to two hundred.²⁵⁴

As Maine moved to recreational sales, it extended a similar preference as Illinois for medical sellers of cannabis.²⁵⁵ The scoring system in *946 Portland, Maine, for instance, favors applicants with both long-term leases and at least \$150,000 in liquid assets.²⁵⁶ In Nevada, the Cannabis Compliance Board is focusing on vetting license applicants and stricter regulation.²⁵⁷ Massachusetts has draft regulations that would expand fee waivers for those participating in the social equity program, which could potentially save those businesses thousands of dollars.²⁵⁸ This follows reports that tax proceeds are bypassing Massachusetts communities impacted by the war on drugs.²⁵⁹

The Smart and Safe Arizona Act, approved by referendum in November 2020, references “nationwide pressure ... to diversify cannabis ownership.”²⁶⁰ As a result, the initiative provides for 26 licenses for social equity applicants.²⁶¹ These licenses notwithstanding, of the 130 total licenses that will be issued, current medical sellers are much more favored as license recipients.²⁶²

*947 The Arizona law reserves 10% of revenue²⁶³ --after covering costs associated with carrying out the Act--to the Justice Reinvestment Fund.²⁶⁴ Of the 10% it receives from the Smart and Safe Arizona Fund, the Justice Reinvestment Fund will transfer 35% to county public health departments to provide justice reinvestment programs; 35% to the Department to “distribute] grants to qualified nonprofit organizations that provide justice reinvestment programs in [Arizona];” and 30% to the Department to address public health issues.²⁶⁵

In New Jersey, there are social equity provisions in the medical marijuana context. For instance, the Jake Honig Compassionate Use Medical Cannabis Act provides that at least 15% of licenses be awarded to a certified minority-owned business and 15% to certified women- and disabled veteran-owned businesses.²⁶⁶ By contrast, the November 2020 recreational cannabis referendum in New Jersey had no social equity measures in place. Advocates called for social equity provisions in the New Jersey law.²⁶⁷

At the federal level, Congress is considering the Marijuana Opportunity Reinvestment and Expungement Act of 2021.²⁶⁸ Known as the MORE Act of 2020, the act would advance a number of key initiatives, including creating a trust fund to support business in communities impacted by the war on drugs. In addition, the law explicitly would prevent the Small Business Administration from declining to offer loans to businesses owned by individuals with prior cannabis offences.²⁶⁹ *948 Further, the law creates an equitable licensing grant program designed to assist states and local governments in creating equitable licensing programs.²⁷⁰

III. The Current State of Economic Justice Campaigns

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Advocacy campaigns nationally can, and in some cases already are, advancing preferential government procurement practices. The author collected data about current economic justice campaigns using limited search terms to investigate the current state of advocacy efforts around procurement preferences in particular, and around economic justice broadly. This Part presents and analyzes the limited campaign-related data that was collected. Importantly, additional economic justice campaigns exist that this survey does not identify. The data presented, however, is representative of trends nationally. One particular campaign to advance small business preferential procurement based on the race and gender of the business owner is presented to advance the argument of this Article: that governments can further expand inclusivity in government procurement for small businesses owned by women and members of other marginalized groups.

A. Objectives of Economic Justice Campaigns at the Moment

During the course of performing research concerning economic justice campaigns, the author and a research assistant identified a total of twenty-seven ongoing economic justice campaigns. Our research methodology included internet searches using search terms descriptive of particular small business owner preferences, such as “MWBE,” “veteran,” and “employee-owned,” in connection with a broader search term, such as “economic campaign,” or simply “campaign.” Upon reaching a list of organizations following the initial search, the researchers read organization and campaign websites and explored accompanying news stories and partner websites.

The results of this research are presented below in four campaign categories: (1) those with an industry focus; (2) those with focus on particular employers; (3) those that aim attention on public budgets; and (4) those with a national scope. The full findings of this study are listed in the attached Appendix. In classifying economic justice campaign objectives, the author offers a proposal for how the recommendations for ^{*949} reform in this Article can, and in a number of cases already are, being implemented at the grassroots and advocacy levels.

In no way is this search meant to be a comprehensive presentation of all current economic justice campaigns currently in progress in the nation. Such a survey is outside the scope of this Article. Rather, the presentation of these campaigns is an attempt to offer a limited sampling of particular types of campaigns that may benefit from the research presented elsewhere in this Article.

No doubt there are additional economic justice campaigns ongoing. The author invites additions to the list and types of campaigns compiled in the coming pages. Further, the author invites suggestions about other advocacy efforts that could benefit from the research presented elsewhere in this Article.

1. Industry Focus

The first category of economic justice campaigns identified place focus on a particular industry, in a number of cases oil, gas, and related fossil fuel producers. For example, People's Action is a national membership organization with offices in Chicago and Washington, D.C., and member groups in twenty-seven states. It seeks to end “taxpayer subsidies for oil and gas companies” as part of its People & Planet First campaign.²⁷¹ Another organization, Kentuckians for the Commonwealth, has an economic justice campaign that seeks to mitigate environmental harms and extractive business practices of coal, oil, and gas companies in Appalachia.²⁷²

Some campaigns have specific objectives related to legalized cannabis. The organization New Virginia Majority, for example, has an Economic Justice Campaign that supports both large businesses paying their fair share of taxes, and to use a portion of tax revenue from legalized cannabis to assist Black entrepreneurs.²⁷³ The theme of using recaptured subsidies was echoed by People's Action, which supports using recaptured subsidies to fossil fuel companies to provide reparations for marginalized communities.²⁷⁴

***950 2. Particular Employers**

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Other campaigns focus objectives on particular employers. In a number of cases, campaigns are focused on retailers such as Amazon.com and Walmart.²⁷⁵ At least five economic justice campaigns are organized in opposition to public subsidies extended to Amazon.com,²⁷⁶ and at least one national campaign is organized to counter state and local subsidies for Walmart.²⁷⁷ With respect to Amazon.com, most of the local campaigns are focused on its search for a second headquarters.²⁷⁸

3. Public Budgets

At least twelve economic justice campaigns across the nation have organized to address public spending, in particular with respect to education, health care, and infrastructure. Many such campaigns, Texas Forward, for instance, often include organized labor and advocate shifting public funds to public services instead of subsidizing private businesses.²⁷⁹ Other campaigns, such as Redlight the Gulch in Atlanta, are contesting and litigating public approvals for development projects, arguing, in one instance, that public funds ought not be diverted “away from public services to subsidize” a large-scale development project.²⁸⁰

In the context of public budgets, 2020 brought about many movements in cities to shift funding from policing to human social services. Austin, Texas, for instance, shifted \$150 million from the police *951 department to instead fund health care, access to food, and violence prevention.²⁸¹ Other cities across the country, including Los Angeles, San Francisco, Baltimore, Washington, D.C., Hartford, Portland, Salt Lake City, Seattle, Philadelphia, and Minneapolis have all cut or significantly altered funding of their police.²⁸² With extremely high costs of defending police misconduct lawsuits, as well as the high costs associated with current police tactics, less expensive approaches to protecting public health and safety are increasing.²⁸³

4. Nationwide Focus

Nationwide, economic justice campaigns have emerged in recent years arguing for fair taxation and community control of economic development infrastructure. These campaigns often overlap with the public budget-focused campaigns, however, their national scope and organization merit special mention. For instance, the Partnership for Working Families launched the “We Make This City” campaign in ten cities across the country in 2018.²⁸⁴ This campaign seeks to fight for access to and control over public infrastructure including housing, transit, education, and water.²⁸⁵

B. Economic Justice Campaigns and Procurement Preferences

The issue of procurement preference for women- and minority-owned small businesses is also a feature of economic justice campaigns. In addition to the New Virginia Majority's Economic Justice Campaign effort to direct government revenue from legalized cannabis sales to Black entrepreneurs,²⁸⁶ other campaigns, such as those led by The Black Institute place attention specifically on government procurement.²⁸⁷ In 2015, The *952 Black Institute issued a report titled “Not Good Enough: The Myth of ‘Good Faith and Best Efforts’” detailing the history of minority- and women-owned business enterprise procurement law and its impacts.²⁸⁸

In their 2015 report, The Black Institute proposed a number of key recommendations to support minority- and women-owned business enterprises with respect to procurement. For example, the report called for a mandatory 35% of prime contracts, and subcontracts go to minority- and women-owned business enterprises, as well as the establishment of Chief Diversity Officer positions in state and city agencies to monitor minority- and women-owned business enterprise procurement programs.²⁸⁹ The report also included several seemingly outside-the-box ideas, such as requiring any for-profit company that receives tax incentives from the city or state to participate in public minority- and women-owned business enterprise procurement requirements, and allocating 1% of public pension funds to offer start-up capital to minority- and women-owned business enterprises.²⁹⁰ The advocacy of a group such as The Black Institute is instructive as this Article turns in the next Part to potential solutions to the phenomenon of excluding disadvantaged businesses.

IV. Eliminating Exclusion of Disadvantaged Businesses

This Part focuses on potential opportunities lawmakers and judges can use to remedy, and possibly eliminate, exclusion in legal interventions to support disadvantaged businesses. This Part is organized in the following categories: (1) financial assistance; (2) procurement preferences; and (3) licensing. Financial assistance remedies focus on mechanisms that rewards behavior that reduces exclusion. Procurement preference tools punitively address instances of exclusion. Finally, licensing principles guide how lawmakers view policy making around support for small businesses to avoid exclusion of disadvantaged businesses. Such proposals may naturally find a place within the campaign platforms of movements for economic justice currently active across the country. In addition, the author suggests such principles ought to guide scholarly critique and analysis of economic development laws more generally.

***953 A. Financial Assistance**

1. Grants and Loans to Disadvantaged Businesses

This Article has critiqued the Paycheck Protection Program--the federal government's largest forgivable loan program for small businesses--as excluding disadvantaged businesses by, among other things, restricting owners with certain prior felonies from seeking funding. Relying on criminal records in the application for small business loans adds a greater burden on African American business owners who already face disparate treatment with regard to the carceral state.²⁹¹ The challenge, perhaps, is in designing a tool that is inclusive, avoids excluding disadvantaged businesses, and maximizes impact among the most deserving businesses.

One point of critique for allocating funding is in deciding which institutions are responsible for distributing the funds. The Paycheck Protection Program relied on banks, which were already certified as lenders under the Small Business Administration's 7(a) program. It is possible that this reliance is misplaced.

Many Black-owned businesses rely on Community Development Financial Institutions, lenders which are certified by the US Treasury, and other community-based banks. As of April 7, 2020, one-third of community bankers did not have access to the Small Business Administration's system for administering the Paycheck Protection Program.²⁹² Small businesses needing to access loans had to look elsewhere for services.

Financial technology ("fintech") company Kabbage, for instance, processed \$7 billion in Paycheck Protection Program loans to 300,000 small businesses.²⁹³ There are reasons to be skeptical of fintech as a mechanism for expanding access to credit and financial products.²⁹⁴ However, expanding access to financial products through postal banking, ***954** or other means, is an important concept in distributing government grant or loan funding to disadvantaged businesses.²⁹⁵

The process by which loans or grants are made can be as important as allocating funding in the first place. Policy makers are wise to explore processes that expand rather than limit access. Expanding access includes using nontraditional lenders, including Community Development Financial Institutions.

2. Mentorship

Mentorship programs for disadvantaged businesses exist at all levels of government and offer in-kind financial assistance that business owners might otherwise have to pay for in order to navigate market access. Currently, the Small Business Administration's 8(a) program offers disadvantaged businesses mentorship, in addition to preferential contracting.²⁹⁶ Further, states offer mentorship to startups, including those owned by individuals discriminated against on the basis of sex and race and

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which are also financially disadvantaged.²⁹⁷ Finally, new legislation would allow disadvantaged businesses to seek mentorship in cannabis licensing and operations in Colorado.²⁹⁸

At least one commentator critiques mentorship programs as inadequate at adding additional value to disadvantaged businesses and creating opportunities for rent-seeking.²⁹⁹ From the perspective of exclusion, mentorship-- which typically amounts to the sharing information and lived experience-- appears to be a benign-level support. To the extent that mentorship excludes particular disadvantages from accessing information, more expansive opportunities for mentorship should be considered. In addition, further study related to the benefits or potential harms of mentorship ought to be performed and disseminated. It is important to continue government mentorship programs, however, insofar as they do assist disadvantaged businesses in accessing resources those businesses would not otherwise access.

