FROM MANDELA AND MLK TO BEECom AND THE SBA: LAYING THE GROUNDWORK FOR EQUALITY THROUGH BUSINESS DEVELOPMENT PROGRAMS IN SOUTH AFRICA AND THE UNITED STATES

Daniel M. Ludlam*

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* J.D., University of Georgia School of Law, 2007; B.B.A., University of Georgia, 2004.
I. INTRODUCTION AND OVERVIEW

The United States still struggles with a significant population of citizens having a background of social, political, and economic disadvantage as a result of an historically oppressive society. The young government of the Republic of South Africa fights a similar, but much larger problem due to the fact that the previously disadvantaged community represents the overwhelming majority of the total population of the country. In a capitalist society, systematic oppression can lead to a vicious cycle of oppression that persists from generation to generation. In the business context, historically disadvantaged individuals (HDI) in both countries may be in need of government assistance to compete with non-HDI-owned businesses. This Note assumes the proposition of several legal and economic scholars that small businesses are the cornerstone to a healthy and stable economy. Analyzing


2 Broad-Based Black Economic Empowerment Bill, 2003, Bill 27-03 (GA) pmbl. (S. Afr.), available at http://www.info.gov.za/gazette/bills/2003/b27-03.pdf (“South Africa’s economy still excludes the vast majority of its people from ownership of fixed assets and the possession of advanced skills.”); see also STATISTICS SOUTH AFRICA, MID-YEAR POPULATION ESTIMATES, SOUTH AFRICA 2005, at 9 (2005), available at http://www.statssa.gov.za/Publications/P0302/P03022005.pdf [hereinafter STATISTICS] (showing that the previously disadvantaged population made up of non-Whites was estimated around 42.5 million, or 90.7% of the total population).

3 See Ali Khan, Lessons From Malcom X: Freedom by Any Means Necessary, 38 HOW. L.J. 79, 85 (1994) (stating the thesis that “when the oppressor controls the legislative, judicial, and enforcement machinery of the legal system a direct relationship is established between law and oppression”).

4 See Circular from the National Treasury of South Africa (July 9, 2001), available at http://www.treasury.gov.za/organisation/ostb/docs/circulars/ 6.pdf [hereinafter Circular] (advising “that the phrase ‘Previously Disadvantaged Individuals (PDI’s)’ not be used but instead ‘Historically Disadvantaged Individuals (HDI’s),’ since the former phrase is understood to imply that the concerned persons are currently no longer disadvantaged”).

5 See Broad-Based Black Economic Empowerment Bill, pmbl. (“[U]nless further steps are taken to increase the effective participation of the majority of South Africans in the economy, the stability and prosperity of the economy in the future may be undermined to the detriment of all South Africans, irrespective of race.”); see also 15 U.S.C. § 637(a) (2000) (authorizing the Small Business Administration to favor disadvantaged individuals in granting assistance in the private markets as well as in granting government contracts).

6 Steven H. Hobbs, Toward a Theory of Law and Entrepreneurship, 26 CAP. U. L. REV.
the effective parts of the programs in the United States and South Africa targeted at remedying this vicious cycle of disadvantages can serve to find the most effective course of action for leveling the small business playing field in both countries. The ultimate goal is that equality in small business opportunities would bear the seed for equality in all facets of society.\(^7\)

The important differences and similarities between the United States and South African HDI experiences will be described more deeply in Part II, but a brief overview of the similarities here will explain why there is good reason to compare the laws of these two countries specifically. Essentially, without regard to the magnitude of the subjugation and oppression, the United States and South Africa have ended up in similar positions as a result of pervasive racism lasting from colonial times to today.\(^8\) While a great number of the indigenous population in the Americas was killed by colonial powers or died of disease,\(^9\) the Dutch and British colonists always remained a small minority in South Africa.\(^10\) Part of this difference is due to the dissimilar reasons for settling on the respective continents.\(^11\) Colonists in the Americas arrived for different reasons, but after arrival, most cultivated the land and settled for life.\(^12\) One of the primary motives for establishing Cape Town, South Africa,

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241, 250 (1997) (commenting that “[s]mall business enterprises form the cornerstone of our local and national economies” and “[s]mall businesses have been heralded as the creators of jobs and economic growth”).

\(^7\) See id. at 244–45 (“[W]ith the waning of affirmative action as a remedy for past racial and ethnic discrimination, the development of entrepreneurship and small business ownership is a critical part of the pursuit of social and economic justice.”).


\(^10\) See OXFORD HISTORY, supra note 8, at 9 (showing that the prospect of sustaining the Cape colony was threatened with the talk of the opening of the Suez Canal).

\(^11\) See id.

on the other hand, was for strategic reasons, as the town was a major gateway on the eastbound route to India before the construction of the Suez Canal.\textsuperscript{13}

Another similarity between the countries is the twentieth century movement toward equality between the races, both movements being literally and spiritually led by charismatic leaders.\textsuperscript{14} The fact that civil rights legislation in the United States arose thirty years prior to similar ideas being expressed in the South African Constitution makes little difference when comparing the steps being taken today in each country, due to the fact that the HDI problem nonetheless still persists.\textsuperscript{15} This Note is based upon the notion that a comparison of these two countries is worthwhile, regardless of the size of the historically disadvantaged community or the temporal proximity of the recognition of civil rights for all citizens, because similar issues and challenges between the two countries must be addressed by their respective governments.

By comparing the two approaches for small business assistance for HDIs, a better understanding can be reached of the best method for creating a level small business playing field.\textsuperscript{16} The business development programs of the United States and South Africa undoubtedly are currently necessary and serve important functions in creating opportunities for HDIs, but these programs are not perfect and should not last forever. Following recent Supreme Court decisions in the United States and the drafting of the new constitution in South Africa, legislatures in both countries have attempted to draft legislation that toes the line in marking how far an affirmative action program can go and still survive a court challenge.\textsuperscript{17} This drafting method is illogical. It reeks of the fallacy of mistaking what is necessary for what is possible. The goal is not to do as much as is allowed by law, but to do what will bring about permanent equal opportunity and equal opportunities for achievement between the races in the shortest time possible.

\textsuperscript{13} See OXFORD HISTORY, supra note 8, at 9.


\textsuperscript{16} See Hobbs, supra note 6, at 244–45.

