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REBUILDING THE CITY OF RICHMOND: CONGRESS'S POWER TO AUTHORIZE THE STATES TO IMPLEMENT RACE-CONSCIOUS AFFIRMATIVE ACTION PLANS†

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INTRODUCTION

Among the most difficult issues with which the Supreme Court has wrestled over the last two decades is the right of public officials to consider an individual's race in making hiring, promotion and contracting decisions. The Court's opinions interpreting constitutional, statutory and administrative provisions have failed to establish clear guidelines to assist public officials and counsel in their decision making.¹ At the heart of the Court's jurisprudential insta-

¹ Putting aside the enormously complicated *moral* issues involved in race-conscious preferences, the task of determining what is and is not forbidden by antidiscrimination laws is daunting. Dean William N. Hines of the University of Iowa Law School aptly captured the frustration in observing, "The law school is trying to do the right thing [regarding minority student recruiting]. It's having a hard time trying to figure out just what that is." *Somewhat Affirmative Action: Law Schools Are Caught in a Bind Balancing Bias Remedies with Recruitment Efforts*, NAT'L L.J., Jan. 7, 1991, at 1.

Federal officials are just as confused as public and private employers and contracting authorities. See *infra* note 46 discussing the Reagan Administration's approval of race norming in the scoring of certain employment-related tests and the Bush Administration's disapproval. In 1990, the Department of Education announced that scholarships reserved for minority university students were illegal. In the face of enormous public outcry, the Bush Administration beat a hasty retreat from that position, allowing race/gender-specific schol-

bility lies a profound vacillation between two very different notions of equality: equal access and equal achievement. The equal access construct defines equality in terms of the removal of overt barriers to employment, contracting, housing, voting, and so forth. The equal achievement construct goes beyond removal and adds a compensatory element to make up for the lingering effects of years of societal discrimination. In two recent cases, *Metro Broadcasting, Inc. v. FCC*² and *City of Richmond v. J.A. Croson Co.*,³ the Supreme Court carried this vacillation to a new frenzy. While permitting Congress to define equality in terms of equal achievement, the Court denied that same power to the states, cabinining the states' definition to equal access.⁴

In doctrinal terms, the Court accomplished this striking bifurcation with relative ease. It held that race-conscious preferences adopted by the states were subject to review under the strict scrutiny standard, while those adopted by Congress were subject to the less rigorous intermediate standard.⁵ The net result of *Metro Broadcasting* and *City of Richmond* is to make it next to impossible for states to adopt race-conscious preferences in the absence of clear proof of discrimination attributable to them. These decisions frustrate local initiatives to eradicate the pervasive, lingering effects of public and private discrimination.⁶ They endanger local initiatives that

arships donated by private sources. William Celis III, *Court Questions Use of Race-Based Scholarships*, N.Y. TIMES, Feb. 6, 1992, at A15; Anthony DePalma, *Theory and Practice Are at Odds in New Proposal on Minority Scholarships*, N.Y. TIMES, Dec. 7, 1991, at 10; Carlyle C. Douglas, *A Learning Experience in Education Policy*, N.Y. TIMES, Dec. 16, 1990, § 4, at 7. The United States Court of Appeals for the Fourth Circuit recently reversed an order of summary judgment dismissing a complaint challenging a scholarship program for African-Americans at the University of Maryland. Applying the Supreme Court's contemporary strict scrutiny analysis, the court of appeals held that the race-specific scholarship program violated the Equal Protection Clause unless it remedied the present effects of past discrimination by the University. *Podberesky v. Kirwan*, 956 F.2d 52 (4th Cir. 1992). See generally *infra* notes 71-125 and accompanying text.

² 110 S. Ct. 2997 (1990).

³ 488 U.S. 469 (1989).

⁴ See *id.*; 110 S. Ct. at 2997. *Milwaukee County Pavers Ass'n v. Fiedler*, 922 F.2d 419 (7th Cir. 1991), *cert. denied*, 111 S. Ct. 2261 (1991), strikingly illustrates the schizophrenic bifurcation of government power resulting from *City of Richmond* and *Metro Broadcasting*. In that case, the Court of Appeals for the Seventh Circuit struck down a race-conscious program adopted by the state of Wisconsin in its sovereign capacity. At the same time, it upheld an identical race-conscious program adopted by Wisconsin as an "agent" of the federal government. See *infra* notes 157-62 and accompanying text.

⁵ See *Metro Broadcasting*, 110 S. Ct. at 3008-09; *City of Richmond*, 488 U.S. at 469.

⁶ The President of the Minority Business Enterprise Legal Defense and Education Fund in commenting upon the *City of Richmond* decision observed that "the only means by which minorities have been able to get access to these markets is through contracting

have shown themselves to be effective in ending economic apartheid.

This article argues that Congress possesses the constitutional power to authorize the states to adopt measures that effectively define equality in terms of the equal achievement construct. Part I highlights the general differences between the two approaches to the notion of equality.⁷ Part II analyzes the Court's affirmative action jurisprudence, emphasizing its vacillation between the equal access and equal achievement constructs.⁸ Part III examines Congress's power under Section 5 of the Fourteenth Amendment to permit the states to adopt race-conscious preferences.⁹ In Part IV, the author advocates Congressional intervention to hasten the integration of minorities into the economic mainstream of the United States.¹⁰ Juxtaposing evidence of continuing wage and income disparities between minorities and non-minorities with social science data exposing employment and business discrimination, the author proposes that economic diversity enter the lexicon of constitutionally acceptable justifications for race-conscious preferences. Part IV also focuses attention on significant cases in which the Court has acknowledged diversity in economic affairs as an appropriate sub-

programs. . . ." He feared a resurgence of "old-boy networking" among white contractors. Nancy Lewis, *Lawyers, Builders Disagree on Impact of High Court Decision on Set Asides; D.C. Program Seen as Target for Law Suits After Ruling*, WASH. POST, Jan. 29, 1989, at A21. The Court's decision jeopardized over 200 set-aside programs. Stephen Wermiel, *Justices Limit State Contracts Based on Race*, WALL ST. J., Jan. 24, 1989, at A3. The Minority Business Enterprise Legal Defense and Education Fund, Inc. ("MBELDEF") estimates that between January 1989 and March 1, 1991, approximately 41 Management Business Enterprise ("MBE") programs were subject to *City of Richmond*-based challenges. MBELDEF, Memorandum dated March 1, 1991 (on file in author's office) [hereinafter MBELDEF Memo]. *E.g.*, *Milwaukee County Pavers Ass'n*, 992 F.2d at 419, discussed *supra* note 4; *American Subcontractors Ass'n v. City of Atlanta*, 376 S.E.2d 662 (Ga. 1989) (set-aside invalid under the equal protection clause of the Georgia Constitution for reasons similar to those given in *City of Richmond*). See also *Michigan Road Builders Ass'n, Inc. v. Milliken*, 834 F.2d 583 (6th Cir. 1987), *aff'd*, 489 U.S. 1061 (1989) (mem.). In addition, 65 jurisdictions voluntarily terminated their MBE programs after *City of Richmond*. MBELDEF Memo, *supra*, at 21-25.

The impact of these cases and voluntary decisions can be devastating for both individual minority contractors and minority contracting enterprises in general. When the Philadelphia MBE program was struck down, MBE contracts with the city declined from 25% to 3.5% in the 1990 fiscal year, representing a decline in revenue from \$65 million to \$21.3 million. Tom Wicker, *Toward the Idea*, N.Y. TIMES, Dec. 26, 1991, at A25. As the percentage of contracts awarded to MBEs shrinks, the employment rate of minority construction workers declines. Barnett, *Just the Facts Ma'am*, MBE MAG., Jan.-Feb. 1990, at 22.

⁷ See *infra* notes 14-68 and accompanying text.

⁸ See *infra* notes 69-125 and accompanying text.

⁹ See *infra* notes 126-62 and accompanying text.

¹⁰ See *infra* notes 163-256 and accompanying text.

ject matter for decision making by the political branches of government.¹¹ Finally, Part V outlines the substantive parameters of the proposed Congressional legislation.¹²

The legislation called for in this article has many advantages. First, it will reflect a national consensus on the circumstances justifying the adoption of race-conscious preferences by thousands of state and municipal agencies. Nationwide standards will promote fairness in employment and business for both minorities and non-minorities. At the same time, the legislation will respect federalism principles by leaving the initial decision to adopt race-conscious preferences to the states and municipalities. Second, the legislation will foster full participation of minorities in the United States economy. While strengthening the nation internally, it will also enable the country to compete more effectively in a global economy. Third, in light of the changing racial and ethnic demographics of the nation's labor pool, it will counterbalance the educational and social malfunctioning that tends toward producing a plantation economy, in which power and mobility are lodged with non-minorities.

Finally, this legislation represents a natural progression in the nation's understanding of racial discrimination and commitment to its eradication. As the twenty-first century approaches, Congress must break away from strategies designed to overcome the exclusion of minorities and instead promote strategies designed to ensure inclusion. Congress took the first step in this new direction last year with the adoption of the Glass Ceiling Act of 1991.¹³ That statute affirmatively acknowledged the importance of diversity in the work and market places and conceded the nation's poor record in assuring the much-needed diversity. It called for further study of the issue and appointed a commission to conduct a comprehensive review of management decision making. The next step in establishing a national policy of inclusion is incremental and hardly radical. Congress must permit the states, if they so elect, to foster diversity

¹¹ See *infra* notes 228-56 and accompanying text.

¹² See *infra* notes 257-301 and accompanying text.

¹³ Glass Ceiling Act of 1991, Pub. L. 102-166, 105 Stat. 1081 (1991). Labor economists and management experts have coined the term "glass ceiling" to describe the absence of minorities and women at the upper rungs of corporate career ladders. The Department of Labor has defined it as "those artificial barriers based on attitudinal or organizational bias that prevent qualified individuals from advancing upward into their organization into management-level positions." U.S. DEPT OF LABOR, A REPORT ON THE GLASS CEILING INITIATIVE I (1990) [hereinafter GLASS CEILING]. This phenomenon is also described as a career "plateau," a point beyond which advancement rarely occurs. *Id.* at 4. See Diana B. Henriques, *Piercing Wall Street's Lucite Ceiling*, N.Y. TIMES, Aug. 11, 1991, § 3, at 1.

in their employment and commercial settings. The time has come to permit the City of Richmond to rebuild itself and dismantle the glass ceiling, assuring equality of achievement in the work and market places.