***955 B. Procurement Preferences**

To the extent that government set-asides for disadvantaged businesses decrease unemployment for members of marginalized groups, such programs ought to continue.³⁰⁰ Professors Chatterji, Chay, and Fairlie find that Black business ownership increased in the 1980s following city-level initiatives to set aside contracting for minority-owned businesses.³⁰¹ However, the study performed by Chatterji, Chay, and Fairlie note that those who were better educated benefitted more from set-asides.³⁰²

This Article argues that attention in reviewing such programs ought to focus on instances where disadvantaged businesses are excluded, including those business owners who lack advanced educational credentials. Such attention, while well-intentioned, is difficult to implement. In addition, many existing procurement programs allow otherwise high ceilings for the number of employees and the amount of annual revenue, which dictate the size of startup businesses and new entrepreneurs that can qualify for set-asides. Customers in government tend to have concerns that startup companies, especially disadvantaged ones, may lack the size, capital, knowledge, or ability to perform contracts.

Another concern around certifying businesses as eligible for favorable treatment for procurement is confirming that the business is actually what it claims to be. For instance, in order to be eligible for state minority-and women-owned business enterprise certification, businesses are required in many cases to be in business for at least three years. Some states, like Kansas, on the other hand, does not list such a requirement on their certification affidavits.³⁰³

This Article does not claim to offer a solution to solve the challenges presented by government procurement preferences for disadvantaged businesses. It does claim, however, that lawmakers and judges, when enacting and reviewing such programs, ought to focus on instances where the proposed program operates to exclude disadvantaged businesses. Avoiding such exclusionary laws and remedying such exclusion when it exists, ought to be the focus of government interventions in this area.

The following Sections will introduce proposed solutions Congress and state legislatures could enact to help include disadvantaged businesses in future programs.

***956 1. Tax Incentive for Purchasing from Disadvantaged Businesses**

A market-based approach to breaking down barriers that exclude disadvantaged businesses might include a tax incentive for private companies purchasing goods and services from disadvantaged businesses. With such an approach there are several key questions to address during implementation: (1) which businesses qualify as a disadvantaged?; (2) what is the appropriate amount of the tax incentive?; (3) what is the process for taxpaying companies for claiming and reporting the incentive; and (4) how should the Internal Revenue Service audit for fraud?

With respect to disadvantaged business qualifications, there are two options: self-certification or government-based certification. Self-certification is simpler yet risks improper certification. With a government-based certification, businesses must comply

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with whatever process is required, however complicated it may be. If a government certification process is required, the costs of compliance should not outweigh the potential benefits of participation such that exclusion of disadvantaged businesses occurs.

To facilitate certification, while simultaneously limiting the burdens on both the government and disadvantaged businesses, an intermediary that is an otherwise already regulated entity might make an elegant policy fix. Community Development Financial Institutions, for instance, which are mission-bound to serve low-income individuals and communities through financial services, might be well-suited to also certify disadvantaged businesses. Ceding authority to certify to an intermediary organization does come with some risks. However, the main risk is one of expanding policy making to nongovernmental organizations. Yet, given the history of failed implementation among governmental actors, perhaps looking for assistance outside of government is fruitful.

For instance, Small Business Administration guidance that has excluded small business within certain industries has had particularly negative impact on the Black business community. In 1966, for instance, the Small Business Administration advised area administrators to withhold start-up financing from small grocery, beauty parlor, and carry-out food shops.³⁰⁴ Businesses across industries have had access to Small Business Administration funds, both through 7(a) loans, and the recent Paycheck Protection Program. Some might view expanding preferences ^{*957} for disadvantaged businesses through a tax incentive as not necessarily advancing economic growth. However, the intermediary Community Development Financial Institution providing the certification could provide some assurance that borrowers are bona fide and not simply gaming the system.

2. Enforcing Anti-Discrimination Laws

Funds spent on affirmative action-type programs in government procurement far exceed the funds spent by the federal government enforcing anti-discrimination laws, including Title VII of the 1964 Civil Rights Act and Executive Order 11246.³⁰⁵ This, perhaps, indicates the importance of looking beyond enforcement of anti-discrimination tools to eliminate exclusion of disadvantaged businesses from otherwise well-intentioned laws. Yet, enforcing existing anti-discrimination laws in employment can serve a shared goal of ensuring fairness in the labor market. To the extent that enforcement actions further reduce exclusion in employment and in small business ownership, since those who are employed may eventually go on to own their own businesses, such actions ought to continue.

3. Equal Credit Opportunity Act

In the instance of exclusion from federally backed loans because of criminal history, one sword in the arsenal available to disadvantaged businesses is the Equal Credit Opportunity Act.³⁰⁶ To prevail in an action under the Equal Credit Opportunity Act, a plaintiff needs to show evidence of discrimination through any of three approaches: (1) direct evidence of discrimination; (2) disparate impact analysis; or (3) disparate treatment analysis.³⁰⁷ Since direct evidence of discrimination is difficult to come by, plaintiffs often rely on disparate impact analysis or the “effects test.” A disparate impact showing requires a prima facie case that defendant's standards for extending credit to applicants result in a pattern that deviates significantly from that of the general pool of applicants.³⁰⁸ If the plaintiffs cannot make a prima facie case, the action cannot progress. However, if plaintiffs can assert a prima facie case of disparate impact, ^{*958} defendants can still protect themselves under the theory that the defendants' practices have a manifest relationship to creditworthiness.³⁰⁹

Courts have upheld lender use of criminal history, for instance, in assessing creditworthiness for two reasons. First, regulations require the Small Business Administration to consider character, reputation, and credit history of an applicant in deciding whether to extend credit.³¹⁰ Second, courts have held that evaluating criminal history provides relevant information about an applicant's creditworthiness, including judgment and character.³¹¹

Given the difficulty in asserting an Equal Credit Opportunity Act claim against an individual lender, businesses might assert an action against the Small Business Administration under the Act. A business or businesses could rest such a claim on the basis of disparate impact upon a showing that considering criminal history results in fewer loan dollars flowing to businesses

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that are owned by African Americans. The plaintiffs in *Defy Ventures v. U.S. Small Business Administration*³¹² did not assert Equal Credit Opportunity Act claims in their complaint against the Small Business Administration for their denial of Paycheck Protection Program loans--rather, the plaintiffs relied on the Administrative Procedures Act.³¹³ However, the allegations and evidence presented about how African American and Latinx business owners are more negatively impacted by criminal history being considered in loan applications than White business owners might support Equal Credit Opportunity Act claims against the Small Business Administration.³¹⁴

C. Licensing

In addition to the proposed mechanisms discussed above, there are additional principles that lawmakers and judicial deciders should consider in regulating or licensing business activities when evaluating how the law excludes disadvantaged businesses.

*959 1. Inclusivity, Access to Markets, Competition, and Avoiding Zombies

A number of recent scholars have argued for ways to rebuild democracy by understanding and shifting power.³¹⁵ In the context of how the law excludes certain businesses, there are a number of relevant principles. First, inclusivity as a principle is not only about protecting the rights of members of marginalized groups. Inclusivity has significance in terms of ensuring that all individuals have access and opportunity to participate in and benefit from the market economy. If individuals cannot participate and instead continue to be excluded then it is only reasonable for such individuals to pursue nontraditional means of participating in the economy, including informal and other means.³¹⁶

Second, free and fair access to markets, while related to inclusivity, is a distinct principle. Market access has to do with the ability of businesses to reach customers on a local and increasingly national scale. If barriers continue to prevent market entry because of factors such as lack of capital access, self-employed owners are doomed to less success than those with greater capital access.

Third and fourth are competition and the avoidance of zombie businesses, respectively--and these two principles are related and focus on the role of government intervention in the economy. The government's role in ensuring robust competition between many small firms is a simpler proposition when there are in fact many small firms providing the same or similar services and goods. Government interventions in the economy mean that few companies thrive on extremely low credit access costs, while many small firms face significant barriers to accessing credit. Artificial support of zombie businesses threatens the stability of the economy and democratic participation through business ownership. Avoiding, or at least curtailing and setting reasonable limits on, government support for large businesses should be *960 considered when lawmakers and judges enact and review economic development laws geared to support small businesses.

2. Correcting Past Exclusion: Sharing Power, Not Hoarding It

Whether one views the notion of correcting past exclusion through affirmative action in government procurement as important or not, one cannot avoid discussing the topic in considering how governments should frame laws to support disadvantaged businesses. A related principle has to do with sharing power and the means for achieving economic security. A property theory offers some support for advancing these principles in the connect of economic development and support for small businesses.

Professor Gregory S. Alexander has advanced a theory of property based upon human flourishing.³¹⁷ Alexander's core claim in human flourishing theory is that the "vital purpose of property is to enable individuals to live a flourishing life."³¹⁸ Alexander does not address business ownership specifically. Neither does Alexander apply human flourishing theory to the subject of this Article: avoiding laws that exclude disadvantaged businesses from competing for government support, capital access, and markets. Framing government intervention in a manner to avoid excluding certain deserving businesses on the grounds that such exclusion limits human flourishing may sound appealing. Exploring the theoretical connection between human flourishing theory and small business ownership merits further study and discussion.

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Professor Timothy Mulvaney offers a view of property-as-society that combines both libertarian and pecuniary conceptions of property.³¹⁹ Such a view combines notions of property as freedom and control and property as a tool for economic investment.³²⁰ Conceiving of property as a means to avoiding exclusion among disadvantaged business owners could offer theoretical support to the implementation of new legal reforms to programs and institutions.

3. Economic Consequences and Externalities

Finally, one should consider the economic consequences and potential externalities of affirmative steps by government to avoid exclusion of disadvantaged businesses. In instances where private ***961** individuals are seeking to find ways to support businesses owned by disadvantaged owners, cities may benefit from explicit steps to remedy exclusion. For example, mayors may tout efforts to engage with businesses owned by Black, Indigenous, or People of Color as a means for growing local economies and spreading the benefits of open markets.³²¹

Conclusion

The author's goal at the outset of this project was to study whether government procurement preferences resulted in greater small business ownership and financial success for women, African Americans, Latinxs, and business owners from other diverse racial backgrounds. While some research supports increased proportions of business ownership by marginalized groups following the implementation of affirmative action in purchasing programs, research in the area is still sparse. Although more study is needed, what became clear was that such programs were only a small part of a more insidious story. It turns out that otherwise well-intentioned laws designed to support small businesses in fact exclude the most disadvantaged ones.

To tell that story, this Article began by defining disadvantaged business as it is used in federal law and connecting businesses owned by disadvantaged owners and the racial wealth gap. Next, this Article introduced several examples of how economic development laws exclude disadvantaged businesses. Such examples included factoring criminal history into Small Business Administration-backed lending programs; procurement preferences in government purchasing; and recent efforts to include social equity programs in recreational cannabis licensure. Next, this Article included a study of current economic justice campaigns and suggests that these campaigns can--and in some instances already do--support legislation to avoid the exclusion of disadvantaged business. Lastly, this Article discussed incentives and enforcement mechanisms for remedying exclusion, as well as principles to guide lawmaking in this area.

Ultimately, it is not the role of government to put a thumb on the scale for certain businesses or industries. Similarly, it is not government's role to exclude the most disadvantaged businesses for accessing markets and capital. In reality, however, the law does just that. In excluding ***962** disadvantaged businesses, the law limits economic growth and vitality. Such exclusionary acts are ripe for legislative and judicial curtailment.