Permanent equal opportunity and achievement can only be attained if successful small businessmen are able to pass along the knowledge and experience they have garnered over the years. In order to set this positive cycle in motion, the best method for promoting business opportunity equality in both countries is to focus on skills development while deemphasizing programs that are solely preferred contracting mechanisms. True progress will be evident when non-preferential contracting makes up the substantial majority of the business and not just a balance. This process of advanced skills replacing the need for preferential contracts will reduce any stigma associated with being favored for getting government procurement contracts and instead will promote a more competitive environment where HDIs possess the tools to compete. In turn, this equal opportunity at the small business level will bring HDIs toward an equal footing in all aspects of modern democratic society.\(^\text{18}\)

The balance of Part I will identify the areas of law in the respective jurisdictions that will serve as the basis for comparison. Part I will also address the organic filaments from which to derive a better system for achieving equal footing between the races in modern democratic societies still reeling from a history of racial oppression.\(^\text{19}\) Part II will emphasize the importance and urgency of this topic for not only the HDIs at issue, but also the respective countries as a whole.\(^\text{20}\) Part III will analyze the business development programs that attack the inequities addressed in Part II. Part IV will conclude this Note by describing the implications of the analysis and how each country can resolve the HDI dilemma in the best manner possible.

This Note involves identifying aspects of the laws enabling and governing the business development programs of the United States and the Republic of South Africa, and analyzing how they relate to and affect the development of businesses owned and operated by HDIs.\(^\text{21}\) This will include a critical evaluation and comparison of the program legislation in each country that attempts to provide essential services for HDI-owned small businesses. Specifically, the laws in the United States will relate to the Small Business

\(^{18}\) See Sabin, supra note 17.


\(^{20}\) See, e.g., MCKINNON, supra note 1.

\(^{21}\) See Circular, supra note 4.
Administration (SBA) 8(a)\textsuperscript{22} Programs\textsuperscript{23} and the Small Disadvantaged Business Certification (SDB) Programs,\textsuperscript{24} with tangential treatment given to the Office of Native American Affairs branch of the SBA\textsuperscript{25} and the U.S. Department of Commerce’s Minority Business Development Agency (MBDA).\textsuperscript{26} In South Africa, the laws relating to the Black Economic Empowerment Commission (BEECom) of South Africa’s Department of Trade and Industry (DTI) will be the focus of analysis and comparison.\textsuperscript{27} The strengths and weaknesses of both countries’ legislation and implementation will be addressed, along with possible opportunities for improvements based on the individual country’s specific economic, social, and political climates.

II. BACKGROUND OF HISTORICALLY DISADVANTAGED INDIVIDUALS (HDI)

A comparison of post-Civil Rights era United States with post-Apartheid South Africa is not a new idea.\textsuperscript{28} Legal scholars and historians alike have noted the similarities and differences of the complex issues facing both nations.\textsuperscript{29} Centuries of racial oppression have left both countries still facing

\begin{footnotesize}
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\item \textsuperscript{22} 15 U.S.C. § 637(a) (2000).
\item \textsuperscript{23} 13 C.F.R. § 124.1-.1024 (2005). This particular provision of Title 13 (Business Credit and Assistance), Chapter I (Small Business Administration) deals with business development and specific determinations for Small Disadvantaged Business status.
\item \textsuperscript{24} \textit{Id.} Both 8(a) and SDB certifications are covered in this regulation. The difference lies in that “SDB certification strictly pertains to benefits in Federal procurement. 8(a) firms automatically qualify for SDB certification,” but not all SDB firms qualify for 8(a) certification. U.S. Small Business Administration, Frequently Asked Questions, Small Disadvantaged Business (SDB), http://app1.sba.gov/faqs/faqindex.cfm?areaID=22 (last visited Apr. 15, 2007) [hereinafter SDB-FAQs].
\item \textsuperscript{25} U.S. Small Business Administration (SBA), Office of Native American Affairs, http://www.sba.gov/naa/about.html (last visited Apr. 15, 2007) [hereinafter Office of Native American Affairs] (noting that this branch of the SBA focuses on outreach for offering the various SBA programs specifically to Native Americans).
\item \textsuperscript{26} Exec. Order No. 11,625, 36 Fed. Reg. 19,967 (Oct. 13, 1971). After the Office of Minority Business Enterprises was established in 1969, President Richard M. Nixon issued this executive order to improve upon that foundation by clarifying the authority of the Secretary of Commerce in this particular area.
\item \textsuperscript{27} Broad-Based Black Empowerment Bill, pmbl. ("[E]stablish[ing] a legislative framework for the promotion of black economic empowerment; . . . empower[ing] the Minister to issue codes of good practice and to publish transformation charters; . . . establish[ing] the Black Economic Empowerment Advisory Council; and . . . provid[ing] for matters connected therewith.").
\item \textsuperscript{28} See Abdelrahman, supra note 17.
\item \textsuperscript{29} See id.
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significant discrepancies in opportunities and achievements between whites and non-whites. In efforts to combat these regrettable products of the past, both countries have found ways to implement affirmative action legislation within the frameworks of their respective constitutions. U.S. affirmative action law was molded by Supreme Court decisions that have left the United States applying a strict scrutiny standard of review to government programs, as required by the justices’ interpretations of Equal Protection under the Fourteenth Amendment. This path of development in U.S. law was required because the concept of affirmative action developed a good number of years after the drafting of the U.S. Constitution.

South African affirmative action law, conversely, was specifically contemplated in the drafting of its new constitution. As a result, legal scholars suggest the standard to be applied by the Constitutional Court of South Africa should fall somewhere between rational basis and strict scrutiny review, based upon an interpretation of relevant provisions of the Constitution of South Africa, including the preamble and sections 9, 36, and 39 of chapter 2 of the Bill of Rights. The programs analyzed in this Note are current programs, and thus have not been struck down as violating the respective jurisdiction’s constitution. Additionally, most of the suggestions this Note makes for improving the business development programs in the United States and South Africa recommend building upon the effective portions and discontinuing the less effective ones.