I. DEFINING EQUALITY: EQUAL ACCESS OR EQUAL ACHIEVEMENT?

A. *Origin of the Controversy*

No issues have more continuously rent the fabric of American political and constitutional life than those surrounding the securing of the promise of equality first pronounced in the Declaration of Independence. As the historian Richard Morris has so ably pointed out, "We, the people" was a profoundly exclusionary concept, leaving no place in the body politic for African-Americans, women or non-propertied white males.¹⁴ The political and moral battle to dismantle the barrier of racial exclusion culminated in the Civil War, turning state against state, family against family, and brother against brother.¹⁵ For a short while, the quest for equality continued after the guns of war were silenced. Regrettably, the country too quickly abandoned the enormous task of opening the nation's political and economic infrastructure in a meaningful way to the newly emancipated slaves.¹⁶ The Supreme Court's calamitous opinion in *Dred Scott*¹⁷ left the legislative and executive branches constitutionally paralyzed, unable to prevent the Civil War through political compromise. The Court proved no wiser after the war, issuing a series of opinions that effectively bolted the door of the courthouse to seekers of racial equality and justice.¹⁸

¹⁴ RICHARD B. MORRIS, *THE FORGING OF THE UNION: 1781-1789*, 163-93 (1987); *STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS 4-6* (Bernard Schwartz ed., 1970) [hereinafter *CIVIL RIGHTS*].

¹⁵ E.g., HENRY S. COMMAGER, *I THE BLUE AND THE GREY: THE STORY OF THE CIVIL WAR AS TOLD BY PARTICIPANTS* (1951); JAMES M. MCPHERSON, *BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA* (1988); CHARLES ROYSTER, *THE DESTRUCTIVE WAR: WILLIAM TECUMSEH SHERMAN, STONEWALL JACKSON AND THE AMERICANS* (1991).

¹⁶ C. VANN WOODWARD, *REUNION & REACTION: THE COMPROMISE OF 1877 AND THE END OF RECONSTRUCTION* (1951).

¹⁷ *Dred Scott v. Sandford*, 60 U.S. 393 (1856).

¹⁸ *Hodges v. United States*, 203 U.S. 1 (1906) (Civil Rights Act of 1866); *James v. Bowman*, 190 U.S. 127 (1903) (Enforcement Act); *The Civil Rights Cases*, 109 U.S. 3 (1883) (Civil Rights Act of 1875); *United States v. Harris*, 106 U.S. 629 (1883) (Ku Klux Klan Act); *United States v. Reese*, 92 U.S. 214 (1876) (Enforcement Act); *The Slaughter-House Cases*, 83 U.S. 36 (1872) (Civil Rights Act of 1875). See also *Plessy v. Ferguson*, 163 U.S. 537 (1896) (upholding state-mandated *de jure* segregation). See generally *CIVIL RIGHTS*, *supra* note 14.

First cautiously,¹⁹ and then with bold strokes,²⁰ the Supreme Court after the Second World War mobilized the country to resume the barely begun task of opening the political and economic infrastructure. Responding to the fury and strength of the Civil Rights movement, the President finally joined the Court in endeavoring to fulfill the promise of equality. The most significant Executive Branch action was President Johnson's issuance of Executive Order 11,246, that required most contractors with the federal government to "take affirmative action to ensure that the applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin."²¹ The agencies charged with enforcing Executive Order 11,246 insisted upon sophisticated structural analyses of the employer-contractor's workforce, which frequently resulted in findings of underutilization of women and minorities. In turn, the findings led contractors to adopt "goals" and "timetables" for diversifying their workforce.

The Legislative Branch followed suit. The 1960s witnessed the enactment of sweeping legislation designed to eradicate racial dis-

¹⁹ *Barrows v. Jackson*, 346 U.S. 249 (1953); *Terry v. Adams*, 345 U.S. 461 (1953); *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Smith v. Allwright*, 321 U.S. 649 (1944); *Nixon v. Condon*, 286 U.S. 73 (1932); *Nixon v. Herndon*, 273 U.S. 536 (1927).

²⁰ The Supreme Court later moved decisively to ban government segregation. *Bolling v. Sharpe*, 347 U.S. 497 (1954) (segregated schools in the District of Columbia); *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (segregated state public schools). *Accord* *New Orleans City Park Improvement Ass'n v. Detiege*, 358 U.S. 54 (1958) (per curiam) (public parks and golf courses); *Holmes v. City of Atlanta*, 350 U.S. 879 (1955) (per curiam) (municipal golf course); *Mayor of Baltimore v. Dawson*, 350 U.S. 877 (1955) (per curiam) (public beaches and bath houses); *Muir v. Louisville Park Theatrical Ass'n*, 347 U.S. 971 (1954) (per curiam) (amphitheater in city park).

As part of its crusade to end segregation, the Court also acknowledged sweeping power in Congress to use the Civil Rights Amendments to outlaw private and public discrimination. *E.g.*, *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968) (Thirteenth Amendment); *Katzbach v. Morgan*, 384 U.S. 641 (1966) (Fourteenth Amendment); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) (Fifteenth Amendment). Discussions of segregation and the Civil Rights movement easily fall into the trap of treating discrimination as a Southern phenomenon. The North was hardly immune from racial bias. *E.g.*, *Milliken v. Bradley*, 418 U.S. 717 (1974) (education); *Keyes v. School Dist. No. 1*, 413 U.S. 189 (1973) (same); *Detroit Police Officers Ass'n v. Young*, 608 F.2d 671 (6th Cir. 1979), *cert. denied*, 446 U.S. 917 (1980) (employment); *United States v. City of Chicago*, 573 F.2d 416 (7th Cir. 1978) (same). Labor unions, especially in the construction industry, are particularly resistant to integration. *See* *Local 28, Sheet Metal Workers v. EEOC*, 478 U.S. 421 (1986), described *infra* Appendix.

²¹ Exec. Order No. 11,246, 3 C.F.R. 339 (1964-1965) *reprinted as amended* in 42 U.S.C. § 2000e (1988). The implementing regulations for Executive Order 11,246 are found at 41 C.F.R. § 60-2 (1990). *See* generally 2 CHARLES A. SULLIVAN, MICHAEL J. ZIMMER & RICHARD F. RICHARDS, *EMPLOYMENT DISCRIMINATION* 547-60 (2d ed. 1988), discussing Executive Order 11,246's contents, enforcement and validity.

crimination in employment, housing and voting.²² The Court accelerated the momentum by issuing decisions broadly interpreting the rights recently created by Congress.²³

Initially, the nation's struggle to open the political and economic infrastructure, to include racial minorities in "We, the people," focused on the removal of barriers to participation, or in other words, equal access. For example, in 1964, when Congress and the President first joined together to put the strength of the national government behind the Civil Rights movement, it was generally believed that with the outlawing of deliberate racism in employment, minorities would have access to blue-collar, white-collar and professional jobs. Congress's overriding concern was to prohibit disparate treatment, i.e., intentional discrimination.²⁴ It soon became apparent, however, that many employment practices that eliminated minorities from hiring and promotion opportunities at a rate much greater than whites were neutral on their face and adopted without apparent discriminatory motive.²⁵

Responding to this awareness, the Court fashioned the "disparate impact" theory of liability under Title VII.²⁶ That theory required employers to eliminate neutral barriers that were not

²² Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972) (codified as amended at 42 U.S.C. §§ 2000e-5(c)-2000e-17 (1988)); Fair Housing Act of 1968, Pub. L. No. 90-284, 82 Stat. 81 (codified as amended at 42 U.S.C. §§ 3601-3631 (1988)); Civil Rights Act of 1968, Pub. L. No. 90-284, §§ 801-809, 82 Stat. 73 (1968); Voting Rights Act of 1965, Pub. L. No. 89-110, §§ 1973 *et seq.*, 79 Stat. 437 (1965) (codified as amended at 42 U.S.C. §§ 1973 *et seq.* (1988)); Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 28 U.S.C. § 1447; 42 U.S.C. §§ 1971, 1975a-1975d, 2000a-2000h-6 (1988)).

²³ *E.g.*, *Dothard v. Rawlinson*, 433 U.S. 321 (1977); *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977); *United Jewish Orgs. of Williamsburgh, Inc. v. Carey*, 430 U.S. 144 (1977); *Runyon v. McCrary*, 427 U.S. 160 (1976); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Oregon v. Mitchell*, 400 U.S. 112 (1970); *Newman v. Piggie Park Enters.*, 390 U.S. 400 (1968); *Hamm v. City of Rock Hill*, 379 U.S. 306 (1964); *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964).

²⁴ Drew S. Days III, *The Court's Response to the Reagan Civil Rights Agenda*, 42 VAND. L. REV. 1003, 1003-07 (1989).

²⁵ Congress specifically evidenced this new awareness in the 1972 amendments to Title VII. S. REP. NO. 1137, 91st Cong., 2d Sess. 4 (1970). *See also* S. REP. NO. 415, 92d Cong., 1st Sess. 5 (1971).

²⁶ *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). *See generally* BARBARA L. SCHLEI & PAUL GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 1286-394 (2d ed. 1983); Mary C. Daly, *Some Runs, Some Hits, Some Errors—Keeping Score in the Affirmative Action Ballpark from Weber to Johnson*, 30 B.C. L. REV. 1, 10-12 (1988). For a considered and comprehensive study of the disparate treatment and disparate impact theories of Title VII liability, see Theodore Y. Blumoff & Harold S. Lewis, Jr., *The Reagan Court and Title VII: A Common-Law Outlook on a Statutory Task*, 69 N.C. L. REV. 1 (1990).

clearly "business-related." Congress, in amending the 1964 Equal Employment Opportunity Act in 1972, approved the Court's expansive definition of proscribed forms of discrimination.