***963** Appendix: Economic Justice Campaigns

ORGANIZATION (IF ANY)	CAMPAIGN NAME	PROJECT(S) TARGETED	LOCATION	CAMPAIGN OBJECTIVE
	Our HQ2 Wishlist	Amazon's HQ2	USA	Amazon/Nationwide
Becoming Employee Owned	The Workers to Owners Collaborative	Employee-Owned Businesses	National	Employee

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OWN Rochester		Economic Justice	Rochester	Employee
People's Action	People and Planet First	Campaign	USA	Industry Focus
The Black Institute		MWBE	NYC	MWBE
Partnership for Working Families	We Make This City	Campaigns are launched across multiple cities (place-based)	USA	Nationwide
	Americans for Tax Fairness	Campaign	USA	Nationwide
	PrimedOut NYC	Opposing HQ2	Long Island City, NY	Particular Employers
Jews for Racial & Economic Justice	Neighbors Beyond Amazon	Campaign	NYC	Particular Employers
	For Us, Not Amazon	Campaign targeting HQ2 in VA	Virginia	Particular Employers
Our Revolution Arlington	Economic Democracy	Target local corporations in Arlington, VA.	Arlington, VA	Particular Employers
La ColectiVA	Amazon: Forgo Corporate Kickbacks From Virginia and Arlington County	HQ2 in Virginia	Virginia/Arlington County	Particular Employers
	St. Joseph's Accountability Coalition	Economic Justice	Wisconsin	Particular Employers
Grassroots Collaborative	No Amazon Without Us!; Close the Loopholes	Amazon and Illinois State government	Illinois	Particular Employers/Public Budgets
Good Jobs First	Wal-Mart Subsidy Watch	Walmart Subsidies	USA	Particular Employers/ Nationwide
	Bargaining for the Common Good Network	Economic Justice	National	Particular Employers/Public Budget
New Virginia Majority	Economic Justice Campaign	Economic Justice	Virginia	Particular Employers/Small Business
	Texas Forward	State budget	Texas	Public Budget
Keystone Research Center and PA Budget and Policy Center	Corporate Income Taxes	Overhaul PA state budget	Pennsylvania	Public Budget
	Redlight the Gulch	Atlanta Gulch Project (apartments, offices, retail, hotels)	Atlanta, GA	Public Budget
Georgia Stand Up	Redlight the Gulch	Atlanta Gulch Project	Atlanta, GA	Public Budget
Kentuckians for the Commonwealth	Campaign for Our Commonwealth	Economic Justice	Kentucky	Public Budget
One Northside	Economic Justice	Economic Justice Campaign	Chicago, IL	Public Budget
Fair Economy Illinois	People and Planet First Budget for Illinois	Campaign	Illinois	Public Budget

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Reinvent Albany	Business subsidies should be transparent, clean, sensible	Transparency in government	New York State	Public Budget
Community Labor United	Campaigning for the Public Good	Economic Justice	Massachusetts	Public Budget
ACRE Action Center	Refund America Project	Economic Justice	National	Public Budget

Footnotes

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- ¹ See Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”) § 1102(a)(2), [15 U.S.C. § 636\(a\)\(36\)\(A\)\(iii\) \(2020\)](#); CARES Act § 1102(b)(1), *amended by* Paycheck Protection Program and Health Care Enhancement Act, Pub. L. No. 116-139, § 101(a), 134 Stat. 620 (2020) (adding an additional \$310 billion when the initial \$349 billion was depleted within two weeks).
- ² See Ruth Simon & Peter Rudegeair, *In Race for Small-Business Loans, Winning Hinged on Where Firms Bank*, WALL ST. J. (Apr. 20, 2020, 7:32 PM), <https://perma.cc/BP3A-RYQM> (discussing how banks prioritized relationships with businesses, including public companies). Publicly traded companies, such as Shake Shack and Ruth's Chris Steak House, voluntarily agreed to return loan funds; others have not. Jeanne Whalen, *Vague Rules for Paycheck Protection Program Complicate Treasury Effort to Claw Back Money*, WASH. POST (May 5, 2020, 2:38 PM), <https://perma.cc/4Q7U-KTYA>.
- ³ An initial application to access program funds included a sweeping exclusion for business owners with greater than 20% ownership who were incarcerated, on probation or parole, subject to indictment, or convicted of or pleaded guilty to a felony or misdemeanor in the past seven years. See U.S. SMALL BUSINESS ADMINISTRATION, PAYCHECK PROTECTION PROGRAM APPLICATION FORM, OFFICE OF MANAGEMENT AND BUDGET CONTROL NO. 3245-0407 (2020), <https://perma.cc/93AS-FAP6>. The Small Business Administration's interim final rule restricted business eligibility to seek funds if an owner of 20% or more is incarcerated, on probation, on parole, subject to an indictment, or has been convicted of a felony within the past five years. [Business Loan Program Temporary Changes; Paycheck Protection Program](#), 85 Fed. Reg. 20,811 (Apr. 15, 2020) (to be codified at 13 C.F.R. pt. 120). In March 2021, the Biden Administration further relaxed some aspects of the Paycheck Protection Program related to owners with criminal histories and the ability for sole proprietors to borrow funds; although, many small businesses failed to take advantage of these changes because they applied for funds before the changes were enacted. Amara Omeokwe & Ruth Simon, *PPP Loan Changes Came Too Late for Smallest Businesses*, WALL ST. J. (Mar. 22, 2021, 8:00 AM), <https://perma.cc/XM7P-45SG> (discussing efforts to push for retroactivity of rules and facilitate greater borrowing by smaller businesses).
- ⁴ Declaration of Dr. Christopher Wildeman in Support of Plaintiff's Emergency Motion for Preliminary Injunction at 3-4, *Defy Ventures, Inc. v. U.S. Small Bus. Admin.*, 469 F. Supp. 3d 459 (D. Md. 2020).

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- 5 Robert W. Fairlie, *The Impact of Covid-19 on Small Business Owners: Evidence of Early-Stage Losses from the April 2020 Current Population Survey 1* (Nat'l Bureau Econ. Rsch., Working Paper No. 27309, 2020) (analyzing data from the Bureau of Labor Statistics Current Population Survey indicating 41% of African American businesses and 32% of Latinx businesses disappeared in early 2020).
- 6 Businesses owned more than 20% by an individual with a felony conviction, for instance, are ineligible for most Small Business Administration programs. Research suggests Congress originally granted this authority to the agency as an amendment to the National Housing Act. The amendment added Title XII to the Act and section 1106 stated that “[n]o person who has been convicted of committing a felony during and in connection with a riot or civil disorder shall be permitted, for a period of one year after the date of his conviction, to receive any benefit under any law of the United States providing relief for disaster victims.” Housing and Urban Development Act of 1968, Pub. L. No. 90-448, 82 Stat. 476, 567 (1968). This prohibition ties into the Small Business Administration's powers because the agency's 7(b) loans implicate disaster loans, and because this amendment to the National Housing Act uses the phrasing “under any law of the United States providing relief for disaster victims.” See *id.* Further, 13 C.F.R. § 120.110 states that “[t]he following types of businesses are ineligible [for small business loans]: ... Businesses with an Associate who is incarcerated, on probation, on parole, or has been indicted for a felony or a crime of moral turpitude[.]” 13 C.F.R. § 120.110(n) (2020). At the state level, administrative burdens exclude and limit entrepreneurial access to legal business formation.
- 7 See *A.B. & S. Auto Serv., Inc. v. S. Shore Bank of Chi.*, 962 F. Supp. 1056, 1059 (N.D. Ill. 1997) (challenging a lender's denial of credit based on Equal Credit Opportunity Act and bank's practice of considering criminal records); 13 C.F.R. § 120.110(n). The Small Business Administration's 8(a) Program, designed to support women- and minority-owned businesses in federal contracting, requires business owners have “good character” prior to participation. 13 C.F.R. § 124.108 (2020). More broadly, the economic impacts of criminal justice consideration are well-addressed in literature. See, e.g., Jamila Jefferson-Jones, *A Good Name: Applying Regulatory Taking Analysis to Reputation Damage Caused by Criminal History*, 116 W. VA. L. REV. 497, 499-501 (2013); Deborah N. Archer & Kele Stewart, *Making America “The Land of Second Chances”: Restoring Socioeconomic Rights for Ex-Offenders*, 30 N.Y.U. REV. L. & SOC. CHANGE 527, 527-28 (2006).
- 8 For instance, a business owner reported in 2018 that a denial of a certification as a woman-owned business in 2016 cost her as much as \$500,000 in business contracts. Abraham Kenmore, *Senators Get Earful About MWBE Program*, WATERTOWN DAILY TIMES (July 20, 2018), <https://perma.cc/QKM5-5AKA>.
- 9 See ALLIE HOWELL, REASON FOUND., CRIMINAL CONVICTION RESTRICTIONS FOR MARIJUANA LICENSING 7 (2018), <https://perma.cc/9VCN-ESMJ> (discussing how states restrict licensure for marijuana-related business based on criminal conviction history). In a regulatory double whammy, many states require proof of significant assets on hand in order to secure a cannabis business license, although Michigan voters chose to remove that state's capitalization requirement. Amy Biolchini, *Michigan Drops Capitalization Requirements for Recreational Weed Businesses*, MLIVE (July 3, 2019), <https://perma.cc/X4RM-KZH8>.
- 10 See discussion *infra* Part I.A and Section II.B.2.
- 11 In 2018, before the COVID-19 pandemic, US small businesses numbered 30.2 million, employing 47.5% of private workers. OFF. OF ADVOC., U.S. SMALL BUS. ADMIN., 2018 SMALL BUSINESS PROFILE FOR THE UNITED STATES, <https://perma.cc/HB6Q-U842>. Businesses with fewer than 100 employees employ the greatest number of workers, and businesses employing fewer than twenty workers accounted for the greatest number of net job increases in 2015. *Id.* The often-repeated notion proves true: small businesses are engines for economic growth in the United States. Press Release, Off. of Advoc., U.S. Small Bus. Admin., Small Businesses Drive Job Growth in the U.S. (Apr. 25, 2018), <https://perma.cc/UL2D-3RHG>.
- 12 IAN HATHAWAY & ROBERT E. LITAN, BROOKINGS INST., WHAT'S DRIVING THE DECLINE IN THE FIRM FORMATION RATE? A PARTIAL EXPLANATION 1 (2014), <https://perma.cc/42AZ-GQAD>.
- 13 See discussion *infra* Section I.A.

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- 14 See Ruchir Sharma, *The Rescues Ruining Capitalism*, WALL ST. J. (July 24, 2020, 11:15 AM), <https://perma.cc/37NW-TSST>.
- 15 See Ryan Banerjee & Boris Hofmann, *The Rise of Zombie Firms: Causes and Consequences*, BIS Q. REV. (Sept. 2018), <https://perma.cc/ZE94-F4ZC>.
- 16 See Sharma, *supra* note 14 (noting how younger workers say they prefer socialism to the current form of “distorted” capitalism).
- 17 See, e.g., Simon & Rudegeair, *supra* note 2 (noting that those without “the right ties” were often not approved for loans).
- 18 The very definition of “perfect competition” in economics assumes both price consistency and a large number of firms who can make similar products or services. See Joan Robinson, *What is Perfect Competition?*, 49 Q.J. ECON. 104, 104, 112 (1934).
- 19 In so doing, it contributes to the growing exclusion literature. See, e.g., Sarah L. Swan, *Exclusion Diffusion*, 70 EMORY L.J. 847 (2021) (critiquing banning and exclusion laws that have shifted to private rental housing); see also Sarah Schindler, *Architectural Exclusion: Discrimination and Segregation Through Physical Design of the Built Environment*, 124 YALE L.J. 1934, 1942-45 (2015) (discussing the theory behind the built environment as a form of regulation that often leads to discriminatory exclusion).
- 20 Edward W. De Barbieri, *Lawmakers as Job Buyers*, 88 FORDHAM L. REV. 15, 22-23 (2019) (exploring the phenomenon of place-based job creation tax incentives and suggesting a reverse auction approach to save taxpayer resources).
- 21 Edward W. De Barbieri, *Opportunism Zones*, 39 YALE L. & POL’Y REV. 82, 93 (discussing the implementation of a novel tripartite “Use-Transparency-Participation” framework for critiquing the “Opportunity Zone” tool).
- 22 Edward W. De Barbieri, *Connecting Community Control of Infrastructure and Economic Development with Race and Privilege*, 28 J. AFFORDABLE HOUS. & CMTY. DEV. L. 213, 213 (2019).
- 23 Shalini Unnikrishnan & Cherie Blair, *Want to Boost the Global Economy by \$5 Trillion? Support Women Entrepreneurs*, BOS. CONSULTING GRP. (July 30, 2019), <https://perma.cc/TP29-GX24>. Diversity and inclusion within companies matters, too; firms in the top quartile of ethnic diversity are 36% more likely to outperform their fourth quartile industry counterparts. Sundiatu Dixon-Fyle, Kevin Dolan, Vivian Hunt & Sara Prince, *Diversity Wins: How Inclusion Matters*, MCKINSEY & CO. (2020), <https://perma.cc/MEE7-9UKB>.
- 24 See Lynnise E. Phillips Pantin, *The Wealth Gap and the Racial Disparities in the Startup Ecosystem*, 62 ST. LOUIS U. L.J. 419, 457-58 (2018); see also Susan R. Jones, *Small Business and Community Economic Development: Transactional Lawyering for Social Change and Economic Justice*, 4 CLINICAL L. REV. 195, 199-200 (1997).
- 25 See generally MEHRSA BARADARAN, *THE COLOR OF MONEY: BLACK BANKS AND THE RACIAL WEALTH GAP* (2017) (telling the history of Black banks and efforts to undermine African Americans' access to credit).
- 26 See discussion *infra* Part I.B.
- 27 Those who explore strategies to expand the Black middle-class frequently discuss Black families as key beneficiaries of the labor-union movement. Such arguments are important and point to significant policy approaches to expanding ownership and wealth. Small business ownership ought to be considered as one of a number of tools in assisting African Americans, and individuals from other marginalized backgrounds, improve economically. See Pantin, *supra* note 24, at 424. Scholars have proposed a number of solutions for addressing the racial wealth gap through entrepreneurship, including expanding access to capital and affordable financial services. See BARADARAN, *supra* note 25, at 1-2 (examining the structural inequity in Black banking and challenging the argument that Black communities would have ever been able to accumulate wealth given the de jure hurdles placed in their way); Priya Baskaran, *Respect the Hustle: Necessity Entrepreneurship, Returning Citizens, and Social Enterprise Strategies*, 78 MD. L. REV. 323, 333, 374-81

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(2019) (proposing local economic justice incubators for returning citizen entrepreneurs); Pantin, *supra* note 24, at 453-57 (suggesting access to social capital, such as incubators, and looking to alternatives to credit scoring, as well as promoting asset building for the bottom sixty percent of taxpayers, including through homeownership). Booker T. Washington and W. E. B. DuBois each argued that ownership in business was crucial to achieving racial equity. See BARADARAN, *supra* note 25, at 2. Exclusion through criminal background checks in housing demonstrates other ways that law continues to segregate based on race. Deborah N. Archer, *The New Housing Segregation: The Jim Crow Effects of Crime-Free Housing Ordinances*, 118 MICH. L. REV. 173, 176 (2019) (“[T]here is no evidence that these ordinances reduce crime, [but] there is reason to believe that they play a role in restricting access to affordable housing and promoting racial segregation.”).