A. The United States’ HDI Environment

As described above, the judicial and legislative climates in the United States’ small business sector have been shaped by recent U.S. Supreme Court decisions determining the constitutional scope of the government’s ability to
implement programs favoring HDIs.\textsuperscript{38} \textit{Adarand Constructors v. Pena},\textsuperscript{39} one of the most important cases, led to the 1995 Supreme Court decision holding that "federal programs that apply favorable or preferential treatment to minority-owned enterprises must survive a strict scrutiny standard of review under the Constitution."\textsuperscript{40} Essentially, "the [g]overnment must prove that it has a compelling interest in treating certain minority groups more favorably than the populace as a whole and that the means chosen to address the compelling interest are narrowly tailored."\textsuperscript{41} This development led to the government shaping programs that would pass the muster of the strict scrutiny standard to reduce the chance that federal courts would strike down the legislation creating the program.\textsuperscript{42} This Note will illustrate the misguided nature of this pursuit in drafting legislation. Part III will analyze the U.S. business development programs in light of both the current HDI situation and legislative and judicial environments in the United States.

\textbf{B. The South African HDI Environment}

An understanding of the economic, social, and political climates in South Africa is necessary prior to analyzing the current programs aiding businesses owned by HDIs. The problems faced by the current government are rooted in the country's troubled history. Ever since the days of colonialism when the Dutch and English vied for power on the strategic Cape of Good Hope, the southern tip of Africa had been engineered into two South Afticas.\textsuperscript{43} Dr. D.F. Malan's Nationalist Party institutionalized oppressive separation of the races


\textsuperscript{39} \textit{Adarand Constructors}, 515 U.S. 200 (vacating the court of appeals’ ruling for failing to apply the strict scrutiny standard and remanding to the lower court to decide, based on the proper standard of review, the legislation).

\textsuperscript{40} Sabin, supra note 17, at 828.

\textsuperscript{41} Id.

\textsuperscript{42} Id.

in 1948 under the Grand Plan of Apartheid, \(^4^4\) essentially solving what was termed "The Poor White Problem."\(^4^5\) Through monetary taxation in the rural homelands of the native Africans, the Afrikaner Nationalist government forced working-age men to leave their families to work in the mining industry for cash instead of continuing subsistence farming for their families.\(^4^6\) Wages were structured so that black workers received less compensation than white workers for doing the same job.\(^4^7\)

The government continued apartheid through the years to maintain the societal structure that established an underclass of Africans, Coloureds, and Indians for all of the country’s business sectors, especially the booming mining industry.\(^4^8\) In many ways, mining companies and other powerful businesses in South Africa kept the country afloat in the world marketplace during this period, but very little of the rich, big business economy trickled down to the manual laborers and their families in rural areas.\(^4^9\)

The oppressive regime was ultimately replaced, but South Africa did not seek to forget the violent history of the past half century when implementing its new constitution in 1996.\(^5^0\) Instead, newly elected President Nelson Mandela promoted reconciliation as the mantra for the new republic in the country’s first fully participatory election.\(^5^1\) In 1999, current President Thabo Mbeki succeeded Nelson Mandela to lead the country into the twenty-first century.\(^5^2\) Reconciliation set the stage for a more peaceful transition rather than an all-out power grab by the newly empowered majority. At the same

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\(^{4^4}\) See Oxford History, supra note 8, at 406–07.
\(^{4^5}\) Id. at 438.
\(^{4^6}\) Id.
\(^{4^7}\) Id.
\(^{4^8}\) Id. In the context of South Africa, "Africans" are specifically black Africans, "Coloureds" is a South African term used for identifying those of mixed race, and "Indians" are South African citizens from the sub-continent of India or Asia in general. Lundy R. Langston, Affirmative Action, A Look at South Africa and the United States: A Question of Pigmentation or Leveling the Playing Field?, 13 AM. U. INT’L L. REV. 333, 351 (1997).
\(^{4^9}\) See Oxford History, supra note 8, at 440 (describing this inaction as a form of "economic strangulation").
\(^{5^0}\) S. Afr. Const. 1996 pmbl. (noting that they "[r]ecognise the injustices of our past; [h]onour those who have suffered for justice and freedom in our land; [r]espect those who have worked to build and develop our country; and [b]elieve that South Africa belongs to all who live in it, united in our diversity").
\(^{5^1}\) See Mandela, supra note 14, at 539–40 (citing Mandela’s entreaties that the people of South Africa must come together as one).
time, this newly liberated majority remained largely uneducated and powerless, with little access to resources necessary for participation in the post-apartheid economy.53

Sixteen years after the transition to a non-discriminatory democratic government in South Africa, the country continues to make strides toward sustainable economic development.54 The sustainability of economic development in South Africa depends largely on the incorporation of the historically disadvantaged majority of non-whites.55 Early attempts at fostering the development of businesses owned by non-whites included a program called the Business Trust, which, with corporations maintaining an important presence in South Africa and cooperating with the new South African government, implemented a three-pronged attack on the problems apartheid had created.56 From 1999 to 2004, the three areas focused upon were job creation, human capacity development, and the reduction of crime levels.57 The proposal to extend the Business Trust to 2009 slightly refocused its mission by replacing the crime reduction prong with the goal of enhancing trust.58 The job creation prong focused on tourism,59 the fastest growing industry in South Africa at the turn of the century.60 The boom in foreign tourism can largely be attributed to two factors that caused South Africa to appear relatively safe: (1) the settling of anti-government tensions after the fall of apartheid;61 and (2) the attacks of September 11,2001, which diminished the perception of relative safety in traditional tourist destinations.62

53 See OXFORD HISTORY, supra note 8, at 438-40.
55 See Broad-Based Black Economic Empowerment Bill, pmbl.
60 Id. (noting “that the tourism sector had the potential to add 450,000 job opportunities by 2005, and was identified as the fastest-growing creator of jobs in the country”).
61 See DEEGAN, supra note 52.
62 Ambassador Michael Sheehan, Keynote Address, International Terrorism: Trends and Responses, 12 DePaul Bus. L.J. 45, 46 (1999) ("You would be surprised to learn that some of
The climates in the United States and South Africa are obviously markedly different in a variety of ways. Similarly, however, both countries struggle with a significant history of racial oppression, and both have attempted to deal with this struggle through legislation intended to bring HDIs onto an even playing field. South Africa's problem is much more intense for the historically disadvantaged population because this population is much larger than in the United States, and a higher percentage of this community lives in complete poverty. In addition, the transition to a free democracy is much more recent for South Africa. The spirit of the civil rights legislation passed in the United States in the 1960s did not manifest itself in the formal government of South Africa until the adoption of the new constitution in 1996. However, despite these differences, the urgency to bring about equal opportunity remains a common goal for both countries and a common challenge for both governments.