The 1972 amendments also extended Title VII's prohibitions to state and municipal governments.²⁷ Until the 1972 amendments, public sector employees could seek redress for racial discrimination in employment only by invoking the protection of the Fourteenth Amendment. To establish a Fourteenth Amendment violation, however, they had to prove intentional discrimination. The 1972 amendments enormously benefited the victims of discrimination by relieving them of the responsibility of proving intent.²⁸ Public sector employees alleging discriminatory hiring and promotion policies bore a significantly reduced burden of proof under the disparate impact theory of liability.²⁹

The legislative history of the 1972 amendments suggests, moreover, that Congress approved the race-conscious regulations imposed on federal contractors by Executive Order 11,246.³⁰ These regulations required federal contractors to adopt goals and timetables to insure the greater participation of minorities in their workforce.³¹

Executive Order 11,246 and the disparate impact test also reflected a subtle but powerful shift in the philosophical underpinning of affirmative action. Courts and executive agencies increasingly measured discrimination in terms of "groups," not "individuals."³² The government and private attorneys general spent considerable energy ferreting out institutional structures that blocked minority

²⁷ Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 104-05 (1972) (codified at 42 U.S.C. §§ 2000e-5(c), 2000e-16 (1982)). George P. Sape & Thomas J. Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 GEO. WASH. L. REV. 824, 847-49 (1972).

²⁸ Congress described relief under the Fourteenth Amendment as "an empty promise . . . [for] disadvantaged individuals." H.R. REP. NO. 92-238, 92d Cong., 2d Sess., reprinted in 1972 U.S.C.C.A.N. 2137, 2153-54.

²⁹ SCHLEI & GROSSMAN, *supra* note 26, at 1186.

³⁰ While Congress was considering the 1972 amendments, two courts in highly publicized cases rejected statutory and constitutional challenges to Executive Order 11,246. *United States v. Ironworkers Local 86*, 443 F.2d 544 (9th Cir.), cert. denied, 404 U.S. 984 (1971); *Contractors Ass'n v. Secretary of Labor*, 442 F.2d 159 (3d Cir.), cert. denied, 404 U.S. 854 (1971). During the Congressional debate, Senator Ervin introduced two separate amendments to overturn these decisions. Both amendments were overwhelmingly rejected. 118 CONG. REC. 1676, 4917-18 (1972).

³¹ 3 C.F.R. § 340 (1965), reprinted as amended in 42 U.S.C. § 2000e (1982). See generally Roy L. Brooks, *Affirmative Action in Law Teaching*, 14 COLUM. HUM. RTS. L. REV. 15, 19, 22 (1982).

³² Days, *supra* note 24, at 1004-05.

access to better job and career opportunities.³³ Enforcement emphasis shifted from "perpetrators" (those with evil intent) to "victims" (minority group members disadvantaged by institutional barriers as much as, if not more than, by deliberate racism). Accompanying this shift was a corresponding shift in remedies. Comparatively little energy was invested in punishing perpetrators. The goal was elimination of the offending barriers. The success of these efforts was measured by the percentage increases in the employment of, promotion of, or contracting with, minority group members.

The Court's momentum has slowed considerably in the last several years. Indeed, many students of the Court point to *Metro Broadcasting* and other recent decisions as proof that the momentum is now moving in the *opposite* direction, making it more difficult for civil rights complainants to have their day in court.³⁴ Organizations representing racial minorities are increasingly looking to Congress to take the lead in eradicating the still too persistent vestiges of second-class citizenship from which minorities suffer.³⁵

³³ *E.g.*, height and weight requirements (*Dothard v. Rawlinson*, 433 U.S. 321 (1977)); aptitude tests (*Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975)); high school diploma requirement (*Griggs v. Duke Power Co.*, 401 U.S. 424 (1971)). The disparate impact theory applies to subjective criteria used in making hiring and promotion decisions as well as to objective criteria. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 988 (1988).

³⁴ The author argued precisely this point in Mary C. Daly, *Affirmative Action, Equal Access, and the Supreme Court's 1988 Term: The Rehnquist Court Takes a Sharp Turn to the Right*, 18 *HOFSTRA L. REV.* 1057, 1060, 1067-68, 1127 (1990). See also generally Douglas D. Scherer, *Affirmative Action Doctrine and the Conflicting Message of Croson*, 38 *KAN. L. REV.* 281, 281-82, 285, 340 (1990). Two stimulating articles with more abstract frameworks that reach the same conclusion are: Alan Freeman, *Antidiscrimination Law: The View from 1989*, 64 *TUL. L. REV.* 1407, 1407-08, 1433, 1441 (1990); D. Marvin Jones, *Unrightable Wrongs: The Rehnquist Court, Civil Rights and an Elegy for Dreams*, 25 *U.S.F. L. REV.* 1, 2-3, 44-48, 65-66 (1990).

The Court's shift was undoubtedly hastened by the insistence of the Justice Department in the Reagan Administration on an "intent" standard of proof and liability. Compare William B. Reynolds, *The Reagan Administration and Civil Rights: Winning the War Against Discrimination*, 1986 *U. ILL. L. REV.* 1001 with Joel L. Selig, *The Reagan Justice Department and Civil Rights: What Went Wrong*, 1985 *U. ILL. L. REV.* 785. For further commentary, see Drew S. Days III, *Turning Back the Clock: The Reagan Administration and Civil Rights*, 19 *HARV. C.R.-C.L. L. REV.* 309 (1984); Joel L. Selig, *The Reagan Administration and Civil Rights: Professor Selig Responds to Assistant Attorney General Reynolds*, 1987 *U. ILL. L. REV.* 431.

³⁵ Congress has not hesitated in the past to intervene when it disagreed with the Court's statutory interpretation of civil rights legislation. *E.g.*, Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (codified at 42 U.S.C. § 2000d) (overturning *Grove City College v. Bell*, 465 U.S. 555 (1984)); Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, 100 Stat. 796 (codified at 20 U.S.C. § 1415(e)(B)-(G)) (overturning *Smith v. Robinson*, 468 U.S. 992 (1984)); 1986 Amendments to the Rehabilitation Act, Pub. L. No. 99-506, 100 Stat. 1807 (codified at 29 U.S.C. § 701) (overturning *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985)); Pregnancy Discrimination Act of Oct. 31, 1978, Pub. L.

Before the momentum ended, however, significant structural changes occurred within the public and private sectors. Fearful of statutory and/or constitutional liability, worried about employee divisiveness caused by litigation, and apprehensive of the misdirection of valuable executive time, many employers voluntarily instituted "affirmative action"³⁶ programs to increase the number of minorities

No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k)) (overturning *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976)); Civil Rights Attorney's Fees Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (codified at 42 U.S.C. § 1988) (overturning *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975)). See generally Charles S. Ralston, *Court vs. Congress: Judicial Interpretation of the Civil Rights Acts and Congressional Response*, 8 YALE L. & POL. REV. 205 (1990).

The Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) overturns in whole or in part eight Supreme Court decisions handed down between 1987 and 1991: *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) (§ 105); *EEOC v. Arabian Am. Del. Co.*, 111 S. Ct. 1227 (1991) (§ 109); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (§ 107); *Lorance v. AT&T Technologies*, 490 U.S. 900 (1989) (§ 112); *Martin v. Wilkes*, 490 U.S. 754 (1989) (§ 108); *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437 (1987) (§ 113); *Library of Congress v. Shaw*, 478 U.S. 310 (1986) (§ 114); *Patterson v. McLean Credit Union*, 490 U.S. 164 (1989) (§ 101). For a detailed discussion of Congress's dissatisfaction with these cases, see H.R. REP. NO. 102-40(I), 102d Cong., 1st Sess. 1-164 (1991), reprinted in 1991 U.S.C.C.A.N. 549-693 (1991); H.R. REP. NO. 102-40(II), 102d Cong., 1st Sess., 1-81 (1991), reprinted in 1991 U.S.C.C.A.N. 694-767 (1991). The impact of these cases is discussed in Alfred W. Blumrosen, *The 1989 Supreme Court Rulings Concerning Employment Discrimination and Affirmative Action: A Minefield for Employers and a Goldmine for Their Lawyers*, 15 EMPLOYEE REL. L.J. 175 (1989).

³⁶ Both the legislative and executive branches have used the term "affirmative action" in positive law. Section 706(g) of Title VII provides: "If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice . . . the court may . . . order such affirmative action as may be appropriate. . . ." Executive Order 11,246 imposes an "affirmative action" obligation on government contractors. See *infra* notes 55-59 and accompanying text. The term was first used by President Kennedy in Executive Order 10,925, a predecessor to Executive Order 11,246. See generally James E. Jones, Jr., *The Origins of Affirmative Action*, 21 U.C. DAVIS L. REV. 383 (1988).

Unless the context clearly indicates the contrary, "affirmative action" in this article refers to voluntary race-conscious preferences, i.e., preferences adopted by choice after independent decision making, and not in response to either litigation or administrative or judicial mandate. Affirmative action, however, can have a much broader meaning and is often employed to describe a wide range of activities fashioned "to overcome the effects of past or present practices, policies or other barriers to equal employment opportunity." EEOC Guidelines on Affirmative Action Appropriate Under Title VII of the Civil Rights Act of 1964, amended by 29 C.F.R. § 1608.1(c) (1990). Used in this manner, affirmative action encompasses recruiting activities, training programs, elimination of any adverse impact caused by selection criteria not validated pursuant to EEOC Guidelines and modification of promotion and layoff procedures. *Id.*; see also Office of Federal Contract Compliance Programs (OFCCP), Affirmative Action Programs, 41 C.F.R. § 60-2.1-2.32 (1990). This article addresses voluntary race-conscious preferences. The Court has approved the use of judicially mandated preferences where the defendant-employer's conduct has been particularly egregious. *E.g.*, *United States v. Paradise*, 480 U.S. 149 (1987); *Local 28, Sheet Metal Workers v. EEOC*, 478 U.S. 421 (1986). The rationale for such remedies is fairly obvious. Without them, "victims would remain uncompensated, wrongdoers would stand uncorrected, and third persons would

in their workforce and to raise the number of minorities holding non-menial positions within their organizations' structures.³⁷ Public contracting authorities adopted set-aside programs to encourage the participation of minority businesses in public works construction.³⁸ The critical provision in both types of plans was the one that identified the plan's quotas or goals³⁹ for minority participation (e.g., 50 percent minority enrollment in a training program, or 10 percent minority business enterprise participation in public works contracts). Critics denounced such race-conscious programs as "reverse discrimination," because the programs conferred benefits on minorities who were not personally victims of discrimination by an employer or contracting authority. They also condemned the programs' adoption in the absence of findings of discrimination by an administrative, legislative or judicial body. Supporters of affirmative action programs, however, disputed the statutory and constitutional significance of the critics' charges, arguing that "equal access,"—the removal of barriers—was an incomplete remedy. They championed instead "equal achievement," in which membership in a traditionally excluded racial group would be counted as a legitimate cipher in an employer's calculus of hiring and promotion or a public contracting official's calculus of bid letting.