- 28 Government interventions in the economy to support small business development have occurred at the federal level through the creation of the Small Business Administration, and at the state and local levels through executive agencies. See discussion *infra* Part II.A.
- 29 See generally Housing and Urban Development Act of 1968, Pub. L. No. 90-448, 82 Stat. 476 (1968).
- 30 See Christyne J. Vachon, *Mind the Gap: The Story of People with Ideas and an Economy*, 27 J. AFFORDABLE HOUS. & CMTY. DEV. L. 471, 472 (2019) (discussing state administrative filing burdens facing entrepreneurs).
- 31 See Keith H. Hirokawa, *A Challenge to Sustainable Governments?*, 87 WASH. U. L. REV. 203, 203 (2009) (analyzing a municipal procurement law requiring “green” purchasing practices for cement used in infrastructure development).
- 32 See  *Fullilove v. Klutznick*, 448 U.S. 448, 451 (1980) (upholding preferences in government procurement for business owners from disadvantaged backgrounds).
- 33 See Kenmore, *supra* note 8.
- 34 The plaintiff construction firm in *Adarand Constructors, Inc. v. Peña*, for instance, sued after its lowest bid for a subcontract to install guardrails on a Colorado highway was rejected in favor of a bid by another business whose owners were “socially and economically disadvantaged.”  515 U.S. 200, 205 (1995).
- 35  515 U.S. 200 (1995).
- 36 See  *DynaLantic Corp. v. U.S. Dep’t of Def.*, 115 F.3d 1012, 1016 (D.C. Cir. 1997).
- 37 See  *Adarand*, 515 U.S. at 241 (Thomas, J., concurring in the judgment) (“[S]uch programs engender attitudes of superiority or, alternatively, provoke resentment among those who believe they have been wronged by the government’s use of race.”).
- 38 See  *id.* at 240. In addition, the economic consequences of who bears the costs--“whose ox is gored”--are necessary to consider.  *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 295 n.35 (1978) (quoting ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 133 (1975)).
- 39 See discussion *infra* Section II.B.1.a (discussing the costs associated with winning a federal contract).
- 40 See discussion *infra* Section II.B.1.b.
- 41 See discussion *infra* Section U.C.
- 42 See Diana Novak Jones, *Social Equity Lags Behind Progress in Pot Industry*, LAW360 (June 12, 2020, 7:28 PM), <https://perma.cc/KAZ3-2UA5>.

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- 43 Robert McCoppin & Dan Hinkel, *Who's Profiting Off the Millions that Illinois' Marijuana Business is Bringing in? State Officials are Keeping that Secret*, CHI. TRIB. (Mar. 3, 2020, 7:30 AM), <https://perma.cc/2KRL-XASF>.
- 44 See Mirit Eyal-Cohen, *The Cost of Inexperience*, 69 ALA. L. REV. 859, 861-65 (2018) (observing the valuable knowledge advantage of existing businesses over new ones, and recommending this asymmetry be remedied through the use of information cooperatives, regulatory sandboxes, and mechanisms for compensation).
- 45 See *Economic Justice*, MOVEMENT FOR BLACK LIVES, <https://perma.cc/QEV6-3937> (discussing Black alternative institutions such as cooperatives, land trusts, and culturally responsive health infrastructure).
- 46 For instance, states and cities are investing \$68 billion in business location decisions. These campaigns implicate various bodies of law, from public law areas such as taxation and transfers of wealth, to private law areas such as employment and property law. A number of areas of law have attempted to offer theoretical groundings for economic justice campaigns. Many of these areas focus on a human dignity approach--that every life has equal value. One need not look far to find examples from tort, to transportation, to bail, where the law does not treat all lives equally.
- 47 In the case of laws that exclude new market entrants, barriers, such as those which limit participation based on criminal history, should be interrogated for efficacy. The sorts of exclusions permitted in the Paycheck Protection Program should be challenged and examined for the potential harm done to disadvantaged businesses. Declaration of Dr. Christopher Wildeman in Support of Plaintiff's Emergency Motion for Preliminary Injunction at 3-4, *Defy Ventures, Inc. v. U.S. Small Bus. Admin.*, 469 F. Supp. 3d 459 (D. Md. 2020).
- 48 Given the scope of challenges facing disadvantaged businesses and their owners, a federal small business jobs program, administered through states and cities to avoid the ills of a top-down approach, may be in order.
- 49 See, e.g., Daisy Palacios & Kai Ryssdal, *The Stock Market is Not the Economy*, MARKETPLACE (Sept. 30, 2019), <https://perma.cc/43SP-4KAD> (contrasting the stock market as a means for investors to bet on company performance and the economy, in which workers produce goods and services).
- 50 See UNIV. OF MINN., EXPLORING BUSINESS 176-81 (2016), <https://perma.cc/RQ7Y-N79T>; see also OFF. OF ADVOC., U.S. SMALL BUS. ADMIN., THE SMALL BUSINESS ECONOMY: A REPORT TO THE PRESIDENT 113-36 app. A (2010), <https://perma.cc/9XGE-KXZ2> (presenting data on the number of small businesses and their contributions to the economy).
- 51 OFF. OF ADVOC., U.S. SMALL BUS. ADMIN., FREQUENTLY ASKED QUESTIONS, ADVOCACY: THE VOICE OF SMALL BUSINESS IN GOVERNMENT (2012), <https://perma.cc/6L2T-VTPM>.
- 52 *Size Standards*, U.S. SMALL BUS. ADMIN. [hereinafter *Size Standards*], <https://perma.cc/FD92-UWNP>.
- 53 UNIV. OF MINN., *supra* note 50, at 176.
- 54 *Id.* at 177.
- 55 *Id.*
- 56 ANTHONY BREITZMAN & DIANA HICKS, SMALL BUS. ADMIN., NO. 335, AN ANALYSIS OF SMALL BUSINESS PATENTS BY INDUSTRY AND FIRM SIZE 6 (2008).
- 57 The archetypal narrative of innovation is pervasive. Such a story plays out across biographies of technology entrepreneurs who build small companies into large ones. See, e.g., WALTER ISAACSON, STEVE JOBS xxi (2011). For a recent and comprehensive treatment of the development of large pharmaceutical companies from small ones, see generally GERALD POSNER, PHARMA: GREED, LIES, AND THE POISONING OF AMERICA (2020).
- 58 Press Release, U.S. Census Bureau, Annual Business Survey Release Provides Data on Minority- and Women-Owned Businesses (May 19, 2020) [hereinafter U.S. Census], <https://perma.cc/APY8-5CCX>. Most businesses owned by women

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and African Americans are in healthcare and social services industries with 16.9% of such businesses owned by women and 32% owned by African Americans. *Id.*

59 JOYCE A. KLEIN, BRIDGING THE DIVIDE: HOW BUSINESS OWNERSHIP CAN HELP CLOSE THE RACIAL WEALTH GAP 9 (2017).

60 Williams R. Emmons & Bryan J. Noeth, *Essay No. 1: Race, Ethnicity and Wealth*, in CTR. FOR HOUSEHOLD FIN. STABILITY, FED. RSRV. BANK OF ST. LOUIS, THE DEMOGRAPHICS OF WEALTH: HOW AGE, EDUCATION AND RACE SEPARATE THRIVERS FROM STRUGGLERS IN TODAY'S ECONOMY 12 (2015).

61 *See id.* at 7.

62 *See Pantin, supra* note 24, at 424-25 (discussing how lack of access for certain groups of entrepreneurs perpetuates the racial wealth gap and proposing alternative mechanisms to increase access to various forms of startup capital).

63 *Id.* at 451.

64 *Id.* at 452.

65 In 2017, Arizona repealed an anachronistic requirement for newly formed Limited Liability Companies (“LLCs”)--the newspaper publication requirement. *See What 3 States Have LLC Newspaper Publication Requirements?*, LLC UNIV. (Oct. 12, 2020), <https://perma.cc/64VH-QKU8>. The new law repealed the provision of the Arizona Revised Statutes that required new LLCs to file a notice of publication in a print newspaper. *Id.* Two states--Nebraska and New York--still require LLCs to publish notice in a newspaper, costing as much as \$1,200 in certain areas of New York City. *Id.* A number of states require newspaper publication for formations of new corporations, or doing business under an assumed name. *Id.* Numerous, needlessly complex, and costly requirements make legal business formation more difficult for new entrepreneurs, especially low-income individuals. *Id.* At the same time, governments, especially at the state and local levels, talk a great deal about supporting small businesses. Yet, laws, like the LLC publication requirement and others, make things more complicated. In addition, efforts to direct capital to small businesses are needlessly difficult and cumbersome.

66 *See, e.g., Pantin, supra* note 24, at 447.

67 Jumpstart Our Business Startups Act, [Pub. L. No. 112-106](#), [126 Stat. 306](#) (codified in scattered sections of 15 U.S.C.).

68 *See Patricia H. Lee, Access to Capital or Just More Blues? Issuer Decision-Making Post SEC Crowdfunding Regulation*, 18 TENN. J. BUS. L. 19, 68 (2016).

69 Michelle D. Layser, Edward W. De Barbieri, Andrew J. Greenlee, Tracy A. Kaye & Blaine G. Saito, *Mitigating Housing Instability During a Pandemic*, 99 OR. L. REV. 445 (2021) (manuscript at 25-26) (available at <https://perma.cc/9WLS-3EAP>).




70 Housing instability, the eviction crisis, and persistent homelessness are also significant challenges to address through policy solutions.

71 *See Michelle D. Layser, How Place-Based Tax Incentives Can Reduce Geographic Inequality*, 74 TAX L. REV. 1 (2020) (manuscript at 16, 59). Further, early evidence indicates that only 16% of designated Opportunity Zones received capital investment through the incentive. Patrick Kennedy & Harrison Wheeler, Neighborhood-Level Investment from the U.S. Opportunity Zone Program: Early Evidence 3 (April 15, 2021) (unpublished manuscript) (on file with author).

72 DEDRICK ASANTE-MUHAMMAD, DR. JARED BALL, JAMIE BUELL & JOSHUA DEVINE, NAT L CMTY. REINVESTMENT COAL., BLACK ENTREPRENEURSHIP'S LETHAL PRE-EXISTING CONDITION: THE RACIAL WEALTH DIVIDE DURING THE COVID CRISIS 3 (2021) (on file with author).

73 *See Pantin, supra* note 24, at 451-52.