III. ANALYSIS OF EACH COUNTRY'S BUSINESS DEVELOPMENT PROGRAMS

The following parts will describe each of the two countries' programs more in depth, and will point out their respective strengths and shortcomings.

A. United States' Affirmative Action Programs

This part will focus on two interrelated programs falling under the umbrella of the U.S. Small Business Administration. Specifically, the SBA provides two programs for historically disadvantaged entrepreneurs: the 8(a) Business Development Program and the Small Disadvantaged Business Certification Program. The two programs differ in that "the 8(a) Program offers a broad scope of assistance to socially and economically disadvantaged firms,[...]

the most dangerous areas this year, according to CIA statistics, are in Western Europe.


See MANDELA, supra note 14; KING, supra note 14.

S. Afr. Const. 1996 pmb. (adopting the Constitution so as to "[l]ay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law").

whereas] SDB certification strictly pertains to benefits in Federal procurement.”

1. Certification Requirements and Overview of Other Programs

Certification requirements have been a highly disputed issue in the United States. Certification for the 8(a) Program relies on three basic requirements: the applicant firm must (1) be a small business; (2) be “unconditionally owned and controlled by one or more socially and economically disadvantaged individuals who are of good character and citizens of the United States”; and (3) “demonstrate potential for success.” Subject to a rebuttable presumption, socially disadvantaged individuals for the purpose of 8(a) are Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and members of other groups designated by the SBA. All firms certified for the 8(a) Program are automatically certified for the Small Disadvantaged Business Program, but all firms certified for the Small Disadvantaged Business Program are not necessarily certified for the 8(a) Program.

Another arm of the United States government that corresponds to the climate in South Africa is the Native American Affairs branch of the U.S. Small Business Administration. This agency’s mission ensures that Native American, Alaskan, and Hawaiian entrepreneurs have every opportunity to use the SBA’s entrepreneurial development and lending programs. The United States government also has the Minority Business Development Agency (MBDA) as a branch of the U.S. Department of Commerce. The MBDA

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68 SDB-FAQs, supra note 24 (answering frequently asked questions by prospective applicants to these HDI-assistance programs).

69 See Sabin, supra note 17, at 828 ("[A] fundamental problem associated with affirmative action procurement programs [is] the haphazard manner in which minority groups have been chosen to participate.").


71 Id. § 124.103.


73 Office of Native American Affairs, supra note 25.

74 Id.

serves as "the only federal agency created specifically to foster the establishment and growth of minority-owned businesses in America."76

2. SBA 8(a) and SDB Programs

The SBA’s 8(a) Business Development program is designed "to assist eligible small disadvantaged business concerns compete in the American economy through business development."77 This Part will ultimately show whether and to what extent the 8(a) programs achieve this stated purpose. The process begins by the SBA entering into contracts with various federal agencies to provide goods and services.78 After contracting with these agencies, the SBA awards these contracts to 8(a) certified businesses.79 "In fiscal year 1998, more than 6,100 firms participated in the 8(a) Program and were awarded $6.4 billion in Federal contract awards."80 The benefits of participation include the following tangible assistance programs from the SBA.

"Under Section 7(j) of the Small Business Act, the SBA provides specialized training, professional consultant assistance, and high-level executive development to eligible firms."81 This section provides the cornerstone to any potentially successful business development program because it specifically sets out the plan for skills transfer to HDIs rather than solely preferential treatment in contracting.

Other programs foster government contracting to assist in growing HDI-owned businesses, but success still rests on the skills development provided through training, mentoring, and consulting. The government contracting assisting programs consist of the following benefits:

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76 Id.
79 Id. at 195.
80 SBA 8(a) Business Development, supra note 77.
• Participants can receive sole-source contracts,\(^8\) up to a ceiling of $3 million for goods and services and $5 million for manufacturing. While the SBA helps 8(a) firms build their competitive and institutional know-how, the agency also encourages them to participate in competitive acquisitions.

• Federal acquisition policies encourage Federal agencies to award a certain percentage of their contracts to SDBs. To speed up the award process, the SBA has signed Memorandums of Understanding (MOUs) with 25 Federal agencies allowing them to contract directly with certified 8(a) firms.

• Recent changes permit 8(a) firms to form joint ventures and teams to bid on contracts. This enhances the ability of 8(a) firms to perform larger prime contracts and overcome the effects of contract bundling, the combining of two or more contracts together into one large contract.\(^8\)

Firms participating in the 8(a) program complete a nine-year term, during which the firm must maintain its program eligibility.\(^8\) One hundred forty-four firms were terminated from the program during fiscal year 2004, most as a result of failing to comply with reporting requirements.\(^8\) The cause of this attrition stems from the tendency of governments to require frequent and detailed reporting in order to preserve funding for programs, whether or not these requirements are detrimental to the program.\(^8\) Programs like the Mentor-Protégé program could be mutually beneficial, but without accurate reporting data, the government would be unable to justify its investment. Within the nine years, the assistance provided to 8(a) firms is divided into two stages: a four-year developmental stage and a five-year transitional stage.\(^8\) Division of firms at different stages in the target company’s life cycle is beneficial to appropriately tailor the type of support each business requires.

\(^{82}\) See, e.g., Siller Bros. v. United States, 655 F.2d 1039, 1045 (1981) (noting that the sole source concept “involves a situation where the government does not seek bids or invitations from more than one source, but instead decides to negotiate with only one person”).

\(^{83}\) SBA 8(a) Business Development, supra note 77.

\(^{84}\) 13 C.F.R. § 124.112 (2005); SBA 8(a) Business Development, supra note 77.

\(^{85}\) SBA REPORT, supra note 81, at 11.


\(^{87}\) 13 C.F.R. § 124.404(a) (2005); SBA 8(a) Business Development, supra note 77.
This is the kind of specialized assistance that amending legislation and regulations need to reproduce and enhance.