In philosophical and jurisprudential circles, the debate between equal access and equal achievement continues unabated. The contributions of the Supreme Court to the debate have been marginal. Like society at large, the Court has been divided over the use of race in employment and contracting decisions. Study of the Court's

unintentionally reap the unearned benefits of discrimination as a form of unjust enrichment." Burt Neuborne, *Notes for the Restatement (First) of the Law of Affirmative Action: An Essay in Honor of Judge John Minor Wisdom*, 64 TUL. L. REV., 1543, 1546-47 (1990).

³⁷ As Professor Cox has observed:

Employers and Unions are not formally subject to liability for failure to achieve balanced work forces, but they incur substantial risks of liability and costs of defense both in utilizing selection criteria correlated with race or gender and in having imbalanced work forces. They may, moreover, minimize these risks through conscious and formal efforts to achieve race and gender balance. Employers, therefore, have an incentive both to adopt affirmative action as an operating policy and to defend it so long as the incentive structure generated by Title VII theories of liability remains in place. To suggest that affirmative action is not required by this judicially created incentive structure is to engage in "newspeak."

Paul N. Cox, *The Supreme Court, Title VII and "Voluntary" Affirmative Action—A Critique*, 21 IND. L. REV. 768, 806 (1988).

³⁸ See *infra* notes 76-125 and accompanying text for a detailed description of these programs.

³⁹ For a discussion of goals and quotas, see *infra* note 47.

eleven affirmative action cases shows the decisions to be roughly equally divided between the two concepts.⁴⁰

B. *The Equal Access/Equal Achievement Debate*

Two competing concepts of equality have drawn the attention of philosophers and legal scholars in connection with the use of race-conscious preferences in the public and private sectors: equal access and equal achievement.⁴¹ The easiest way to understand the

⁴⁰ For a description of each of these cases and their relationship to the equal access/equal achievement construct, see *infra* Appendix. An earlier version of this chart appeared in Daly, *supra* note 34, at 1128-31.

For the purposes of this article, no distinction is made with respect to the substantive norm under which the cases arose (i.e., Title VII, the Equal Protection Clause of the Fourteenth Amendment or the equal protection component of the Due Process Clause of the Fifth Amendment). The same issues and principles surround race-conscious preferences by employers and contracting authorities in both the public and private sectors, regardless of the statutory or constitutional underpinning. The Court treats these cases as forging one body of law, freely incorporating doctrine and precedent from one line of cases into the others. See Neuborne, *supra* note 36, at 1543-44.

⁴¹ This discussion makes no attempt to describe comprehensively the principles animating the equal access/equal achievement debate. Its purpose is to provide a framework for the subsequent analysis of the Court's standard-of-review jurisprudence. To capture the vigor of the debate in contemporary political terms, compare William B. Reynolds, *An Equal Opportunity Scorecard*, 21 GA. L. REV. 1007 (1987) (equal access); Peter Westen, *The Concept of Equal Opportunity*, 95 ETHICS 837 (1985) (same) with Alan Freeman, *Racism, Rights and the Quest for Equality of Opportunity: A Critical Legal Essay*, 23 HARV. C.R.-C.L. L. REV. 295 (1988) (equal achievement); Benjamin L. Hooks, *Affirmative Action: A Needed Remedy*, 21 GA. L. REV. 1043 (1987) (same); Michael Rosenfeld, *Substantive Equality and Equal Opportunity: A Jurisprudential Appraisal*, 74 CAL. L. REV. 1687 (1986) (same). Additional resources are cited *infra* notes 44-45, 49, 51-53, 82, 84. Extended bibliographies can be found in ROBERT K. FULLINWIDER, *THE REVERSE DISCRIMINATION CONTROVERSY: A MORAL AND LEGAL ANALYSIS* 277-91 (1980); KATHANNE W. GREENE, *AFFIRMATIVE ACTION AND PRINCIPLES OF JUSTICE* 177-81 (1989).

The equal access/equal achievement debate in many ways mirrors the individual rights/group rights debate.

On the one hand, there is the plea from many blacks for reparations in the form of substantial approximation to ethnic proportionality in the allocation of scarce social goods. . . . On the other hand, a policy of ethnic proportionality that qualifies a person's equality of opportunity has no foundation in our individual-rights focused constitutional tradition; [and] no foundation in the traditional western concept of equal citizenship, a status keyed to personality and not to groups. . . .

Robert G. Dixon, Jr., Bakke: *A Constitutional Analysis*, 67 CAL. L. REV. 69, 74 (1979). See generally Frank Askin, *Eliminating Racial Inequality in a Racist World*, 1975 CIV. LIB. REV. 96; Ronald Ellis, *Victim-Specific Remedies: A Myopic Approach to Discrimination*, 13 N.Y.U. REV. L. & SOC. CHANGE 575 (1984-85); Richard H. Fallon, Jr. & Paul C. Weiler, *Firefighters v. Stotts: Conflicting Models of Racial Justice*, 1984 SUP. CT. REV. 1; Robert A. Sedler, *Racial Preference and the Constitution: The Societal Interest in the Equal Participation Objective*, 26 WAYNE L. REV. 1227 (1980). With the exception of *Lamprecht v. FCC*, 958 F.2d 382 (D.C. Cir. 1992), discussed *infra* note 118, Justice Thomas's views on group-based preferences are not specif-

difference between them is through President Lyndon Johnson's metaphor of the road race:

Imagine a hundred-yard dash in which one of the two runners has his legs shackled together. He has progressed 10 yards, while the unshackled runner has gone 50 yards. How do they rectify the situation? Do they merely remove the shackles and allow the race to proceed? Then they could say that "equal opportunity" now prevailed. But one of the runners would still be forty yards ahead of the other. Would it not be the better part of justice to allow the previously shackled runner to make-up the forty yard gap; or to start the race all over again? That would be affirmative action towards equality.⁴²

As this metaphor illustrates, the core value at the heart of the equal access construct is the level playing field. Equal access proponents argue that the public and private sectors' responsibility stops with the removal of barriers blocking entry to employment, entrepreneurial opportunities, housing and education. Their rallying cry is Justice Harlan's dissent in *Plessy v. Ferguson*: "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. . . . The law regards man as man, and takes no account of his surroundings or of his color. . . ."⁴³ Championing Harlan's "color-blind" approach, proponents acknowledge that treating individuals differently because of an immutable characteristic such as race, color, national origin or gender is morally wrong and should be legally outlawed. Because these traits are beyond the individual's control, their presence or absence should not be the basis for the dispensing or withholding of government benefits. Surveying the vast power and resources held by non-public institutions, some equal access proponents take this conclusion a step further. They

ically known. His hostility can reasonably be inferred, however, from statements and policy decisions he made as Chair of the EEOC. Under his leadership, the number of class-action "pattern or practice" lawsuits declined significantly and the agency shifted its enforcement efforts to cases alleging individual instances of discrimination. GREENE, *supra* note 41, at 5. For a general discussion of Justice Thomas's stewardship at the EEOC, see Juan Williams, *A Question of Fairness*, ATLANTIC, Feb. 1987, at 71. See also *Oversight Hearings on EEOC's Proposed Modification of Enforcement Regulations, Including Uniform Guidelines on Employee Selection Procedures*, 99th Cong., 1st Sess. 63 (1985).

⁴² FULLINWIDER, *supra* note 40, at 94-95.

⁴³ *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). There is more than a little irony in celebrating Harlan's "color-blind" approach. Right before this oft-quoted phrase Harlan pays tribute to the white race, "the dominant race . . . in prestige, in achievements, in education, in wealth and in power." *Id.* at 559.

demand that the government impose similar constraints on certain types of private transactions, such as decisions relating to employment, entrepreneurial opportunities, housing, etc.⁴⁴ In their view, government abdicates its responsibility to the body politic when it permits private sector decisionmakers to foreclose economic advancement because of traits over which the individual has no control and which, from an objective viewpoint, bear no relationship to the intrinsic character of the private transaction.⁴⁵

While staunchly supporting the removal of barriers, equal access proponents draw the line at accelerating the entry of previously excluded groups through the use of devices such as the race norming of test scores⁴⁶ or quotas.⁴⁷ Professor Bickel's denunciation occupies a prominent place in their opposition to quotas:

⁴⁴ But see NATHAN GLAZER, *AFFIRMATIVE DISCRIMINATION: ETHNIC INEQUALITY AND PUBLIC POLICY* xii-xiii (arguing against the "active involvement of government . . . in employment and education"). See generally William A. Galston, *Equal Opportunity and Liberal Theory*, in *JUSTICE AND EQUALITY HERE AND NOW* 89-107 (Frank Lucash ed., 1986).

⁴⁵ See JOHN RAWLS, *A THEORY OF JUSTICE* 275 (1971) (endorsing a social system in which government "enforces and underwrites equality of opportunity in economic activities and in the free choice of occupation. This is achieved by policing the conduct of firms and private associations. . .").