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- 74 For instance, in the area of property law, Ezra Rosser pushes back against the proponents of Progressive Property Theory on the grounds that it does not go far enough in accounting for systemic racism. Ezra Rosser, *The Ambition and Transformative Potential of Progressive Property*, 101 CALIF. L. REV. 107, 112 (2013). One could argue that with respect to small business ownership and the racial wealth gap, reform must address structural racism.
- 75 See Jones, *supra* note 24, at 199-200.
- 76 See Pantin, *supra* note 24, at 452.
- 77 See RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* 60, 75, 153 (2017).
- 78 See, e.g.,  *Lindsey v. Normet*, 405 U.S. 56, 74 (1972) (“We do not denigrate the importance of decent, safe, and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill Absent constitutional mandate, the assurance of adequate housing and the definition of landlord-tenant relationships are legislative, not judicial, functions.”). For a discussion about the US Constitution and a right to housing, see Lisa T. Alexander, *Occupying the Constitutional Right to Housing*, 94 NEB. L. REV. 245, 248 (2015) (arguing that although there is no American constitutional right to housing, housing rights advocate groups and movements contribute to the advancement of the human right to housing in local laws).
- 79 See, e.g., *Sharpless v. Mayor of Phila.*, 21 Pa. 147, 169 (1853) (finding that public support for a private railroad was permissible under the public purpose doctrine).
- 80 See, e.g.,  *Loan Ass'n v. Topeka*, 87 U.S. 655, 656, 665 (1874) (striking down as impermissible a local bond issuance to support an ironworks company because the city had not established a public purpose in extending its credit).
- 81 For a discussion of the opposition to the rise in chain stores, and anti-chain store legislation at the state and local level, see Richard C. Schragger, *The Anti-Chain Store Movement, Localist Ideology, and the Remnants of the Progressive Constitution, 1920-1940*, 90 IOWA L. REV. 1011, 1013-14 (2005).
- 82 Robinson-Patman Act, Pub. L. No. 74-692, 49 Stat. 1526 (1936) (codified as amended at  15 U.S.C. §§ 13-13b, 21a).
- 83 Schragger, *supra* note 81, at 1014 (quoting JONATHAN J. BEAN, *BEYOND THE BROKER STATE* 12-13 (1996)).
- 84 See *id.* at 1066.
- 85 Frederick M. Rowe, *The Evolution of the Robinson-Patman Act: A Twenty-Year Perspective*, 57 COLUM. L. REV. 1059, 1088 (1957). For additional background on the Robinson-Patman Act, see Terry Calvani, *Government Enforcement of the Robinson-Patman Act*, 53 ANTITRUST L.J. 921, 921-25 (1984); see also Hugh C. Hansen, *Robinson-Patman Law: A Review and Analysis*, 51 FORDHAM L. REV. 1113, 1174-75 (1983); Herbert Hovenkamp, *The Robinson-Patman Act and Competition: Unfinished Business*, 68 ANTITRUST L.J. 125, 125-27 (2000).
- 86 See Gerald D. Nash, *Herbert Hoover and the Origins of the Reconstruction Finance Corporation*, 46 MISS. VALLEY HIST. REV. 455, 455, 466 (1959).
- 87 99 CONG. REC. 6126 (1953) (Representative Wolcott notes the likely expiration of the Reconstruction Finance Corporation as June 30, 1954, and the creation of the Small Business Administration in anticipation of that probability).
- 88 See Frank P. Huddle, *Revival of Small Business*, PITTSBURGH PRESS, Mar. 27, 1945, at 10 (describing how wartime requirements for rapid production consolidated business activity in relatively few large corporations).
- 89 See Frederick B. Schramm, *Small Business*, 33 ANTITRUST L.J. 94, 94 (1967).





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- 90 ROBERT JAY DILGER & SEAN LOWRY, CONG. RSCH. SERV., RL33243, SMALL BUSINESS ADMINISTRATION: A PRIMER ON PROGRAMS AND FUNDING 1 (2020). The Small Business Administration organic statute defines small businesses both in terms of number of employees and in terms of annual revenue. Businesses generally can include those operated not-for-profit, which are generally eligible for federal income tax exemption. In addition, the Small Business Innovation Program and Small Business Technology Transfer Program are available for businesses with fewer than 500 employees.
- 91 Small Business Act of 1953, Pub. L. No. 83-163, § 202, 67 Stat. 232.
- 92 *Id.*
- 93 See Larry D. Gilbertson, *Small Business Financing Under the Small Business Act and the Small Business Investment Act of 1958*, 8 KAN. L. REV. 538, 538 (1960); Herbert F. Sturdy, *Federal Aids to Small Business*, 11 BUS. LAW. 39, 39, 41 (1956).
- 94 W. Lee & S. L. Black, *Small Business Development: Immigrants' Access to Loan Capital*, 29 J. SMALL BUS. & ENTREPRENEURSHIP 193, 204 (2017) (reporting an interview with a lender describing loan criteria that exclude non-US citizens from borrowing funds guaranteed by the Small Business Administration).
- 95 See, e.g., *Hall v. ECDI*, No. 1:13-CV-1793, 2013 U.S. Dist. LEXIS 155607, at *1 (N.D. Ohio Oct. 30, 2013) (claiming plaintiff was denied a small business loan because of his prior felony conviction). The court in *Hall* found that the plaintiff's cause of action failed to state a claim. *Id.* at *3. The Plaintiff was trying to place his claim under the Truth in Lending Act, but never gave any specific provisions so the Court dismissed the claim. *Id.*
- 96 Housing and Urban Development Act of 1968, Pub. L. No. 90-448, 82 Stat. 476, 567 (“No person who has been convicted of committing a felony during and in connection with a riot or civil disorder shall be permitted, for a period of one year after the date of his conviction, to receive any benefit under any law of the United States providing relief for disaster victims.”).
- 97 See BARADARAN, *supra* note 25, at 46, 70-71, 76-77, 87, 278.
- 98 See U.S. Census, *supra* note 58; Andrew Soergel, *Most of America's Businesses Run by White Men*, U.S. NEWS & WORLD REP. (Sept. 1, 2016), <https://perma.cc/AE6Q-75RU>.
- 99 Alaska Div. of Econ. Dev., *Loan Programs*, DEP'T OF COM., CMTY., & ECON. DEV., <https://perma.cc/L222-MEVS>.
- 100 Alaska Div. of Econ. Dev., *Limited Entry Permits for Sale*, DEP'T OF COM., CMTY., & ECON. DEV., <https://perma.cc/BVF4-S77Q>.
- 101 Gunnar Knapp, *Local Permit Ownership in Alaska Salmon Fisheries*, 35 MARINE POL'Y 658, 658 (2011).
- 102 Government subsidizing economic activity in this instance amounts to a form of economic gentrification: as commercial fishery businesses become more profitable, outside owners are willing to pay more for permits to enter particular areas, which reduces local ownership of fishing permits. *Id.* at 665-66.
- 103 Under the Initiative, the US Department of the Treasury awarded funds to forty-seven states, the District of Columbia, five US territories, and local governments in three states based on a formula that takes into account local unemployment data. See *State Small Business Credit Initiative Preliminary Allocation Table*, U.S. DEP'T OF TREASURY, <https://perma.cc/LS5R-LCDM>.
- 104 CTR. FOR REG L ECON. COMPETITIVENESS & CROMWELL SCHMISSEUR, PROGRAM EVALUATION OF THE US DEPARTMENT OF TREASURY STATE SMALL BUSINESS CREDIT INITIATIVE 17 (2016), <https://perma.cc/NP9G-E5BL>.




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- 105 BUSINESS MENTOR NY, <https://perma.cc/D7VM-VKQ6> (describing the programing and touting that small business success increases with business knowledge and guidance of experienced professionals).
- 106 *See infra* Section II.B.4.
- 107 *See* De Barbieri, *supra* note 20, at 15.
- 108 *See* TIMOTHY P. R. WEAVER, BLAZING THE NEOLIBERAL TRAIL: URBAN POLITICAL DEVELOPMENT IN THE UNITED STATES AND THE UNITED KINGDOM 26 (2016).
- 109 *See, e.g.*, James Rowen, *The Foxconn Road to Ruin*, URBAN MILWAUKEE (Mar. 9, 2020, 3:54 PM) <https://perma.cc/39VN-VHBZ> (discussing Wisconsin's plan to spend \$630 million on roadwork related to the construction of a new flat-panel display plant within the state).
- 110 Mayor Fiorello LaGuardia constructed a number of markets throughout New York City during his term in office, including Essex Street Market, Moore Street Market, and others. *See* Andrew Gustafson, *New York City's Public Markets, Past and Present*, TURNSTILE TOURS (May 3, 2019), <https://perma.cc/7E9B-3TV5>. The Fulton Street Fish Market was recently relocated and continues to operate for food distribution. *See History*, NEW FULTON FISH MARKET COOPERATIVE AT HUNTS POINT, <https://perma.cc/64SP-AY3A>. Hunts Point Terminal Market remains the major distribution point for fresh produce on the North East Coast. *See* Emily Payne, Alexina Cather & Charles Platkin, *Hunts Point Distribution Center: A Report with a Spotlight on the Produce Market*, HUNTER COLL. N.Y.C. FOOD POL'Y CTR. (Jan. 10, 2018), <https://perma.cc/T9CA-TTYF>.
- 111 *See Tax Incentive*, MASS. LIFE SCIS. CTR., <https://perma.cc/7DWB-L5QM> (discussing how to be eligible for the tax incentive, including that companies must hire ten permanent equivalent employee positions and retain them for a certain period of time). Funds allocated for this program totaled \$25 million per year for ten years. MASS. DEPT OF REVENUE, TECHNICAL INFORMATION RELEASE 08-23: LIFE SCIENCES TAX INCENTIVE PROGRAM UNDER ST. 2008, C. 130 (Nov. 21, 2008).
- 112 In a recent report, the director of the Massachusetts Life Sciences Center drew attention to the “dearth of diversity” in the sector, in addition to describing efforts to fund women-led ventures and reporting that only 2% of college interns identified as a race other than Caucasian. MASSACHUSETTS LIFE SCIENCES CENTER, FISCAL YEAR 2020 ANNUAL REPORT 1, 12, 28 (2020), <https://perma.cc/9RD9-EXGY>.
- 113 *What is Jump Start Philly?*, CITY OF PHILA. BUS. SERVS., <https://perma.cc/2NVM-SXRJ>. It remains unclear the extent to which this incentive will actually drive business location decisions since many businesses do not show a profit, or significant taxable liability, in the first few years of operations. New York State also offered a similar incentive to the one in Philadelphia. *See START-UP NY Program*, EMPIRE STATE DEVELOPMENT, <https://perma.cc/VD6D-USWQ>.
- 114 The author was unable to find data specifically related to the impact of Jump Start Philly, or other similar programs, on women- and minority-owned businesses.
- 115 *About the Office of Small Business Development Centers*, U.S. SMALL BUSINESS ADMINISTRATION OFFICE OF SMALL BUSINESS DEVELOPMENT CENTERS, <https://perma.cc/DZ22-DNKW>.
- 116 *Id.*
- 117 *Id.*
- 118 *See* Lee & Black, *supra* note 94, at 197.
- 119 Kathryn Kranhold & Chris Zubak-Skees, *Small Business Loan Data Includes Little About Race*, CTR. FOR PUB. INTEGRITY (July 6, 2020), <https://perma.cc/Y9YW-5EEJ>. For a discussion of ownership of small business assets, see *supra* Part I.B.

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- 120 See Memorandum in Support of Emergency Motion for Preliminary Injunction at 1, 4, *Defy Ventures, Inc. v. U.S. Small Bus. Admin.*, 469 F. Supp. 3d 459 (D. Md. 2020) (No. 1:20-cv-01838), 2020 WL 4493306.
- 121 See *Defy Ventures, Inc. v. U.S. Small Bus. Admin.*, 469 F. Supp. 3d 459, 478-79 (D. Md. 2020). The lawsuit challenges the felon exclusion of the Paycheck Protection Program: [Plaintiffs] allege that: 1) in violation of the Administrative Procedure Act (“APA”), the criminal record exclusions exceed statutory authority and are not in accordance with law; 2) in violation of the APA, the criminal record exclusions are arbitrary and capricious and an abuse of discretion; and 3) in violation of the APA, the criminal record exclusions were adopted without observance of procedure required by law. *Id.* at 468. The court found that the plaintiffs would likely not be successful with the first allegation that the exclusions are contrary to the law. See *id.* at 474. The court also found that the plaintiffs would be unlikely to succeed on the arbitrary and capricious claim as to the last June 24 interim final rule. See *id.* at 476. The court also found that the plaintiffs would not be successful on the third allegation. See *id.* at 477. It seems, therefore, that allegations including violations of the APA are difficult for a plaintiff to prove. The ACLU did point out in their lawsuit the disparate impact of the felon exclusion on marginalized groups. See Memorandum in Support of Emergency Motion for Preliminary Injunction at 4, *Defy Ventures*, 2020 WL 4493306. A section 1983 claim may be a better claim to argue. Obviously, on its face the rule would not be a violation of the Equal Protection Clause, but “in effect” this rule has a disparate impact on minorities due to the correlation between race and convictions. See, e.g.,  *Jackson v. Se. Pa. Transp. Auth.*, No. 2:08-cv-4572, 2009 WL 637460, at *1-3 (E.D. Pa. Mar. 10, 2009) (laying out section 1983 disparate impact theory challenging similar felon exclusion). For a summary of Equal Protection and Due Process Clause Challenges, see also Ann K. Wooster, Annotation, *Equal Protection and Due Process Clause Challenges Based on Racial Discrimination-Supreme Court Cases*, 172 A.L.R. Fed. 1, 1 (2001).
- 122 See, e.g., TIM LOHRENTZ, GABRIELLE LESSARD, HUI CHANG LI & RAVINDER MANGAT, THE INSIGHT CTR. FOR CMTY. ECON. DEV., STATE POLICIES AND PROGRAMS FOR MINORITY- AND WOMEN-BUSINESS DEVELOPMENT 16 (2007) (listing inclusive business practices in government contracting and procurement).
- 123  488 U.S. 469 (1989).
- 124 Preferences for federal purchasing have a strong protectionist history, including the Buy American Act of 1933, and even back to 1844 where legislatures required agencies to buy domestically. CHRISTOPHER MCCRUDDEN, BUYING SOCIAL JUSTICE: EQUALITY, GOVERNMENT PROCUREMENT, & LEGAL CHANGE 26 (2007). While the Small Business Act originally included the authority for the Small Business Administration to engage in inclusive procurement practices, the agency did not do so until President Nixon issued  Executive Order 11,458 in 1969, creating the Office of Minority Business Enterprise and directing federal agencies to support minority-owned business enterprises.  Exec. Order No. 11,458, 34 Fed. Reg. 4937 (Mar. 7, 1969).
- 125 It is true that the federal government has achieved its stated goal of 5% in procurement contracts to small, disadvantaged business. See OFFICE OF POL’Y, PLAN. & LIAISON, U.S. SMALL BUS. ADMIN., FY2019 SMALL BUSINESS PROCUREMENT SCORECARD (2020), <https://perma.cc/S8EK-JUES>. However, those most in need continue to be excluded for contracting opportunities. See Carolyn M. Brown, *Cost of Doing Business with the Federal Government on the Rise*, BLACK ENTER. (Jan. 11, 2017), <https://perma.cc/UBE3-FD9Z> (detailing how minority-owned businesses spend more to compete for government contracts and large businesses win contracts far more often).
- 126 See Grant H. Lewis, *Effects of Federal Socioeconomic Contracting Preferences*, 49 SMALL BUS. ECON. 763, 765, 768 (2017) (finding the participants in the Small Business Administration’s 8(a) program perform no better than other businesses owned by preferential owners who do not participate in the 8(a) program).
- 127 Aaron K. Chatterji, Kenneth Y. Chay & Robert W. Fairlie, *The Impact of City Contracting Set-Asides on Black Self-Employment and Employment*, 32 J. LAB. ECON. 507, 513 (2014).