The specific legislation that creates the trickle down effect of reporting requirements is the Business Opportunity Development Reform Act of 1988. 88 It requires the SBA to report yearly on the 8(a) Business Development Program. 89 The report is intended to determine and quantify the extent to which the . . . program has assisted in the development of firms owned and controlled by socially and economically disadvantaged individuals. The Act requires the SBA to analyze the accomplishments of businesses certified to participate in the 8(a) . . . program during the immediately preceding fiscal year and the status of the business concerns that completed their 8(a) . . . program term during the immediately preceding three fiscal years. 90

As will be shown below, the difficulty of obtaining responses from 8(a) participant firms contributes to the difficulty in drawing substantial conclusions from the data. This could be due to many different reasons, but perhaps yearly reporting is too cumbersome for this program.

The thirty-sixth year of the SBA 8(a) Business Development Program was 2004, and the following are accomplishments boasted by the SBA to Congress in the annual report. 91

During fiscal year 2004, a total of 8,900 businesses participated in the 8(a) Business Development Program. These firms . . . contributed an estimated 194,691 jobs in the Nation’s economy. Between October 1, 2003, and September 30, 2004, a total of 1,328 new firms were certified to participate in the program.

Year-end financial statements submitted by the 8,900 firms participating in the program authorized by 15 U.S.C. 637(a) during fiscal year 2004 reported total revenues exceeding $20.3 billion. Revenue that resulted from the program authorized by 15

89 SBA REPORT, supra note 81, at 3.
90 Id.
91 Id.
U.S.C. 637(a) was $5.6 billion or 27.58 percent of firms’ total revenue.  

Of the 1,707 firms that completed the 8(a) program between October 1, 2001, and September 30, 2004, "776 were independently operational; 19 had substantially curtailed operations; 21 had been acquired by other firms owned and controlled by non-disadvantaged individuals; 199 had ceased business operations, and 692 did not respond to the survey." 9 The SBA seems to flaunt the 76.45% "independently operational" figure in the table, 94 but the statistic is significantly misleading. That percentage is out of the total respondents, not the total firms that completed the program over the three year period. 95 A full 40.54% of the 1,707 did not respond to the survey. 96 Pure extrapolation of the survey would support the SBA’s "independently operational" conclusion, 97 but other explanations for failing to return the survey must be considered. For example, the possibilities exist that the reason a firm did not respond was because the firm is no longer in existence, the owner is discouraged to report due to negative results, or other possible non-response biases. 98 Granted, later in the report the SBA gives the 45% "independently operational" percentage, but not including that percentage in at least a footnote to the table is misleading. 99 Additionally, these numbers are offered in comparison to the entire universe of small businesses. 100 That is not exactly an honest comparison to those firms that have had nine years of supposedly successful government support, 101 given the fact that the SBA selects small businesses based on a showing of some likelihood of success. 102 It is obviously possible the companies could have succeeded regardless of the government's assistance.

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92 Id.
93 Id.
94 Id. at 12 tbl.III.
95 SBA REPORT, supra note 81, at 12 tbl.III.
96 Id. at 3 (noting that of the 1,707 program participants, 692 did not answer the survey).
97 Id. at 11.
99 SBA REPORT, supra note 81, at 9, 12 tbl.III. Table III does not include this percentage.
101 SBA 8(a) Business Development, supra note 77.
102 13 C.F.R. § 124.107 (2005); SBA 8(a) Business Development, supra note 77.
In isolation, firms completing the program seem to exhibit positive revenue and employment numbers. The total annual revenue of graduated firms that responded to the survey and reported earnings was more than $3.2 billion, and they provided employment for approximately 23,865 persons.\(^{103}\) In this manner, the SBA repeatedly emphasizes the success of 8(a) programs by reporting a raw, rather than incremental, employment figure. The usefulness of the following statistic is questionable at best: the 8(a) companies employed "an average of 22 employees per company, whereas the 23.7 million [non-8(a)] small businesses in America employed an average of only 2 persons per firm."\(^{104}\) Again, many explanations exist for this in terms of selection of businesses and types of firms in the market for federal procurement. Reporting of employment statistics should be solely focused on job creation due to the suspect nature of raw figures such as these.

This Note reiterates that effective amending legislation should be focused toward skills development programs. The following programs all represent this positive attempt to provide a bulwark to the HDI small business environment. SBA 8(a) programs provide guidance to HDI-owned businesses through the Service Corps of Retired Executives (SCORE), a national non-profit organization with a mission of counseling America's small businesses,\(^{105}\) Small Business Development Centers (SBDC), Women’s Business Centers (WBC), United States Export Assistance Centers (USEAC), as well as the Mentor-Protégé program, among others.\(^{106}\) This Note proposes that the effectiveness of all other 8(a) programs are contingent upon the success of these direct skills transfer programs where HDIs can interact with other business owners, consultants, or similar advisors.

When taken as a whole, bureaucrats judge the success of 8(a) programs according to the incremental difference they are able to make: "[i]n principal, the benefit [of these programs] to the economy represents the incremental gain to disadvantaged groups from employment and income supported by 8(a) business development contracts, as well as incremental gains in business sustainability."\(^{107}\) The SBA Report breaks down the benefits of the programs to the U.S. economy and government into four categories: (1) Long-term

\(^{103}\) SBA REPORT, supra note 81, at 3.
\(^{104}\) Id. at 8 (citing THE STATE OF SMALL BUSINESS, supra note 100).
\(^{106}\) SBA REPORT, supra note 81, at 4.
Business Development Efforts; (2) Employment; (3) Firm Owners; and (4) Longevity of Firms.\textsuperscript{108} In terms of long-term business development efforts, "since the inception of the 8(a) program (1968), there have been more than 542,000 8(a) contract actions, worth approximately $88.4 billion."\textsuperscript{109} The SBA offers a weakly supported explanation for these numbers: "[w]hile these figures represent a very small percentage of total Federal procurement actions and dollars, they still signal significant success in including targeted businesses in the Federal market."\textsuperscript{110} The SBA should not waste words defending the validity of financial data about federal procurement, but rather should emphasize the skills HDIs should have obtained in performing the awarded procurement contracts.

The "Firm Owners" heading highlights a positive externality of the 8(a) programs: "participants are involved in all areas of community development and volunteer work."\textsuperscript{111} This is an area where the Mentor-Protégé program can be mutually beneficial.\textsuperscript{112} By incorporating the mentor into a community in which he might otherwise not interact, and vice versa, community development and volunteer work in both communities are enhanced.