⁴⁶ The question of race norming became a political hot potato in the Bush Administration. The National Academy of Sciences examined the validity of the Department of Labor's General Aptitude Test routinely used by federal and state employment agencies to measure competence and physical agility in a number of spheres. Officials of the Reagan Administration had encouraged the test users to adjust the scores of Black and Hispanic applicants to lessen the impact of their generally lower scores. The National Academy of Sciences study concluded that the test was only "moderately useful" in predicting job success and urged that the race norming be continued. NATIONAL RESEARCH COUNCIL FAIRNESS IN EMPLOYMENT TESTING: VALIDITY GENERALIZATION, MINORITY ISSUES, AND THE GENERAL APTITUDE TEST BATTERY (John A. Hartigan & Alexandra K. Wigdor eds., 1989). But see Jan H. Blits & Linda S. Gottfredson, *Employment Testing and Job Performance*, 98 *PUB. INTEREST* 18 (1990). The Bush Administration considered ordering the suspension of the test instead. Peter T. Kilborn, 'Race Norming' Tests Becomes A Fiery Issue, *N.Y. TIMES*, May 19, 1991, at 4, 5. See also *Civil Rights Bill Alters Fairness of '64 Law; Test Profits Blacks*, *N.Y. TIMES*, June 11, 1991, at A22. Ultimately, the controversy was resolved with the passage of section 106 of the Civil Rights Act of 1991, Pub. L. No. 102-166, § 105, Stat. 1071 (1991), which made it "an unlawful employment practice . . . to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin."

⁴⁷ In affirmative action vernacular, "quota" carries within its definition the notion of an absolute number that must be attained. In contrast, "goal" carries within its definition the notion of flexibility, a standard toward which an employer or contracting official is striving but need not necessarily satisfy. In condemning quotas, most equal access proponents deny any meaningful distinction between quotas and goals. They argue that employers and contracting officials transform goals into quotas by imposing penalties for failures to achieve the designated goals. See Cox, *supra* note 37, at 842. This criticism does not appear to be merited, however. See *infra* note 281 and accompanying text. The Supreme Court has not meaningfully distinguished between the two terms. *E.g.*, *Johnson v. Transportation Agency*, 480 U.S. 616,

[A] racial quota derogates the human dignity and individuality of all to whom it is applied; it is invidious in principle as well as in practice. Moreover, it can as easily be turned against those it purports to help. The history of the racial quota is a history of subjugation, not beneficence. Its evil lies not in its name, but in its effect; a quota is a divider of society, a creator of castes, and it is all the worse for its racial base, especially in a society desperately striving for an equality that will make race irrelevant.⁴⁸

Proponents of the equal achievement construct, on the other hand, maintain that the removal of barriers is not sufficient to overcome two hundred years of slavery and more than one hundred years of economic and educational oppression.⁴⁹ Where others see

635-36 (1987); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 288-89 n.26 (1978). In *Johnson*, the Court relied on its decision in *Weber*, a quota case, in rejecting a Title VII challenge to the goals and timetables in an affirmative action plan.

Equal access proponents also argue that quotas and goals inevitably lead to the selection of minimally qualified candidates of the preferred race over better-qualified candidates of the non-preferred race. Justice Scalia has forcefully argued this point. In a law review article that achieved a degree of notoriety during his confirmation proceedings, he wrote:

Unfortunately, the world of employment applicants does not divide itself merely into "qualified" and "unqualified" individuals. There is a whole range of ability—from unqualified, through minimally qualified, qualified, well qualified, to outstanding. If I can't get Leontyne Price to sing a concert I have scheduled, I may have to settle for Erma Glatt. La Glatt has a pretty good voice, but not as good as Price. Is she unqualified? Not really—she has sung other concerts with modest success. But she is just not as good as Price. Any system that coerces me to hire her in preference to Price, because of her race, degrades the quality of my product and discriminates on racial grounds against Price. And it is no answer to either of these charges that Glatt is "qualified." To seek to assuage either the employer's demand for quality or the disfavored applicant's demand for equal treatment by saying there is no need to have any unqualified individuals is a sort of intellectual shell game which diverts attention from the major issue by firmly responding to a minor one.

Antonin Scalia, *THE DISEASE AS CURE*: "In order to get beyond racism we must take account of race.", 1979 WASH. U. L.Q. 147, 149.

⁴⁸ ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 133 (1975). See also generally Richard A. Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1, 15-19, 24-25.

⁴⁹ E.g., LESTER C. THUROW, *THE ZERO SUM SOCIETY* 187-89 (1980) (rejecting the equal access construct on the ground that it fails to acknowledge the practical implications of years of discrimination); Morton J. Horwitz, *The Jurisprudence of Brown and the Dilemmas of Liberalism*, 14 HARV. C.R.-C.L. L. REV. 599, 608 (1979) (arguing that the acknowledgment of group rights is an essential predicate to remedying discrimination's lingering effects); Randall Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327, 1328 (1986) (calling the use of race-conscious plans a powerful vehicle for "overcoming entrenched racial hierarchy"); Charles B. Renfrew, *Affirmative Action: A Plea for a Rectification Principle*, 9 SW. U. L. REV. 597, 609 (1977) (applauding the use of the equal achievement construct to distribute social advantages as they might have been distributed in the absence

a level playing field, they see a ladder.⁵⁰ Taking dead aim at Justice Harlan's cry for a color-blind society, they counter with Justice Blackmun's admonition: "In order to get beyond racism, we must first take account of race. . . . [I]n order to treat some persons equally, we must treat them differently."⁵¹ They dispute Professor Bickel's characterization of race-conscious quotas as "a divider of society, a creator of castes." Equal achievement proponents rally around Professor Ely:

Whites are not going to discriminate against all whites for reasons of racial prejudice, and neither will they be tempted generally to underestimate the needs and deserts of whites relative to those, say, of blacks or to overestimate costs of devising a more finely tuned classification system that would extend to certain whites the advantages they are extending to blacks.⁵²

The equal access/equal achievement, Harlan/Blackmun, Bickel/Ely debate continues on without resolution in academia⁵³ and at the national level of political discourse.⁵⁴ While the Court has ended

of lingering *de jure* racial prejudice); Michael Rosenfeld, *Decoding Richmond: Affirmative Action and the Elusive Meaning of Constitutional Equality*, 87 MICH. L. REV. 1729, 1794 (1989) (criticizing the Court's adoption of the strict scrutiny test as "simplistic" and calling for "a vision of constitutional equality that draws explicitly on substantive values"; Thomas Ross, *The Richmond Narratives*, 68 TEX. L. REV. 381, 398, 406, 408, 413 (1989) (arguing that to adopt the equal access construct is to ignore the years of advantage enjoyed by whites at the expense of minorities).

⁵⁰ Courtland Cox, former director of the Minority Business Opportunity Commission and a champion of minority business set-asides, has observed, "[i]f we had a level playing field, I would not object to ending such programs. . . . But [B]lacks and minority businesses don't have a level playing field. They have a ladder." Lewis, *supra* note 6, at A22.

⁵¹ *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 407 (1978).

⁵² JOHN H. ELY, *DEMOCRACY AND DISTRUST* 170 (1980). In a similar vein, Professor Brooks has opined:

Affirmative action is a means (formed from nonconsensual relations) by which white males as a group can share their power, wealth, and opportunities with minorities and females in an equitable manner. When white male power-brokers decide to give minorities and females a bigger . . . piece of the American pie, that can hardly be called "reverse discrimination"—it can only be called sharing.

Roy L. Brooks, *The Affirmative Action Issue: Law, Policy, and Morality*, 22 CONN. L. REV. 323, 352 (1990).

⁵³ *E.g.*, RONALD M. DWORIN, *TAKING RIGHTS SERIOUSLY* 223–39 (1977); FULLINWIDER, *supra* note 40, at 93–109 (1980); GLAZER, *supra* note 44, at vii–xxv; Owen M. Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235, 236–49 (1971). *See also generally* Michael Rosenfeld, *supra* note 41.

⁵⁴ Witness much of the debate over the proposed Civil Rights Act of 1990 and the President's veto based on the White House's assertion that the bill would compel employers to adopt quotas as a matter of practical necessity. *See infra* note 296.

the debate in constitutional terms, its feeble resolution betrays common sense and hobbles state and local initiatives designed to overcome the legacy of slavery and segregation. In *City of Richmond*, discussed below, the Court put its constitutional imprimatur on the equal access construct by subjecting state and local government race-conscious preferences to the strict scrutiny standard of review. Application of that standard inevitably leads to invalidation. In *Metro Broadcasting*, the Court adopted the less rigorous intermediate test, acknowledging Congress's power to employ the equal achievement construct in enacting legislation designed to overcome the decades of political, social and economic exclusion suffered by minorities.

Bifurcating the power of government to deal with the intractable problems of racially inspired economic apartheid makes no sense. The Court lamely resorted to historical events distinctly at odds with the contemporary use of racial preferences to justify the bifurcation: because the states (apparently unlike the national government) once used race to deny minorities political, social and economic rights, their use of race to benefit minorities was too suspect to justify any review less stringent than strict scrutiny.⁵⁵

C. *Equal Achievement: The Preferred Construct in the Marketplace*

While philosophers, law professors and Supreme Court Justices have been debating the meaning of equality, public and private employers and contracting authorities have bypassed the debate and implemented race-conscious preferences across the nation and in every segment of the economy: manufacturing, services and professions. As a recent *New York Times* headline phrased it, "Affirmative Action Plans Are Now Part of The Normal Corporate Way of Life."⁵⁶ The Department of Labor estimates that affirmative action plans cover more than 30 million private sector employees who work in 95,000 different companies that hold contracts with federal agencies for over \$184 billion.⁵⁷ Government agencies at the federal,

⁵⁵ *City of Richmond*, 488 U.S. at 490-92. While a majority of the Justices did not join in Part II of Justice O'Connor's opinion detailing this rationale, they did not voice significant opposition to it. Indeed, the rationale appears to have won the endorsement of a majority of the Justices in *Metro Broadcasting*, 110 S. Ct. at 3008-09.

⁵⁶ Steven A. Holmes, *Affirmative Action Plans Are Now Part of the Normal Corporate Way of Life*, N.Y. TIMES, Nov. 22, 1991, at A20.