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- 128 FED. PROCUREMENT DATA SYS., SMALL BUSINESS GOALING REPORT FISCAL YEAR 2009, <https://perma.cc/52R5-T24H>.
- 129 *See Brown, supra* note 125.
- 130 *Id.*
- 131 *Id.*
- 132 *See Assess Your Business*, U.S. SMALL BUS. ADMIN., <https://perma.cc/H7GP-KGHB>.
- 133 AMY G. COX, NANCY Y MOORE & CLIFFORD A. GRAMMICH, RAND CORP. NAT'L DEF. RSCH. INST., IDENTIFYING AND ELIMINATING BARRIERS FACED BY NONTRADITIONAL DEPARTMENT OF DEFENSE SUPPLIERS ix (2014), <https://perma.cc/Q5YW-8B4C>.
- 134 *Id.* at x.
- 135 *Id.* at 24.
- 136 *Id.* at 19.
- 137  31 U.S.C. § 3903(a)(1)(B). This provision was amended by the National Defense Authorization Act for Fiscal Year 2020 to cut the payment period from 30 days to a “goal” of 15 days. *See* National Defense Authorization Act for Fiscal Year 2020,  31 U.S.C. § 3903(10)-(11).
- 138 *See Eyal-Cohen, supra* note 44, at 861, 865 (explaining that while one form of new regulation may be an efficient correction to a market failure, new market distortions may result from the regulation's distributional effects).
- 139 *See* Alexander O. Canizares, *Cost or Pricing Data Requirements: Emerging Developments and Risk Areas*, 55 PROCUREMENT L. 19, 24 (2020).
- 140 *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-01-346, FEDERAL PROCUREMENT: TRENDS AND CHALLENGES IN CONTRACTING WITH WOMEN-OWNED SMALL BUSINESSES 29 (2001).
- 141 William Gist, *Is Your Business Ready for Government Contracting?*, AM. EXPRESS (June 16, 2016), <https://perma.cc/M6UM-WJKG>.
- 142 *See id.*
- 143 *See* Kenneth Kelly, *10 Tips to Help You Bid for Government Contracts*, AM. EXPRESS (Dec. 15, 2017), <https://perma.cc/EMS9-S3DB>.
- 144 William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. 116-283, § 870, 134 Stat. 3388 (setting compliance obligations of agencies with respect to small and disadvantaged businesses).
- 145 *Id.* § 871 (requiring category management trainings for agency staff to meet procurement requirements).
- 146 These groups include service-disabled veterans-owned small businesses, Historically Underutilized Business Zones; Small Disadvantaged Businesses, and Women-Owned Small Businesses.  15 U.S.C. § 644(g)(1)(A).
- 147 *See id.*







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- 148  *Id.* § 644(g)(1)(B) (“The Small Business Administration and the Administrator for Federal Procurement Policy shall ... insure that the cumulative annual prime contract goals for all agencies meet or exceed the Governmentwide prime contract goal established by the President pursuant to this paragraph.”).
- 149  15 U.S.C. § 644(g)(2)(A)-(D).
- 150 See Jolie Lee, *Small Business Contracting Goal Remains Elusive*, FED. NEWS NETWORK (Sept. 20, 2012, 3:57 AM), <https://perma.cc/7HEL-S8KM>.
- 151 *Id.*
- 152 See Press Release, U.S. Small Bus. Admin., Federal Government Achieves Small Business Contracting Goal for Sixth Consecutive Year with Record-Breaking \$120 Billion to Small Businesses (June 25, 2019), <https://perma.cc/48UV-PNTW>. The federal government recently announced that targets for Women-Owned Small Businesses were achieved in fiscal year 2019. Press Release, U.S. Small Bus. Admin., Federal Government Exceeds Small Business Contracting Goals by Awarding Record-Breaking \$132.9 Billion Small Businesses (Aug. 12, 2020), <https://perma.cc/US9R-YKQJ>.
- 153 See U.S. GOVT ACCOUNTABILITY OFF., GAO-19-623T, SMALL BUSINESS ADMINISTRATION CONTRACTING PROGRAMS: ADDITIONAL MEASURES NEEDED TO IMPLEMENT GAO RECOMMENDATIONS (2019).
- 154 Denise Benjamin Sirmons, *Federal Contracting with Women-Owned Businesses: An Analysis of Existing Challenges and Potential Opportunities*, 33 PUB. CONT. L.J. 725, 759 (2004).
- 155 *Id.*
- 156 See *id.* (quoting H.R. REP. NO. 103-712, at 224; H.R. REP. NO. 103-712, at 224, *reprinted in* 1994 U.S.C.C.A.N. 2607, 2654) (Congress clarified that the 5% procurement target for Women-Owned Small Businesses “was intended as simply a ‘target that will result in greater opportunities for women to compete for federal contracts’”).
- 157 Rachel N. Herrington, *Five Years In: A Review of the Women-Owned Small Business Federal Contract Program*, 45 PUB. CONT. L.J. 359, 360 (2016).
- 158 *Id.* at 377-80 (proposing to “change the economically disadvantaged categorization” and “expand[] available industries to [Women-Owned Small Businesses]”).
- 159 See Kathleen Mee, Note, *Improving Opportunities for Women-Owned Small Businesses in Federal Contracting: Current Efforts, Remaining Challenges, and Proposals for the Future*, 41 PUB. CONT. L.J. 721, 742 (2012). A small business owner also opined before a Congressional Committee on Small Business and Entrepreneurship: “I think [with regard to] the Federal goals, there are absolutely no rewards and there are no consequences, so why set [those goals]?” *Id.*
- 160 *Id.*
- 161 *Id.*
- 162 Justin Marion, *Affirmative Action and the Utilization of Minority-and Women-Owned Businesses in Highway Procurement*, 49 ECON. INQUIRY 899, 914 (2011).
- 163 Lewis, *supra* note 126, at 780-81 (“[R]ules designed to fix today’s problems may only create new opportunities for rent seeking.”).
- 164 See *Size Standards*, *supra* note 52.
- 165 13 C.F.R. § 121.101(a) (2020).

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- 166 *Id.* § 121.102(a).
- 167 *See* U.S. SMALL BUS. ADMIN., TABLE OF SMALL BUSINESS SIZE STANDARDS MATCHED TO NORTH AMERICAN INDUSTRY CLASSIFICATION SYSTEM CODES (2019), <https://perma.cc/SD2B-S7U7>.
- 168 *Size Standards*, *supra* note 52.
- 169 *Id.*
- 170  13 C.F.R. § 121.104(a).
- 171 *Id.* § 121.106(a) (noting the exclusion of volunteers from the average number of employees).
- 172 *Id.* § 121.106(b)(1).
- 173 *Id.* § 121.108(e)(3).
- 174 *See* U.S. SMALL BUS. ADMIN., *supra* note 167.
- 175 The text of the local plan used the pejorative term “Orientals,” which tracked the language used for race-based preferences in *Fullilove*.
- 176 *See*  *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 478, 505 (1989).
- 177  448 U.S. 448 (1980).
- 178  *Id.* at 453, 492.
- 179 In using the term “minority business,” the author is referring to the language used in *Fullilove* and similar cases and statutes. Elsewhere, the author refers to businesses owned by members of “marginalized” groups to reflect what the author considers to be a more accurate characterization of the individual business owners referred to in these laws and cases which interpret them.
- 180  *Fullilove*, 448 U.S. at 473.
- 181 *See*  *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 204 (1995).
- 182  *Id.* at 204-05.
- 183  *Id.* at 206.
- 184 *See* Brief for the Respondents,  *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995) (No. 93-1841), 1994 WL 694992, at *9.
- 185 *Id.*
- 186 *Id.* at *11.
- 187 *See*  *Adarand*, 515 U.S. at 239 (Scalia, J., concurring in the judgment) (“To pursue the concept of racial entitlement--even for the most admirable and benign of purposes--is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred.”).

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- 188 For Justice Scalia, it boiled down to a blending of all races into a national one. “In the eyes of government,” he writes
in concurrence, “we are just one race here. It is American.” *Id.*
- 189  115 F.3d 1012 (D.C. Cir. 1997).
- 190 See  *id.* at 1013.
- 191  *Id.* at 1020.
- 192  *DynaLantic Corp. v. U.S. Dep’t of Def.*, 885 F. Supp. 2d 237, 242, 279 (D.D.C. 2012) (holding that Congress had
a “compelling interest in eliminating the roots of racial discrimination in federal contracting” and that the government
had “established a strong basis in evidence to support its conclusion that remedial action was necessary to remedy that
discrimination”).
- 193 *DynaLantic Corp. v. Department of Defense: Fed Ends 19-Year Battle With DynaLantic*, CTR. FOR INDIVIDUAL
RTS. (Jan. 31, 2014) [hereinafter CTR. FOR INDIVIDUAL RTS.], <https://perma.cc/LB66-7PEB>.
- 194 See  *Grutter v. Bollinger*, 539 U.S. 306, 339, 342 (2003).
- 195 CTR. FOR INDIVIDUAL RTS., *supra* note 193.
- 196 836 F.3d 57 (D.C. Cir. 2016).
- 197 *Rothe Dev., Inc. v. Dep’t of Def.*, 107 F. Supp. 3d 183, 187 (D.D.C. 2015).
- 198 *Id.* at 187-88.
- 199 The six factors are as follows: (1) that alternative race-neutral remedies have proved unsuccessful in addressing the
discrimination targeted here; (2) program flexibility; (3) program is neither over- nor under-inclusive; (4) program
imposes temporal limits; (5) numerical proportionate goals; and (6) set-asides designed to minimize burden on non-
minority-owned firms. *Id.* at 208-09.
- 200 *Rothe*, 836 F.3d at 74.
- 201  707 N.E.2d 871 (Ohio 1999).
- 202 See  *id.* at 922.
- 203 See  *id.* at 926.
- 204 See *id.* at 915, 917 (referring to the state's procurement system as “an old boys club”).
- 205 See Charlie Penrod & Christopher L. Atkinson, *Rothe Development v. U.S. Department of Defense: Overcomplicating
the Uncomplicated*, 25 TEX. J. ON C.L. & C.R. 81, 83 (2019).
- 206 See George R. Gray & Barbara L. Peery, *The U.S. Supreme Court's Croson Decision: Effects on Small Businesses
Contracting with Non-Federal Public Entities*, 28 J. SMALL BUS. MGMT. 54, 58-59 (1990).
- 207 JON WAINWRIGHT & COLETTE HOLT, NAT’L COOP. HIGHWAY RSCH. PROGRAM, GUIDELINES FOR
CONDUCTING A DISPARITY AND AVAILABILITY STUDY FOR THE FEDERAL DBE PROGRAM 11 (2010).