After such a valid non-data-driven part of the report, the SBA Report gets back to offering misleading statistics on longevity of firms: "[w]hile 71 percent of new businesses fail (with 29 percent still in business) within 8 years, 45 percent of 8(a) Business Development firms are still independently operational 10 years after they enter the program."\textsuperscript{113} This boast falls within the scope of this Note’s previous criticism of the data in that the selection criteria tends to foster admission of companies more likely to be in business after nine years than the average HDI-owned small business might be. In order to maintain favorable numbers in the report, the selection criteria are kept unnecessarily narrow. If having the largest cadre of capable small businesspersons were the goal, rather than having good numbers in the report, the selection criteria could be widened to allow participation of more SDBs in skills transfer programs.

These programs also have their respective costs to the United States government and the United States economy. The program’s administrative costs amounted to $34,944,546—these costs consist of “personnel, travel,
supplies, [and] training." Management and technical assistance costs added up to $4,625,909: this price includes pay to qualified individuals retained for the purpose of offering the specialized services. Advance payments now amount to $0—these payments were “non-interest bearing loans made by the SBA to an [8(a)] participant in connection with the performance of a specific 8(a) ... contract to assist the firm in meeting the financial requirements of performing the contract.” Since the Federal Credit Reform Act of 1990, the SBA has made no advance payments on 8(a) contracts. This somewhat recent movement away from free loans conforms with the suggestions of this Note to focus the business development programs on skills development, with fewer instances of preferred loan or contract terms.

Legislatures and agencies focusing on skills development rather than financial assistance will help to remove some of the limitations on program participation. These limitations include (1) “requir[ing] 8(a) firms to maintain a balance between their commercial and government business”; (2) a ceiling “on the total dollar value of sole-source contracts that an individual participant can receive while in the program”; and (3) “annual reviews, business planning, and systematic evaluations” by the SBA district offices.

Other necessary limitations exist to safeguard that access to support is available exclusively for legitimate HDI businesspersons: 1) a ceiling less than $250,000 on the net worth of the individual, excluding the value of the business and personal residence; (2) size standards for the small business concern; (3) in business at least two years prior to application; and (4) demonstration of potential success and good character. Modifications of the 8(a) programs have made “it easier for non-minority firms to participate by proving their social disadvantage.” This change is troublesome in that it dilutes the specificity of designing programs exclusively for leveling the playing field between minority-owned and majority-owned businesses.

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114 Id.
115 Id.
116 Id. at 9–10.
117 Id. at 10.
118 Id.
120 SBA REPORT, supra note 81, at 10.
121 SBA 8(a) Business Development, supra note 77.
122 Id.
123 Id.
124 Id.
125 Id.
Perhaps the most personalized 8(a) program, the Mentor-Protégé Program, enables new 8(a) businesses to develop more efficiently through “private-sector relationships” with more experienced business owners. Mentors assist their protégés with various management and financial issues. For example, mentors may, among other methods of support, (1) make equity investments in or loans to the protégé; (2) give subcontract support; or (3) enter into a joint venture with the 8(a) firm. In order to maintain the autonomy of the 8(a) firm, mentors’ equity interests in their protégé firms are capped at 40%.

In order to become a protégé, in addition to being in good standing and current with all reporting requirements, he or she must have a business which (1) is “in the developmental stage of the 8(a) BD program”; (2) has “never received an 8(a) contract”; or (3) has “a size of less than half the size standard for a small business based on its primary SIC code.” In order to foster better relationships and decrease the opportunity for conflicting messages, “protégés have only one mentor at a time.” In order for the mentor to focus fully on the protégé’s success, mentors generally have only one protégé at a time.

Mentors come from various backgrounds. Some mentors own a firm in the transitional stage of the 8(a) program, some have graduated from the program, and others own small or large businesses unassisted by the program. In addition to a one year commitment and “the capability to assist the protégé,” mentors must show they are (1) in good financial shape and (2) “a federal contractor in good standing.”

The SBA consummates the mentor-protégé relationship by approving the participants’ “written agreement outlining the protégé’s needs and describing the assistance the mentor has committed to providing.” Also, “SBA conducts annual reviews to determine the success of the mentor-protégé relationship.” The person-to-person interaction and these subjective reviews

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126 See SBA, 8(a) Business Development Mentor-Protégé Program, supra note 112.
127 Id.
128 Id.
129 Id.
130 Id.
131 Id.
132 SBA, 8(a) Business Development Mento-Protégé Program, supra note 112.
133 Id.
134 Id. A mentor also must show an ability, through the mentor’s experience, to “provide valuable support to a protégé.”
135 Id. The agreement must meet requirements of 13 C.F.R. § 124.520 (2004).
136 Id.
give the Mentor-Protégé program its biggest asset and advantage over other programs: the ability to adapt to changing circumstances, including, ideally, diminished necessity of affirmative action programs.

Other groups struggle with the desire to be included in the list of groups presumed to be disadvantaged. Some women's advocacy groups have constituents that believe the stigma that comes with having access to these programs is worse than not having access at all. This perceived stigma is another factor that must be considered as a backdrop to these programs. Does the stigma create difficulties in private contracting due to negative perceptions held by competing or related businesses? This stigma is an important consideration because it illustrates further that skills development, rather than preferential treatment in contracting, may be better for giving HDIs the tools to compete in the private markets of the United States and South Africa. By terminating the potentially counterproductive and stigmatizing programs, skills development programs will have more resources with which to work. Without hindrances, skills development programs will reach their ultimate success when the skills they teach spontaneously transfer both horizontally to unassisted HDI businesses and vertically to the next generation of HDI businesspersons.

B. South African Affirmative Action Programs

One of the more important initiatives started for the purpose of incorporating HDIs into the South African marketplace is the Black Economic Empowerment Commission, established by the Broad-Based Black Economic Empowerment Bill of 2003. The preamble of this bill addresses the prevailing reasons why this legislation needed to be enacted. It asserts that the exclusion of the majority of South Africans “from ownership of fixed assets and the possession of advanced skills,” systematically implemented

\[137\] Cheng, supra note 78, at 187–88 ("The controversy in designating women as presumptively socially disadvantaged for the 8(a) program is evident in recent political election rhetoric that echoes the current American consensus: 'Affirmative Action' is a dirty word.").

\[138\] See id.

\[139\] Broad-Based Black Economic Empowerment Bill, 2003, Bill 27-03 (GA) (S. Afr.) (noting that the bill was partially enacted to “increase broad-based and effective participation of black people in the economy and promote a higher growth rate, increased employment and more equitable income distribution”).

\[140\] Id. pmbl.
under apartheid, persists today under the new government. The preamble also attributes this lasting impact from apartheid to the underperformance of the South African economy as a whole, due to the minuscule income level of the large, historically disadvantaged, majority. Lastly, the preamble to this bill states that "the stability and prosperity of the [South African] economy" is completely dependent upon solving this problem and achieving black economic empowerment.