⁵⁷ HOUSE COMM. ON EDUC. AND LABOR, A REPORT ON THE INVESTIGATIONS ON THE CIVIL RIGHTS ENFORCEMENT ACTIVITIES OF THE OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, U.S. DEP'T OF LABOR, 100th Cong., 1st Sess. 1-2. See also Holmes, *supra* note 56, at A20. See *infra* notes 62-66 and accompanying text for a discussion of Executive Order 11,246.

state and municipal level have implemented affirmative action plans in greater numbers.⁵⁸ A survey of major federal contractors revealed:

Most corporate executives see affirmative action as an essential management tool that reinforces accountability and maximizes the utilization of the talents of their entire workforce. None see 'goals and timetables' elements in their affirmative action plans as requiring the use of quotas. Without exception those interviewed were opposed to quotas on the basis of sex or race.⁵⁹

Ironically, American businesses recognized the need for an integrated workforce at precisely the same time the Supreme Court turned its back on affirmative action. When the Reagan Administration proposed eliminating the numerical goals and timetables mandated by Executive Order 11,246 and sought to reopen prominent goal-based consent decrees entered into by prior Administrations,⁶⁰ the vigorous opposition of private sector employers caught the Administration completely by surprise.⁶¹

Government contractors, based on years of experience implementing Executive Order 11,246,⁶² championed the cause of goals

⁵⁸ For a comprehensive 50-state survey, see Daly, *supra* note 41, at 1074 n.72.

⁵⁹ See generally J. FEILD, *AFFIRMATIVE ACTION: A FRESH LOOK AT THE RECORD TWENTY-TWO YEARS AFTER THE BEGINNING* (1984).

⁶⁰ Based on the Court's decision in *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984) (see *infra* Appendix), the Reagan Administration argued that voluntary goals and timetables violated Title VII. See *Racial Quotas Hurt Blacks and Constitution*, N.Y. TIMES, Dec. 9, 1985, at A22; Kenneth B. Noble, *Labor Dep't Aides Rebut Meese View*, N.Y. TIMES, Nov. 29, 1985, at A28; Robert Pear, *Rights Chief Assails Hiring Goals As Failure*, N.Y. TIMES, Nov. 1, 1985, at A19; Joe Davidson & Linda Watkins, *Jobs Debate*, WALL ST. J., Oct. 24, 1985, at 1; Joann S. Lublin & Andy Pasztur, *White House Softens Its Draft Proposal to Lift Jobs-Bias Rules for Contractors*, WALL ST. J., Sept. 12, 1985, at 10. See also Days, *supra* note 24. The Reagan Administration abandoned these efforts after the Court decided *Johnson v. Transportation Agency*, 480 U.S. 616 (1987) and *United States v. Paradise*, 480 U.S. 149 (1987). See *infra* Appendix. Administration officials were highly critical of both decisions. Stuart Taylor, Jr., *Supreme Court Reaffirms Rejection of a Reagan Tenet*, N.Y. TIMES, Mar. 29, 1987, § 4 (The Week in Review), at 1; Robert Pear, *Rights Panel Assails High Court Sanctioning Job Preferences*, N.Y. TIMES, May 14, 1987, at A1.

⁶¹ See Nathan Glazer, *The Affirmative Action Stalemate*, 90 PUB. INTEREST 99, 105-06 (1988); see generally BUREAU OF NAT'L AFFAIRS, *AFFIRMATIVE ACTION TODAY* 101-43 (1986) (describing the broad-based support in the business community for race/gender-conscious preferences).

⁶² The success of Executive Order 11,246 in accelerating minority entry into previously all-white jobs is well documented. E.g., HERBERT HAMMERMAN, *A DECADE OF NEW OPPORTUNITY: AFFIRMATIVE ACTION IN THE 1970s* 42-44 (The Potomac Institute, 1984). *Equal Opportunity*, Nat'l Bureau of Economic Research, 47 Fed. Cont. Rep. (BNA) 1092 (June 15, 1987). See also Virginia du Rivage, *The OFCCP Under the Reagan Administration: Affirmative Action in Retreat*, 36 LAB. L.J. 360, 363 (1985); Alan Freeman, *Black Economic Progress After*

and timetables, describing them as highly effective tools for assuring racial and gender equality in the workplace.⁶³ Strong support for numerical goals and timetables, moreover, came from private sector employers who were not government contractors subject to Executive Order 11,246.⁶⁴ Their companies had voluntarily incorporated race/gender-conscious preferences into personnel decisions. The experience of these employers pointed to the usefulness of numerical goals and timetables in opening previously closed career opportunities to minorities and women. The National Association of Manufacturers described affirmative action as "good business policy."⁶⁵ Surveys showed that even if the Reagan Administration had succeeded in dissolving the numerical goals and timetables of Executive Order 11,246, private sector employers would not have abandoned them until such time as their illegality was conclusively established.⁶⁶

The strong support of the business community represents an amazing about-face. In the early days of Executive Order 11,246 and Title VII, the federal government argued that numerical goals and timetables made business sense; employers disagreed. In the 1980s, the business community vigorously defended the use of numerical goals and timetables; the federal government protested.⁶⁷ Just as race/gender-conscious plans are now tightly woven into the fabric of public and private employment, they are also a fixture in public contracting. In 1989, it was estimated that 250 states and municipalities had enacted minority business set-aside programs to the benefit of 60,000 minority/women owned firms.⁶⁸

1964: *Who Has Gained and Why?*, in *STUDIES IN LABOR MARKETS* (Sherwin Rosen ed., 1981); James J. Heckman & J. Hoult Verkerke, *Racial Disparity and Employment Discrimination Law: An Economic Perspective*, 8 *YALE L. & POL'Y REV.* 276, 290-91, 297 (1990); Richard T. Seymour, *Why Executive Order 11246 Should Be Preserved*, 11 *EMPLOYEE REL. L.J.* 568, 572 (1985). Race-conscious preferences have particularly benefited minorities at the upper end of the skills and education continuums. James P. Smith & Finis Welch, *Affirmative Action and Labor Markets*, 2 *J. LAB. ECON.* 269 (1984).

⁶³ See Daniel Seligman, *Affirmative Action Is Here to Stay*, *FORTUNE*, Apr. 19, 1982, at 143, 160.

⁶⁴ See BUREAU OF NAT'L AFFAIRS, *supra* note 61, at 92; Colin Leinster, *Black Executives: How They're Doing*, *FORTUNE*, Jan. 18, 1988, at 109, 114.

⁶⁵ Anne B. Fisher, *Businessmen Like to Hire by the Numbers*, *FORTUNE*, Sept. 16, 1985, at 26, 28-30. See also Peter C. Robertson, *Why Bosses Like to Be Told to Hire Minorities*, *WASH. POST.*, Nov. 10, 1985, at D1.

⁶⁶ See BUREAU OF NAT'L AFFAIRS, *supra* note 61, at 89, 92-93.

⁶⁷ See Seligman, *supra* note 63, at 162.

⁶⁸ *U.S. NEWS & WORLD REP.*, Feb. 6, 1989, at 13. A comprehensive listing of local and state-sponsored MBE programs can be found in Drew S. Days III, Fullilove, 96 *YALE L.J.* 453, 454-55 n.10 (1987). See also Brief of the National League of Cities *et al* as Amici Curiae

II. HOW THE COURT'S SELECTION OF THE STANDARD OF REVIEW IN GOVERNMENT ACTION CASES REFLECTS ITS VACILLATION BETWEEN THE EQUAL ACCESS/EQUAL ACHIEVEMENT CONSTRUCTS

A. *The Standard of Review*

There are many frayed threads in the fabric of the Court's affirmative action jurisprudence. Among the most worn is the question of which standard of review should be applied to government decisions benefiting minorities as opposed to disadvantaging them. Over the course of the past fifty years or so, the Court has developed a three-tiered standard of review to test the constitutionality of government classifications against the equal protection guarantees of the Fifth and Fourteenth Amendments. At the lowest rung is the rational basis test, by which the Court judges economic and social welfare legislation, rules and practices. Its bite is minimal because the government must demonstrate only that the challenged conduct has a legitimate basis and that the means are rationally related to that purpose.⁶⁹ More rigorous than the rational basis test is the intermediate test, which requires the government to demonstrate an important purpose and that the means are substantially related to that purpose. The Court has applied the intermediate test to government action that distinguishes among individuals based on their gender, their status as non-citizens, and the marital status of their parents.⁷⁰

The strict scrutiny test occupies the highest rung of the three tiers. The government must demonstrate a compelling state interest and adopt means narrowly tailored to effect that end. Because the strict scrutiny theory is inevitably "strict in theory and fatal in fact,"⁷¹ the Court, until *City of Richmond*, had reserved its application to government action that disadvantaged individuals based on their race and national origin.⁷²

in Support of Appellant at 1-2, *City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469 (1989) (No. 87-998).

⁶⁹ *E.g.*, *Bankers Life Casualty Co. v. Crenshaw*, 486 U.S. 71 (1988); *Bowen v. Owens*, 476 U.S. 340 (1986); *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985). *See generally* *United States v. Caroline Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

⁷⁰ *E.g.*, *Clark v. Jeter*, 486 U.S. 456 (1988) (illegitimacy); *Pickett v. Brown*, 462 U.S. 1 (1983) (same); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982) (gender); *Plyler v. Doe*, 457 U.S. 202 (1982) (alienage); *Mills v. Habluetzel*, 456 U.S. 91 (1982) (illegitimacy); *Craig v. Boren*, 429 U.S. 190 (1976) (gender).

⁷¹ Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

⁷² *E.g.*, *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984); *Loving v. Virginia*, 388 U.S. 1, 11

Strict scrutiny's fatal effect left the Court in a quandary when the first race-conscious plans reached its docket. Ultimately, the Court splintered into two camps: those who espoused Justice Harlan's credo of a color-blind Constitution⁷³ and those who believed with Justice Blackmun that, "[i]n order to get beyond racism, we must first take account of race . . . in order to treat some persons equally, we must first treat them differently."⁷⁴ The first camp defined equality solely in terms of the equal access construct; the second, in terms of the equal achievement construct. Neither camp could consistently muster majority support because Justices O'Connor, Stevens and White recognized the constitutional virtues and vices in both definitions. Their votes were unpredictable and inconsistent.⁷⁵ The result is an unseemly bifurcation of governmental power.