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- 208 MARÍA E. ENCHAUTGUI, MICHAEL FIX, PAMELA LOPREST, SARAH C. VON DER LIPPE & DOUGLAS
WISSOKER, URBAN INST., DO MINORITY-OWNED BUSINESSES GET A FAIR SHARE OF GOVERNMENT
CONTRACTS? x (1997), <https://perma.cc/B65U-457E>.
- 209 *Id.*
- 210 *See id.* at ix.
- 211 *See* MGT CONSULTING GRP., CITY OF WINSTON-SALEM 2019 DISPARITY STUDY 4 (2019), <https://perma.cc/J9HE-D23L>.
- 212 Yuhua Qiao, Khi V. Thai & Glenn Cummings, *State and Local Procurement Preferences: A Survey*, 9 J. PUB.
PROCUREMENT 371, 381 (2009).
- 213 *See* Mitchell F. Rice, *Justifying State and Local Government Set-Aside Programs Through Disparity Studies in the Post-
Croson Era*, 52 PUB. ADMIN. REV. 482, 483 (1992).
- 214 U.S. GOVT ACCOUNTABILITY OFF., GAO-01-273, SMALL BUSINESS: STATUS OF SMALL
DISADVANTAGED BUSINESS CERTIFICATIONS 6-7 (2001).
- 215 *Id.* at 2. While the Small Business Administration projected that 30,000 Small Disadvantaged Businesses would be
certified, only 9,034 were actually certified. *Id.* Of this amount, around 6,400 firms were “automatically grandfathered”
into the Small Disadvantaged Business program because they were 8(a) certified. *Id.* The agency approved 78% of
complete applications. *Id.* at 9.
- 216 *Id.* at 10.
- 217 *See* Memorandum from the U.S. Small Bus. Admin. Assistant Inspector Gen. for Investigations to the U.S. Small Bus.
Admin. Associate Admin. for the Off. of Bus. Dev. (Nov. 13, 2012).
- 218 *Id.* The study recommended that the reviewer receive an additional thirty days to decide whether to retain or terminate
an 8(a) firm, and that there should be a “decision pending” category to differentiate and provide more flexibility from
the only categories of retention or termination. *Id.*
- 219 Federal agencies incorrectly reported contract actions in the Federal Procurement Data System-Next Generation
as being awarded to eligible firms. U.S. SMALL BUS. ADMIN. OFF. OF INSPECTOR GEN., REP. NO. 14-18,
AGENCIES ARE OVERSTATING SMALL DISADVANTAGED BUSINESS AND HUBZONE GOALING CREDIT
BY INCLUDING CONTRACTS PERFORMED BY INELIGIBLE FIRMS 7 (2014).
- 220 In 2016, the Small Business Administration Office of Inspector General found that the Associate Administrator for
Business Development approved thirty firms into the 8(a) program without completely documenting in the data system
how concerns that lower-level reviewers raised were resolved, and recommended clearly documenting justifications
for approving or denying 8(a) program applicants and documenting how the lower-level concerns were resolved. U.S.
SMALL BUS. ADMIN. OFF. OF INSPECTOR GEN., REP. NO. 16-13, SBA'S 8(A) BUSINESS DEVELOPMENT
PROGRAM ELIGIBILITY 4 (2016) [hereinafter U.S. SMALL BUS. ADMIN., REP. NO. 16-13]. A 2017 follow-up
of this study showed that the Small Business Administration resolved eligibility concerns for twenty of these thirty
firms and recommended conducting continuing eligibility reviews for the remaining ten firms, as well as developing
specific measurements to monitor performance and compliance of 8(a) program admitted applicants where there were
different opinions between the approver and the reviewer. U.S. SMALL BUS. ADMIN. OFF. OF INSPECTOR GEN.,
REP. NO. 17-15, REASSESSMENT OF ELIGIBILITY REQUIREMENTS FOR 30 FIRMS IN SBA'S 8(A) BUSINESS
DEVELOPMENT PROGRAM 4 (2017). Finally, in 2018, another Small Business Administration Office of the Inspector
General study found that Small Business Administration reviews did not consistently pinpoint ineligible firms in the
8(a) program, in that twenty of twenty-five firms reviewed should have been removed, and those firms were receiving
\$126.8 million in 8(a) set-aside contracts. U.S. SMALL BUS. ADMIN. OFF. OF INSPECTOR GENERAL, REP. NO.

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18-22, IMPROVEMENTS NEEDED IN SBA'S OVERSIGHT OF 8(A) CONTINUING ELIGIBILITY PROCESSES 4, 7, 9, 16 (2018) [hereinafter U.S. SMALL BUS. ADMIN., REP. NO. 18-22].

221 See U.S. SMALL BUS. ADMIN., REP. NO. 18-22, *supra* note 220, at 7.

222 *Id.* at 5-6, 8, 11.

223 THE MODEL PROCUREMENT CODE FOR STATE AND LOCAL GOVERNMENTS. (1979). Article 11 of the Model Code contains provisions addressing assistance to small and disadvantaged business. *Id.* at 63.

224 Qiao et al., *supra* note 212, at 380-81 (citing Jerrell D. Coggburn, *Exploring Differences in the American States' Procurement Practices*, 3 J. PUB. PROCUREMENT 3, 11 (2003)).

225 See Chatterji et al., *supra* note 127, at 508. Louisiana ended its program in 1996, Ohio ended its program in 1998, Florida ended its program in 2000, and Oklahoma ended its program in 2001, with Colorado's program undergoing minor revisions in 1996, Minnesota ending its goal-based program in 1998, and New Hampshire ending its race- and gender-based goals in transportation programs in 1999. LOHRENTZ ET AL., *supra* note 122, at 36-37.

226 LOHRENTZ ET AL., *supra* note 122, at 26.

227 See *id.*

228 GOVERNING INST., ACQUISITIONS 2019 STATE OF PROCUREMENT: 5 TRENDS THAT ARE RESHAPING HOW GOVERNMENTS BUY 3 (2019).

229 *Id.*

230 See *id.* For a discussion of local purchasing preferences, see Katherine Barrett & Richard Greene, *In Government Procurement, Buying Local is Popular. But Is It Beneficial?*, GOVERNING (Mar. 2018), <https://perma.cc/9HC2-Z8K7>. To implement technology in how cities purchase goods and services, some cities are partnering to create the website "marketplace.city." The site shares information about vendors to improve pricing and data in procurement. For more information, see MARKETPLACE.CITY, <https://perma.cc/X2NE-MM88>.

231 N.Y.C., N.Y., Loc. L. No. 22 (Mar. 18, 2015); see also N.Y.C., N.Y., ADMIN. CODE § 6-139 (2015).

232 See CITY COUNCIL OF CITY OF N.Y., FISCAL YEAR 2021 ADOPTED EXPENSE BUDGET ADJUSTED SUMMARY/SCHEDULE C 5 (2020); *Worker Cooperative Business Development Initiative*, NYC BUS., <https://perma.cc/5QHR-M58S>.

233 The author previously was employed by a legal services organization that was a member of the New York City Worker Cooperative Business Development Initiative and lobbied to support its continuation.

234 NYC SMALL BUS. SERVS., MAYOR'S OFF. OF CONT. SERVS., FY2017-2019 WORKING TOGETHER ADDENDUM 4-5, <https://perma.cc/CJG3-SDE6>.

235 The Institute and Network obtained the entity name data through a Freedom of Information Law request.

236 Radix Media LLC is a self-identified worker cooperative, according to the company's website. *About*, RADIX MEDIA, <https://perma.cc/Q865-6HVC>. In this case, the entity selected a Limited Liability Company entity form, with governance practices that make it a worker cooperative. See *id.* In addition to being worker-owned, Radix Media is also unionized with Local 1 of the Amalgamated Lithographers Union/International Brotherhood of Teamsters. *Id.*

237 Three entities were New York not-for-profit corporations, one is a New Jersey business corporation that self-identifies as a US veteran-owned business, one is a Delaware business corporation, and one is a Delaware limited liability company. The remaining entities are all either New York business corporations or limited liability companies. Of the remaining

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New York entities, two are minority- and women-owned businesses certified by New York City, and one is veteran-owned.

- 238 Alaska, Arizona, California, Colorado, Delaware, Illinois, Maine, Massachusetts, Michigan, Montana, Nevada, New Jersey, Oregon, Vermont, Washington, and the District of Columbia. Jeremy Berke, Shayanne Gal & Yeji Jesse Lee, *Marijuana Legalization is Sweeping the U.S. See Every State Where Cannabis Is Legal*, BUS. INSIDER (Apr. 14, 2021, 8:14 PM), <https://perma.cc/7BQB-GWY9>. Voters in Arizona, Montana, New Jersey, and South Dakota approved referendums in November 2020 making recreational cannabis legal. Lauren Dezenski, *Montana, Arizona, New Jersey, South Dakota and Mississippi Approve Marijuana Ballot Measures, CNN Projects*, CNN POLS. (Dec. 7, 2020, 4:38 PM), <https://perma.cc/TV3L-46H7>. South Dakota's referendum was overturned by a judge in February 2021. Teo Armus, *South Dakota Voters Said Yes to Legalizing Marijuana. But a Judge Ruled It's Unconstitutional*, WASH. POST (Feb. 9, 2021, 6:44 PM), <https://perma.cc/8RPY-2GM7>. New York's state government enacted a recreational cannabis law on March 31, 2021. Andrew Cuomo (@NYGovCuomo), TWITTER (Mar. 31, 2021, 11:02 AM), <https://perma.cc/88XG-94ZB>.
- 239 See Novak Jones, *supra* note 42; Raymon Troncoso, *Deadline for Illinois' First Marijuana Social Equity Grants is July 20*, S. ILLINOISAN (Aug. 20, 2020), <https://perma.cc/FY5H-JZS8>.
- 240 See Novak Jones, *supra* note 42.
- 241 See *Id.* Advocates for marijuana legalization have called out how people of color are disproportionately impacted by anti-drug laws. *Id.* A senior policy advisor for the Minority Cannabis Industry Association indicated how not including minority applicants at the beginning of the process has excluded people of color from licensing. *Id.*
- 242 *Id.* Currently, social equity applicants are limited to “34 licenses [of 569] that were ‘forfeited, cancelled, revoked, or never issued but which could have been issued without exceeding the statewide cap on the number of retail licenses set in rule by the board.’” *Id.*
- 243 *Colorado Lawmakers Pass Cannabis Social Equity Measure*, MARIJUANA BUS. DAILY (June 16, 2020), <https://perma.cc/TLA6-9ASA>. Previously, Colorado's accelerator program allowed low-income owners to obtain cultivation or manufacturing licenses and receive mentorship from existing companies to get started as well as financial incentives. *Id.* Legislation passed in June 2020 defined social equity license applicants. Kyle Jaeger, *Colorado Governor Signs Marijuana Social Equity Bill Letting Him Expedite Possession Pardons*, MARIJUANA MOMENT (June 29, 2020), <https://perma.cc/QL6M-6ZAJ>. This legislation allows the governor to bypass prosecutors and judges to pardon those with prior marijuana convictions. *Id.*
- 244 *Id.* A recreational marijuana business owner with a social equity license said, “Social equity is about righting the wrongs of the drug war and giving diversity a strong foot hold in the developing industry.” *Id.*
- 245 See Tiney Ricciardi, *Denver's Marijuana Businesses Lack Diversity in Ownership and Employment, City Study Finds*, DENVER POST (June 8, 2020, 4:22 PM), <https://perma.cc/P2BY-UG6C>.
- 246 See Troncoso, *supra* note 239.
- 247 Novak Jones, *supra* note 42.
- 248 Troncoso, *supra* note 239.
- 249 *Id.*
- 250 *Id.* A report at the end of 2019 showed that the eleven dispensaries with licenses to sell recreational marijuana in Chicago are owned by White men. Celeste Bott, *Chicago Council Defeats Effort to Stall City's Legal Pot Sales*, LAW360 (Dec. 18, 2019, 6:12 PM), <https://perma.cc/78TP-UAEX>.