Black economic empowerment (BEE), in its first conception, attempted to function solely by focusing on ownership and management. This was known as narrow-based black economic empowerment, and the problems of this tunnel vision approach were obvious by the end of the century. In 2004 and 2005, various departments, including the Enterprise and Industry Development Division (EIDD) of the Department of Trade and Industry, led the push for a more comprehensive approach to black economic empowerment. Broad-based black economic empowerment (B-BBEE) supplanted the narrow-based economic empowerment in an attempt to accelerate blacks out of the "second" economy (that of the oppressed majority) into participation in the "first" economy of South Africa (that of the historically powerful minority).

The Department of Trade and Industry (DTI) implemented B-BBEE as part of the DTI's Codes of Good Practice, which included a seven element scorecard to keep tabs on the success of the plan. The seven elements consist of Ownership, Management Control, Employment Equity, Skills Development, Preferential Procurement, Enterprise Development, and the Residual Element. The seven elements are weighed differently: Ownership, Skills Development, and Preferential Procurement each consist of 20%, and

141 Id.
142 Id.
143 Id.
145 Id. at 3.
147 CODES OF GOOD PRACTICE, supra note 144, at 3.
148 Id. at 4.
149 Id.
the remaining four elements account for 10% each. The weights of each are multiplied by a “score” for each element. The sum of these makes up the BEE status for the entity which must be used in situations specified by the Act.

Section 10 of the Broad-Based Black Economic Empowerment Act established that government branches and public entities must take an entity’s BEE status into account when: “determining qualification criteria for the issuing of licenses and concessions; developing and implementing a preferential procurement policy; determining qualification criteria for the sale of state-owned enterprises; and developing criteria for entering into partnerships with the private sector.”

Two specific programs that facilitate B-BBEE are Khula Enterprise Finance (Khula) and The Enterprise Organisation (TEO). Khula falls under the support of the EIDD of the DTI, and has created more than 46,000 jobs in the small and medium enterprise (SME) sector. Additionally, 51% of Khula’s disbursements “went towards supporting BEE initiatives,” while the remaining 49% went to women-owned and women-run businesses.

In a slightly different manner from Khula, TEO operates “to stimulate and facilitate the development of sustainable, competitive enterprises through the efficient provision of effective and accessible supply-side incentive measures, such as matching grants, cash grants and tax allowances.” One of TEO’s accomplishments in 2004-2005 was “[a] 50% increase in the number of BEE firms supported through the [Black Business Supplier Development Programme] BBSDP.” Both of these initiatives focus on the supply of financial means rather than personal capabilities.

Without discounting the assistance these programs provide, they would be useless without the cornerstone of providing skills training for the BEE firms. Because resources for programs are scarce without additional funding, exclusively financial assistance programs may have to shrink to allow for a

150 Id.
151 Id. at 9.
152 Id. at 4.
154 Id.
155 ANNUAL REPORT, supra note 146, at 19.
156 Id.
157 Id. at 22.
158 Id. at 23.
reallocation of existing resources into foundational skills development programs. As a comparison, when the United States had to curtail its similar advance payments program after the Federal Credit Reform Act of 1990, theoretically, the dissolution of this program should have allowed for the diverting of resources to other programs such as the Mentor-Protégé program. However, because South Africa has not passed an equivalent to the Federal Credit Reform Act of 1990, perhaps its government could look toward incorporating more skills development into these financial assistance programs instead of diverting money between them in the zero sum game of government funding.

South Africa has less trouble determining those in the historically disadvantaged position due to the temporal proximity and systematic pervasiveness of apartheid in which strict formulas were followed to determine in which social stratus one would belong. In a more simplistic manner, the Broad-Based Black Economic Empowerment Bill defines black people as a “generic term which means Africans, Coloureds and Indians.” The socio-economic strategies implemented by this bill include but are not limited to—

(a) increasing the number of black people that manage, own and control enterprises and productive assets; 
(b) facilitating ownership and management of enterprises and productive assets by communities, workers, cooperatives and other collective enterprises; 
(c) human resource and skills development; 
(d) achieving equitable representation in all occupational categories and levels in the workforce; 
(e) preferential procurement; and 
(f) investment in enterprises that are owned or managed by black people.

While the comprehensive nature of BEECom is a major strength in terms of having a detailed plan, at first this attribute created difficulties in terms of

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160 See OXFORD HISTORY, supra note 8, at 459–60.
161 Broad-Based Black Economic Empowerment Bill § 1.
measuring the success of the program.\textsuperscript{163} This is reflected in the Codes of Good Practice, listing as a problem the "[l]ack of uniform framework for the recognition and measurement of BEE."\textsuperscript{164} This problem was ameliorated by standardizing "recognition and measurement principles to provide clarity."\textsuperscript{165} While this change was necessary to reduce confusion, it does not address the central issue of providing a better service, but rather ensuring more accurate reporting. "Extensive delays in BEE implementation due to differences in interpretation" was dealt with in the same manner.\textsuperscript{166} "Disparity in definitions and targets in charters and other BEE requirements" was another problem that needed to be addressed to reduce confusion.\textsuperscript{167} Other administrative problems addressed by the Codes of Good Practice include the fact that the "[s]tatus of transformation charters was unclear," and that "[n]o BEE verification standards or benchmarks [existed] across different BEE verification agencies."\textsuperscript{168} However, the last three implementation problems identified are the true culprits in the underperformance of the program.