B. *The Cases: An Overview*

Three lines of inquiry dominate the Court's affirmative action jurisprudence and reflect the divisions just noted: (1) the institutional competence of the authority implementing the race-conscious program; (2) the program's factual predicate; and (3) its effect on non-minority employees and contractors. How vigorously the Court pursues each inquiry is a function of the standard of review it applies. In addition, *City of Richmond* and *Metro Broadcasting* calibrate the standard according to the state or federal character of the implementing authority.

1. The Equal Access Construct and State-Sponsored Race-Conscious Preferences: *Bakke*, *Wygant* and *City of Richmond*

In *Bakke*, a state medical school reserved sixteen out of one hundred seats exclusively for minority applicants.⁷⁶ In *Wygant*, a school board and a teachers' union adopted a collective bargaining agreement altering the traditional "last hired, first fired" rule in

(1967). Prior to *City of Richmond*, the Justices were divided on whether to apply the strict scrutiny or intermediate test. *E.g.*, *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). The Court also applies strict scrutiny to government action that encroaches upon fundamental rights. *E.g.*, *Shapiro v. Thompson*, 394 U.S. 618 (1969).

⁷³ *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

⁷⁴ *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. at 407.

⁷⁵ The author has elaborated on this inconsistency at great length in Daly, *supra* note 26, at 45-77.

⁷⁶ 438 U.S. at 275.

order to preserve the jobs of recently hired minority teachers.⁷⁷ In *City of Richmond*, a city council set aside 30 percent of certain public works contracts exclusively for minority business enterprises (MBEs).⁷⁸ The Court's analysis in all three cases reflects an exaggerated concern for the political independence and the institutional competence of the implementing authority.

Justice Powell's opinion in *Bakke* set the tone for the subsequent cases. He took a highly restrictive view of the Board of Regents' competence, limiting it to policy decisions affecting education.⁷⁹ Justice Powell rejected the Board's competence to remedy societal discrimination, characterizing it as "an amorphous concept of injury that may be ageless in its reach into the past."⁸⁰ Thus, the Board was competent to adopt a race-conscious program to promote diversity in the classroom, but incompetent to adopt one to hasten the entry of minorities into the medical profession, from which they had been routinely excluded in the past.

The competence issue in *Wygant* and *City of Richmond* was more subtle than in *Bakke*. The Court did not dispute the competence of the school board and the teachers' union in *Wygant* to amend the seniority clause of the collective bargaining agreement. Nor did it dispute the competence of the Richmond City Council to adopt policies relating to the letting of public works contracts. In both cases, the Court entertained reservations about the ultimate fairness of the democratic process that led the admittedly competent bodies to the adoption of the contested race-conscious preferences.

But in the vocabulary of affirmative action, competence includes more than the legal authority to make a decision; it includes the entire decision-making process. In *Wygant*, an overwhelming majority of the union membership voted to modify the seniority clause to preserve recent gains in minority hiring. The modification, however, did not affect them. Its burden fell exclusively on the most junior white teachers.⁸¹ The Court seemed perturbed by an unfairness in the process that allowed the majority to retain their jobs

⁷⁷ 476 U.S. at 270-71.

⁷⁸ 488 U.S. at 477-78.

⁷⁹ The Court's concern for competence is not limited to affirmative action cases. For example, in *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976), the Court struck down a civil service regulation barring aliens from federal employment on the ground that the Civil Service Commission "has no responsibility for foreign affairs, for treaty negotiations, for establishing immigration quotas or conditions of entry, or for naturalization policies." *Id.* at 114.

⁸⁰ 438 U.S. at 307.

⁸¹ 476 U.S. at 281 n.8.

while depriving others of theirs. The vote was not a sharing of a burden; it was a shifting.⁸² In *City of Richmond*, the Court's "competence" review focused on the racial composition of the city council. In contrast to the Board of Regents in *Bakke* and the school board and teachers' union in *Wygant*, the Richmond City Council was controlled by minority group members. Thus, it was a "minority" majority that voted to enact the MBE program.⁸³ This highly unusual fact pattern led the Court to view the set-aside with great suspicion. Attempting to hoist the proponents of the equal achievement construct by their own petard, the majority opinion even quoted Professor Ely: "Of course, it works both ways: a law that favors Blacks over Whites would be suspect if it were enacted by a predominantly Black legislature."⁸⁴

The strength of the Court's attraction to the equal access construct is revealed by considering an alternative holding, midway between complete approval or rejection of race-conscious preferences. The Court could have invalidated Richmond's racial preferences by invoking Ely's presumption and thus leaving for another day the issue of which standard of review to apply to race-conscious plans adopted by white majorities. The Court's decision, however, clearly indicated that strict scrutiny applied across the board, regardless of the racial make-up of the state implementing authority.

The Court attempted to justify its tough stance by anchoring it in structural concerns. In Part II of her opinion, Justice O'Connor drew a sharp line between the power of Congress to adopt race-conscious preferences and the power of the states to do so. She denied that power to the latter by invoking "the intentions of the

⁸² From *Bakke* to *Metro Broadcasting*, the Court has consistently demanded that burdens resulting from race-conscious preferences not fall exclusively on "innocent" non-minorities. The Constitution tolerates a sharing of burdens; it condemns their shifting. *E.g.*, *Fullilove v. Klutznick*, 448 U.S. 448, 484 (1980); see also *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 777 (1976). For a powerful indictment of the innocence strand of the Court's jurisprudence, see Thomas Ross, *Innocence and Affirmative Action*, 43 VAND. L. REV. 297 (1990); Kathleen M. Sullivan, *The Supreme Court, 1985 Term—Comment: Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78 (1986). Even if that indictment is rejected, the value of a racially integrated economy outweighs the harm to non-minorities, especially in instances of initial hiring and contract letting.

⁸³ 488 U.S. at 495–96. One study has shown that there is a direct correlation between the presence of a black mayor and the emergence of procurement programs designed to guarantee MBEs a share of municipal contracts. TIMOTHY BATES, *THE ROLE OF BLACK ENTERPRISE IN URBAN ECONOMIC DEVELOPMENT* (Joint Center for Political and Economic Studies ed., 1990).

⁸⁴ 488 U.S. at 496 (quoting John H. Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 739 n.58 (1974)).

Framers of the Fourteenth Amendment, who desired to place clear limits on the States' use of race as a criterion for legislative action, and to have the federal courts enforce those limitations."⁸⁵ In addition, she expressed fear of "ced[ing] control over the content of the Equal Protection Clause to the 50 State legislatures and their myriad political subdivisions."⁸⁶

Part II of Justice O'Connor's opinion did not win the endorsement of four other Justices (only Justices White and Rehnquist joined in Part II). Nonetheless, the view she expressed must be carefully considered in evaluating the Court's affirmative action jurisprudence. Justice Kennedy concluded, "the summary in Part II is both fair and precise."⁸⁷ Justice Scalia's opinion concerning the judgment seems identical to Justice O'Connor's on this point.⁸⁸ Of the three dissenting Justices in *City of Richmond*, only Justice Blackmun remains on the Court.⁸⁹ Justice Stevens, while refusing to join in Part II, voted to invalidate the set-aside and in a separate opinion expressed a general mistrust of local legislative efforts to redress racial discrimination not directly attributable to government action.⁹⁰

While the fine lines of the Court's jurisprudence of competence are not clear, the shadow it casts over state and local race-conscious programs is a long one. The *Bakke/Wygant/City of Richmond* triad dims the visions of state and local governments, confining them to remedying discrimination clearly attributable to them.

The full impact of this limitation cannot be appreciated, however, unless the Court's pronouncement concerning the factual predicate of race-conscious programs is also understood. No member of the Court has ever disputed the right of state and local governments to use race-conscious preferences to remedy their own acts of discrimination. That unanimity breaks down, however, when the Court attempts to define the quantum and type of proof re-

⁸⁵ 488 U.S. at 490-91.

⁸⁶ *Id.* at 490.

⁸⁷ *Id.* at 518 (Kennedy, J., concurring in part and concurring in the judgment). Justice Kennedy declined to join in Part II because "[t]he process by which a law that is an equal protection violation when enacted by a State becomes transformed to an equal protection guarantee when enacted by Congress poses a difficult proposition for me; but as it is not before us, any reconsideration of that issue must await some further case." *Id.*

⁸⁸ Justice Scalia declined to join Justice O'Connor's opinion only because he disagreed with her conclusion that the Fourteenth Amendment permitted the state to correct "identified" discrimination. *Id.* at 520-22 (Scalia, J., concurring in the judgment).

⁸⁹ Justice Brennan retired on July 20, 1990, and Justice Marshall on June 28, 1991.

⁹⁰ 488 U.S. at 511-18 (Stevens, J., concurring in part and concurring in the judgment).

quired before the state or local government can act. Terms such as a "strong basis in evidence," "manifest imbalance" and "prima facie case" are bandied about with little or no precision.⁹¹ The Court has imposed rigorous requirements, moreover, with respect to statistical proof. Factual predicates usually turn out to be fatally flawed if they rest on comparisons between the percentage of minority employees or contractors and the percentage of minorities in the population or general labor pool. The Court demands comparisons based on more refined labor/entrepreneurial statistics.⁹²

The Court insists, moreover, upon detailed evidence identifying the present number of MBEs available and competent to bid on each project, the dollar value of contracts let to MBEs and the dollar value of total city projects.⁹³ Its opinion renders as a virtual necessity sociological and economic studies of the public work sector of the construction industry to show patterns of discrimination and exclusion.⁹⁴

How harshly the Court's insistence on an elaborate factual predicate binds the states is dramatically illustrated in *City of Richmond*. The City Council did not enact the set-aside without reflection. It held several days of hearings at which considerable testimony was given describing the difficulties minority enterprises encountered in obtaining city contracts. One statistic was particularly prominent. While the population of Richmond was 50 percent African-American, black-owned business received only .67 percent of the City's public contracts.⁹⁵ This bleak statistic hardly startled the City Council. After all, Richmond was the former capital of the Confederacy and had persistently avoided recognizing the economic and political needs of its black population until long after *Brown v. Board of Education*.⁹⁶ Furthermore, the City Council was well acquainted with the myriad of Congressional studies demonstrating the pervasiveness of racism in the construction industry. Ironically,

⁹¹ E.g., *Johnson v. Transportation Agency*, 480 U.S. 616, 626-34 *passim* (1987) (manifest racial imbalance); *Wygant*, 476 U.S. at 277 (plurality opinion) (a strong basis in evidence); *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 209 (1979) (manifest racial imbalance). See also *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 307 (1977) (prima facie case).