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- 251 See McCoppin & Hinkel, *supra* note 43. Further, confidentiality of ownership has prevented disclosure of individual owners, stalling progress towards inclusive ownership. *Id.*
- 252 See Jack Queen, *LA Minority Pot Licensing Suit Settles After City Adds Spots*, LAW360 (July 9, 2020, 8:42 PM), <https://perma.cc/82U8-NSY8>.
- 253 *Id.*
- 254 *Id.*
- 255 See Jeff Smith, *Maine Edges Closer to Starting \$300 Million Adult-Use Cannabis Market, Though Opt-Outs and License Caps Linger*, MARIJUANA BUS. DAILY (July 1, 2020), <https://perma.cc/QM23-SHKC>. Such requirements harm upstart sellers. *Id.*
- 256 See *id.*
- 257 Diana Novak Jones, *Cannabis Corner: Nevada's New Pot Regulator Talks Reform*, LAW360 (July 8, 2020, 7:40 PM), <https://perma.cc/8BV2-64B5>. This focus comes after two associates of Rudy Giuliani tried to use foreign cash to influence Nevada political candidates to favorably award licenses. *Id.* The CCB also plans to address social equity when it reopens licensing, but the state does not seem to have a firm plan or program to help minority owners currently. See *id.*
- 258 Jack Queen, *Cannabis Regs: Mass. Floats Sweeping Update to Rules*, LAW360 (July 20, 2020, 8:41 PM), <https://perma.cc/DNG3-WMQV>.
- 259 Naomi Martin, *A Law Said Pot Taxes Should Help Communities Harmed by the War on Drugs. That Hasn't Happened*, BOS. GLOBE (Feb. 14, 2020, 5:00 PM), <https://perma.cc/Z89T-6QVK>.
- 260 Jeff Smith, *Flurry of Investor Interest in Arizona Sparked by Prospect of Recreational Marijuana Legalization*, MARIJUANA BUS. DAILY (July 20, 2020), <https://perma.cc/Y84U-S5TS>.
- 261 *Id.*; see also Smart and Safe Arizona Act § 36-2854(A)(1)(f) (The text of the proposed amendment provides that “no later than six months after the department adopts final rules to implement a social equity program pursuant to paragraph 9 of this section, the Department shall issue twenty-six additional marijuana establishment licenses to entities that are qualified pursuant to the social equity ownership program”). The licenses issued under this program are an effort “to promote the ownership and operation of marijuana establishments and marijuana testing facilities by individuals from communities disproportionately impacted by the enforcement of previous marijuana laws.” Smart and Safe Arizona Act § 36-2854(A)(9); Adam Trenk & Madelaine Bauer, *Marijuana Dispensary Licensing Under Smart and Safe Arizona Act*, ROSE L. GROUP REP. (July 9, 2020), <https://perma.cc/R7DK-BEWS>. Some estimate that the value of such a license would increase business value by 30-80%. Smith, *supra* note 260.
- 262 See Ryan Randazzo, *Backers of Arizona's Recreational Marijuana Measure File 420k Signatures for November Ballot*, AZ CENTRAL (July 1, 2020, 4:11 PM), <https://perma.cc/SXE8-7SCV>.
- 263 Revenue is made up of civil penalties, a 16% excise tax, and penalties from marijuana establishments failing to pay this tax. Smart and Safe Arizona Act §§ 36-2854(B)(2), 42-5453(B), 42-5452(A).
- 264 *Id.* § 36-2856 (D)(4). This includes 33% to community college districts; 31.4% to municipal police departments, fire departments, fire districts, and county sheriffs' departments; 25.4% to the Arizona Highway User Revenue Fund; and 0.2% to the Attorney General for enforcement. *Id.* § 36-2856(D). 10% will be spread out among county health departments, grants to nonprofits focused on justice reinvestment, and public health matters. *Id.* § 36-2863(C).
- 265 *Id.* § 36-2863(C).
- 266 Jake Honig Compassionate Use Medical Cannabis Act, P.L. 2009, c.307., N.J. STAT. ANN. § 24:61-33 (West 2019).




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- 267 At a NJ Cannabis Insider event in March, a keynote speaker said that New Jersey should prioritize providing opportunities to women and people of color at the beginning of the industry's formation. Sophie Nieto-Munoz, *NJ Cannabis Insider Event Attracts Hundreds of Budding Industry Leaders*, NJ.COM (Mar. 10, 2020), <https://perma.cc/MDQ6-DYUS>. Additionally, the president of the New Jersey chapter of Minorities for Medical Marijuana does not think there is the necessary effort to promote racial equity and diversity in this industry. Jessica F. González, *Those Harmed by Marijuana Being Illegal Should Benefit When It Becomes Legal*, NJ.COM (July 8, 2020), <https://perma.cc/8AJX-RLVF>.
- 268 See H.R. 3884, 116th Cong. (2020).
- 269 *Id.* § 3054(b)(2)(B).
- 270 *Id.* § 3054(b)(2).
- 271 See *Membership Organizations*, PEOPLE'S ACTION, <https://perma.cc/BJP4-TAAA>; *People & Planet First*, PEOPLE'S ACTION, <https://perma.cc/L3JQ-NBU3>.
- 272 See *Our Platform*, KENTUCKIANS FOR THE COMMONWEALTH, <https://perma.cc/44NS-M9CE> (describing the campaign's goals to shift tax incentive spending away from private companies and instead to social services).
- 273 See *Economic Justice*, NEW VA. MAJORITY, <https://perma.cc/C3T5-TEKN>.
- 274 See *People & Planet First*, PEOPLE'S ACTION, <https://perma.cc/L3JQ-NBU3>.
- 275 Politically, anti-employer subsidies arguments are made from both the right and the left--the Wall Street Journal editorial page and US Representative Ocasio-Cortez agreed that the public subsidies approved for Amazon were unnecessary. See Editorial, *Amazon's Golden Fleecing*, WALL ST. J. (Nov. 14, 2018, 6:33 PM), <https://perma.cc/5YU4-YDUR>; Alexandria Ocasio-Cortez (@AOC), TWITTER (Nov. 12, 2018, 11:40 PM), <https://perma.cc/6WS2-U9EW>.
- 276 See *Community Organizations Demand Amazon Forgo Corporate Kickbacks From Virginia and Arlington County In Response to COVID-19*, LA COLECTIVA, <https://perma.cc/6W4X-79S8>; *No Amazon Without Us!*, GRASSROOTS COLLABORATIVE, <https://perma.cc/7MMZ-SKY8>; see also For Us, Not Amazon (@ForUsNotAmazon), FACEBOOK (Nov. 30, 2020), <https://perma.cc/CPN6-Z54B>; PrimedOut NYC (@PrimedOUTNYC), FACEBOOK (Nov. 21, 2018), <https://perma.cc/8EWZ-STSM>.
- 277 *How Wal-Mart Has Used Public Money in Your State*, WAL-MART SUBSIDY WATCH, <https://perma.cc/3G34-4N47>.
- 278 See, e.g., J. David Goodman, *Amazon Pulls Out of Planned New York City Headquarters*, N.Y. TIMES (Feb. 14, 2019), <https://perma.cc/3ZKE-ZKDY> (describing the fierce backlash against the nearly \$3 billion in proposed incentives for Amazon).
- 279 About Texas Forward (@TexasForward), FACEBOOK (July 22, 2020) <https://perma.cc/Q52W-PZU6>.
- 280 *Explainer*, REDLIGHT THE GULCH, <https://perma.cc/NZG6-S8S6>.
- 281 Meena Venkataramanan, *Austin City Council Cuts Police Department Budget by One-Third, Mainly Through Reorganizing Some Duties Out From Law Enforcement Oversight*, TEX. TRIB. (Aug. 13, 2020), <https://perma.cc/J4JQ-BLMA>.
- 282 See Sean Collins, *The Financial Case for Defunding the Police*, VOX (Sept. 23, 2020, 7:16 AM) <https://perma.cc/ZK8J-5DVY>.
- 283 *Id.*
- 284 Heather Appel, *"We Make This City" Campaign Launches in 10 Cities*, P'SHIP FOR WORKING FAMILIES (June 20, 2018), <https://perma.cc/VJ66-5X9S>.

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- 285 See K. Sabeel Rahman & Jocelyn Simonson, *The Institutional Design of Community Control*, 108 CALIF. L. REV. 101, 102, 157-58 (2020).
- 286 See NEW VA. MAJORITY, *supra* 273.
- 287 DMITRI DANIEL GLINSKI & BERTHA LEWIS, THE BLACK INST., NOT GOOD ENOUGH: THE MYTH OF 'GOOD FAITH AND BEST EFFORTS' 33-35 (2015), <https://perma.cc/AF7V-3QDG>.
- 288 *Id.* at 3.
- 289 *Id.* at 4.
- 290 *Id.* at 5, 31; BERTHA M. LEWIS & DMITRI DANIEL GLINSKI, THE BLACK INST., THE ONE PERCENT SOLUTION: UNLOCKING SOURCES OF CAPITAL FOR NEW YORK'S MINORITY- AND WOMEN- OWNED BUSINESSES 6, 60-61, <https://perma.cc/LV4K-3ZLR>.
- 291 See *Civil Rights Organizations Sue the Small Business Administration for Excluding Business Owners with Criminal Records from COVID-19 Relief*, PUB. INT. L. CTR. (June 16, 2020), <https://perma.cc/8YLP-DP7F>.
- 292 Zachary Warmbrodt, *Bankers Plead with Trump: Fix Small Business Rescue Plan*, POLITICO (Apr. 7, 2020), <https://perma.cc/N46P-XWL7>.
- 293 *How Kabbage Processed \$7 Billion in Paycheck Protection Program Loans with Machine Learning (VB live)*, VENTUREBEAT (Aug. 28, 2020, 7:10 AM), <https://perma.cc/565A-8VUQ>.
- 294 See, e.g., Christopher K. Odinet, *Securitizing Digital Debts*, 52 ARIZ. ST. L.J. 477, 477 (2020) (describing the unique risks associated with fintech finance).
- 295 See Mehrsa Baradaran, *It's Time for Postal Banking*, 127 HARV. L. REV. F. 165, 166 (2014).
- 296 See U.S. SMALL BUS. ADMIN., REP NO. 16-13, *supra* note 220, at 1.
- 297 See, e.g., BUSINESS MENTOR NY, *supra* note 105.
- 298 See MARIJUANA BUS. DAILY, *supra* note 243.
- 299 See Lewis, *supra* note 126, at 763, 799. This study assesses the relative success of businesses in the Small Business Administration 8(a) program which received mentorship in addition to preferential contracting with a control group of businesses owned by service-disabled veterans who receive preferential contracting, but not mentorship. *Id.*
- 300 See Chatterji et al., *supra* note 127, at 553.
- 301 *Id.* at 507 (finding that the Black-White self-employment gap fell by three percentage points after set-aside programs were initiated in cities and noting that gains in self-employment were in industries heavily affected by set-asides and went mostly to better educated owners).
- 302 *Id.* at 510.
- 303 KAN. DEPT OF COMM., ANNUAL AFFIDAVIT OF ELIGIBILITY (2019), <https://perma.cc/47JS-5FTB>.
- 304 Louis A. Ferleger & Matthew Lavalley, *Lending a Hand: How Small Black Businesses Supported the Civil Rights Movement* 9 n.16 (Inst. for New Econ. Thinking, Working Paper No. 67, 2017) (quoting THEODORE CROSS, BLACK CAPITALISM: STRATEGY FOR BUSINESS IN THE GHETTO 99-101 (1969)), <https://perma.cc/8XD7-BFSD>.
- 305 See Chatterji et al., *supra* note 127, at 508.

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- 306  15 U.S.C. §§ 1691 *et seq.*
- 307 See *A.B. & S. Auto Serv., Inc. v. S. Shore Bank of Chi.*, 962 F. Supp. 1056, 1060 (N.D. Ill. 1997).
- 308  *Sayers v. Gen. Motors Acceptance Corp.*, 522 F. Supp. 835, 839 (W.D. Mo. 1981).
- 309 See  *Cragin v. First Fed. Sav. & Loan Ass'n*, 498 F. Supp. 379, 384 (D. Nev. 1980).
- 310 See generally 13 C.F.R. § 120.150 (2020).
- 311 See *A.B. & S. Auto Serv.*, 962 F. Supp. at 1064.
- 312 469 F. Supp. 3d. 459 (D. Md. 2020).
- 313 *Id.* at 468.
- 314 For additional background on the impact of considering criminal records on Black-owned businesses obtaining credit, see generally TUKUFU ZUBERI & EDUARDO BONILLA-SILVA, WHITE LOGIC, WHITE METHODS: RACISM AND METHODOLOGY (2008).
- 315 See, e.g., K. SABEEL RAHMAN & HOLLIE RUSSON GILMAN, CIVIC POWER: REBUILDING AMERICAN DEMOCRACY IN AN ERA OF CRISIS 12 (2019) (describing the “civic power perspective” on democracy reform).
- 316 There are several components of the informal economy. See Saskia Sassen, *The Informal Economy: Between New Developments and Old Regulations*, 103 YALE L.J. 2289, 2291, 2297 (1994). Internal Revenue Service estimates indicate underreporting of income, one aspect of the so-called underground economy, were around \$450 billion in 2006. Press Release, Internal Revenue Serv., IRS Releases New Tax Gap Estimates; Compliance Rates Remain Statistically Unchanged From Previous Study (Jan. 6, 2012), <https://perma.cc/C84B-27GY>. Another source claims the United States has an informal economy of 8.8%. Friedrich Schneider, *Size and Measurement of the Informal Economy in 110 Countries Around the World* 5 (2002) (workshop manuscript), <https://perma.cc/96E5-7X55>.
- 317 See GREGORY S. ALEXANDER, PROPERTY AND HUMAN FLOURISHING xi (2018).
- 318 *Id.* at xiv.
- 319 Timothy M. Mulvaney, *Property-As-Society*, 2018 WISC. L. REV. 911, 911-13.
- 320 *Id.*
- 321 Perhaps a greater tension is the phenomenon of the government contracting to provide essential services versus hiring more employees to perform those services. Assessing whether it is better for states and cities to increase their payrolls or to outsource more to companies to do the work is beyond the scope of this Article. Nevertheless, the authors mention this notion here as the conversation touches on the manner in which governments buy goods and services.

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