The "[l]ack of underlying economic substance to many BEE transactions" resulted in many instances of black ownership on paper for the transactions, but little economic benefits inured to black shareholders.\textsuperscript{169} The lack of implementation guidelines also allowed for "fronting," or situations where a BEE entity could serve as a cover for a non-BEE entity.\textsuperscript{170} And third, "[b]lack board members tended not to be involved in the implementation of strategic decisions."\textsuperscript{171} All three of these problems reflect the program's failure to widen its perspective. Instead of focusing on effectively transferring skills to enable HDI business owners to compete, the program erroneously focused on the transactions themselves.

The scorecard was offered as the solution to these problems. This actually moves further away from the root of the problem. While it will make clearer guidelines, the persistent impersonal nature of the scorecard does little but require more cleverness from companies pursuing BEE assistance with

\textsuperscript{163} See CODES OF GOOD PRACTICE, supra note 144, at 2.
\textsuperscript{164} Id. at 3.
\textsuperscript{165} Id.
\textsuperscript{166} Id.
\textsuperscript{167} Id.
\textsuperscript{168} Id.
\textsuperscript{169} CODES OF GOOD PRACTICE, supra note 144, at 3.
\textsuperscript{170} Id.
\textsuperscript{171} Id.
illegitimate purposes. Fewer scorecards and more person-to-person interaction is the type of amending legislation and regulations that need to be produced.

The South African economy as a whole has still struggled over the past decade in terms of growth in unemployment between 1995 and 2002.\textsuperscript{172} The Gross Domestic Product has shown growth, and the heightened stability of the economy is evidenced in a substantial reduction of the budget deficit.\textsuperscript{173} The small business climate has experienced similar moderate strides as programs such as the Small Business Council, Khula Enterprise Finance Corporation, and Ntsika Enterprise Promotion Agency are providing good assistance, but still have substantial room for building upon the progress they are making.\textsuperscript{174} Empowerment of Blacks in terms of ownership and positions of top management is growing moderately, but Blacks have made substantial strides from 1994 when practically no Blacks owned or managed businesses.\textsuperscript{175}

The plan of BEECom has involved recommending the fulfilling of targets or quotas to address the continuing problems of incorporating HDIs into the marketplace.\textsuperscript{176} Among a longer list of quotas, these targets include aspirations that 30% of productive land be owned by Blacks, that black equity participation in business become at least 25%, that “[b]lack people . . . hold at least 25% of the shares of companies listed on the [Johannesburg Stock Exchange] JSE,” that 40% of directors of companies listed on the JSE be black, and that “at least 50% of [state-owned enterprises] SOE and Government procurement . . . should go to black companies. . . .”\textsuperscript{177}

Quotas are more effective when couched as ideals rather than immediate goals, and the BEECom Report sets a ten year time frame for attaining these goals.\textsuperscript{178} The officials implementing this strategy must beware of taking shortcuts to satisfy the target percentages. If the quotas are used as immediate goals, the shortcuts used to meet those goals could have worse long-term consequences for HDIs as a result of skipping steps that transfer the skills

\begin{footnotes}
\item[172] \textsc{Towards Ten Years of Freedom, supra} note 54, at 5 (noting that the number of employed people grew from 9.6 million to 11.2 million, but the unemployed population grew by more than 2.4 million due to more people seeking work).
\item[173] Id.
\item[174] Id. at 6.
\item[175] Id. (noting that “Black ownership of public companies was 9.4% in 2002 compared with 3.9% in 1997”).
\item[177] Id. at 8.
\item[178] Id.
\end{footnotes}
necessary to maintain the new level of employment or ownership status. Even though these benchmarks are not unreasonably high when compared with the overall percentage of Blacks in South Africa, pressure upon the private markets to have more black executives, landowners, or employees ignores the prerequisite of skills development necessary for promotion or hiring. Arbitrary implementation of quotas misses the value of the process of getting to those benchmarks.

IV. CONCLUSION: PERFECTING THE PROGRAMS INTO OBSOLESCENCE

Even the strongest proponents of affirmative action programs recognize the need for an event horizon where ideally the overwhelming success of the programs will render the programs obsolete. Even the strongest proponents of affirmative action programs recognize the need for an event horizon where ideally the overwhelming success of the programs will render the programs obsolete. The challenge for the current generation is to use the successes and failures of programs of the past to devise a plan that will eliminate the need for affirmative action. The South African approach is much more comprehensive in applying a centralized Black Economic Empowerment plan to all levels of the economy. The drawback to this approach is that it seemingly takes advantage of the slightly lower standard of review in South Africa to implement programs that are so extensive that they are difficult to measure and maintain.

The United States deals with a problem not as large in terms of numbers, but just as challenging in terms of eliminating the evil. Similarly, the United States Congress jumps at the chance to create programs that approach the U.S. Supreme Court’s line of strict scrutiny review without paying enough attention to the long-term intended benefits of the program. The legislatures of both governments should resist this temptation.

179 See, e.g., Hobbs, supra note 6, at 244–45 ("[W]ith the waning of affirmative action as a remedy for past racial and ethnic discrimination, the development of entrepreneurship and small business ownership is a critical part of the pursuit of social and economic justice.").

180 See id.


182 See, e.g., McKinnon, supra note 1 (highlighting the relatively higher rates of minorities in professional occupations than in South Africa).

183 See Major Patrick E. Tolan, Jr., Government Contracting with Small Businesses in the Wake of The Federal Acquisition Streamlining Act, The Federal Acquisition Reform Act, and Adarand: Small Business as Usual?, 44 A.F. L. REV. 75, 75 (1998) (stating that the Clinton administration advocated "modifying the preferences for minority businesses, so that the programs will pass strict scrutiny").
The insatiable need for governments to see dollar signs and job numbers works against the most effective means of creating equal opportunity and achievement in the small business arena. Programs that involve preferential treatment in granting procurement contracts and low or no interest loans are counterproductive in the long run. The programs are non-specific, impersonal, and incapable of creating the same lasting skills transfer which is characteristic of mentorships or other skills training programs. Legislatures should focus less on what the law will allow and more on what the HDI situation requires: skills development to put HDIs on an even playing field to compete fairly in a capitalist society. Only this approach, due to the personal nature of mentorship and other skills development programs, foresees the scaling back of assistance becoming possible.

This Note focused on the small business level in both the United States and South Africa, which should be a useful guide to judging the progress of creating equal opportunities for HDIs at all levels. Ideally, an even playing field at the small business level will lead to an equal footing in other, and eventually all, economic, social, and political levels.