⁹² See Daly, *supra* note 34, at 1077-94.

⁹³ 488 U.S. at 499-506.

⁹⁴ *Id.*; see also *id.* at 519-20 (Kennedy, J., concurring).

⁹⁵ *Id.* at 479-80.

⁹⁶ For example, in the 1970s, when the African-American population approached majority voting control, Richmond municipal authorities endeavored to annex nearby white boroughs to assure continuing white control. *City of Richmond v. United States*, 422 U.S. 358 (1975).

one of the studies showed that MBEs received only .65 percent of the gross receipts generated in the construction industry nationwide.⁹⁷ Armed with the knowledge of Congress, its own statistics and public testimony of discrimination in Richmond, the City Council adopted an MBE program directly modeled on the federal program that the Court had approved in *Fullilove*.⁹⁸ Nonetheless, the Court struck down the Richmond plan, finding it satisfied neither prong of the strict scrutiny test. The Court was highly critical of the factual predicate upon which the City Council acted as well as its decision to designate minorities other than African-Americans as beneficiaries of the plan.⁹⁹

The problem with the Court's insistence is that it amounts to an endorsement of the status quo. The more pervasive the discrimination, the smaller the percentage of minorities in any given occupation or profession. When the Court criticizes the Richmond City Council for selecting a 30 percent set-aside figure, it is in effect telling the City Council that it must placidly accept the success rate of discrimination. Logic and justice compel the opposite conclusion: where racism has been most effective in excluding minorities, government should be least constrained. The smaller the percentage of minorities, the greater the latitude the Court should accord to government efforts to hasten the entry of previously excluded minorities.

To argue for latitude is not to defend unchecked discretion. The doctrines that the Court has developed to protect the employment and contracting rights of majority employees and entrepreneurs serve the government's interest in seeing that no member of the body politic suffers undue harm from legislative and executive action.¹⁰⁰

The final difficulty with the Court's opinion in *City of Richmond* is its insistence on failed alternatives.¹⁰¹ This requirement obligates the government actor to commit finances and human capital to a prospect that the actor believes is either doomed to failure or cannot

⁹⁷ *Fullilove v. Klutznick*, 448 U.S. 448, 465-66 (1980).

⁹⁸ 488 U.S. at 477-81. The only major difference dealt with the size of the set-aside. Congress set the figure at 10%, a figure which fell halfway between the percentage of minorities in the general population and the percentage of minority contractors. The Richmond City Council selected a 30% figure, a figure which was slightly more than halfway between the percentage of local minority contractors and the percentage of minorities in Richmond. *Id.* at 551 (Marshall, J., dissenting).

⁹⁹ *Id.* at 506.

¹⁰⁰ See *infra* notes 277-94 and accompanying text.

¹⁰¹ 488 U.S. at 507-08.

accomplish the desired goal of economic integration at the same rate of speed, efficiency and cost-control as an MBE program. In theory, the government actor could proceed without trying such an alternative; but it would then run the risk of having a court strike down the MBE program, unless it could persuade the court that no viable alternative existed.¹⁰² Even if the government actor initiated an alternative program and it failed, there is still no guarantee a court will not order exploration and implementation of other alternatives before allowing a race-conscious program to proceed. Ironically, *City of Richmond's* insistence on failed alternatives promotes a kind of judicial activism that the Court is quick to squelch in equal protection, rational basis review.

The *City of Richmond* Court bears an uncanny resemblance to the *Lochner* Court, picking and choosing among state policies according to the decisionmakers' personal visions of the just society. Regardless of the ideological label pasted on its decisions, since 1936 the Court has consistently refused to independently review socioeconomic regulations. Three interlocking reasons are advanced for its refusal: (1) the Court's institutional incompetency to evaluate such legislation; (2) the primacy of the political branches of the national government in such matters; and (3) with respect to state legislation, concern for preserving the federal structure of government. What is striking about *City of Richmond* is the complete absence of reference to any of these considerations.

Although members of the *City of Richmond* Court are willing to extol the virtues of local government in other contexts, they do an about-face if racial preferences are involved.¹⁰³ A brief survey of the Court's jurisprudence regarding constitutional constraints on hiring and public works employment illustrates this point in stark

¹⁰² E.g., *Krupa v. New Castle County*, 56 Fair Empl. Prac. Cases (BNA) 779, 796 (D. Del. 1990) (striking down a race-conscious promotion plan on the ground that "less racially burdensome alternatives" existed).

¹⁰³ Both Justice O'Connor and Chief Justice Rehnquist supported the Court's opinion in *National League of Cities v. Usery*, 426 U.S. 833 (1976), which restricted Congress's Commerce Clause authority over the states "in areas of traditional governmental functions." *Id.* at 852. Both joined in the dissent when the Court overruled *Usery*. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 557 (1985). Justice O'Connor has not infrequently championed the rights of the states at the expense of the national government. E.g., *South Dakota v. Dole*, 483 U.S. 203, 212-18 (1987) (O'Connor, J., dissenting); *FERC v. Mississippi*, 456 U.S. 742, 779 (1982) (O'Connor, J., dissenting). See also *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 60 (1982) (Rehnquist, J., dissenting; Justice O'Connor joining in the dissent). Professor Sullivan develops this point at greater length in Kathleen M. Sullivan, *City of Richmond v. J.A. Croson Co.: The Backlash Against Affirmative Action*, 64 TUL. L. REV. 1609, 1616-18 (1990).

relief. Imagine that the Richmond City Council had concluded that the municipality's tax base and growth were hampered by growing unemployment. The Court would have permitted Richmond to enact legislation requiring all new employees to reside within its borders. Neither the fundamental right to travel nor the Equal Protection Clause prohibits such legislation.¹⁰⁴

The Richmond City Council would be free to require construction companies to employ a specified percentage of residents on public works projects without violating the Commerce Clause. Nor has the Court made the Privileges and Immunities Clause of Article IV an absolute bar to such preferences.¹⁰⁵ The Court has permitted a city to prefer its own residents over out-of-staters on public works projects.¹⁰⁶ The Court curtails Richmond's freedom to experiment precisely where it is most needed: to open the marketplace to excluded groups. The parallels to *Lochner* and the Court's pre-1936 jurisprudence are clear: the fragility of women and the safety of miners merited limited government intervention in the marketplace.¹⁰⁷ The health of bakers was no business of the state. Today, stagnating municipal economies merit limited government intervention in the marketplace. Racial and gender justice is no business of the state.

¹⁰⁴ *McCarthy v. Philadelphia Civil Serv. Comm'n*, 424 U.S. 645 (1976) (per curiam).

¹⁰⁵ In *United Bldg. & Constr. Trades Council v. Mayor of Camden*, 465 U.S. 208 (1984), the Court refused a wholesale incorporation of the market participant exception to the Commerce Clause into its Privileges and Immunities Clause jurisprudence. It preferred a case-by-case analysis inquiring (1) whether the out-of-staters were the peculiar source of the evil to be eradicated, and (2) whether the employment plan was sufficiently tailored to remedy the identified evil.

¹⁰⁶ *White v. Massachusetts Council of Constr. Employers*, 460 U.S. 204 (1983). See generally Dan T. Coenen, *Untangling the Market-Participant Exemption to the Dormant Commerce Clause*, 88 MICH. L. REV. 395 (1989).

¹⁰⁷ *Muller v. Oregon*, 208 U.S. 412, 423 (1908) (refusing to strike down on substantive due process grounds a state statute limiting working hours for women); *Holden v. Hardy*, 169 U.S. 366, 380-81, 398 (1898) (same, upholding state statute limiting working hours for miners). One scholar has pointed out the "striking historical irony in the parallel between the argument for a color-blind Constitution and the way in which the Court provided constitutional protection for the privileges of the new economic elite after the Civil War." JOHN C. LIVINGSTON, *FAIR GAME? INEQUALITY AND AFFIRMATIVE ACTION* 93 (1979). According to Professor Livingston, between 1883 and 1936, the Court used the term "liberty" in the Fifth and Fourteenth Amendments' Due Process Clauses to void state and federal efforts to control new concentrations of economic power. It fashioned a notion of equal protection that insisted upon absolute government neutrality between the wealthy and powerful on the one hand, and the poor and powerless on the other. *Id.* at 96-97. Instead of color-blind, the Court was both wealth-blind and color-blind. The Court's about-face in 1936 thus gives a new meaning to equality, permitting the New Deal to enact beneficent legislation advancing the interests of the working class and the poor at the expense of industry and the financially secure. *Id.*

2. The Equal Achievement Construct and Congressionally Adopted Race-Conscious Preferences: *Fullilove* and *Metro Broadcasting*

The power and discretion the Court so vigilantly denies to the states it readily grants to Congress. In *Fullilove*, the Court reviewed the constitutionality of section 103(f)(2) of the Public Works' Employment Act of 1977 (PWEA). That statute appropriated \$4 billion in federal grant money to state and local governments for public works construction. The statute's goal was to stimulate the sluggish economy by infusing money into the moribund construction industry. Section 103(f)(2) mandated that "at least ten per centum of the amount of each grant shall be expended for minority business enterprises."¹⁰⁸

Section 103(f)(2) was the first legislation since the Reconstruction to restrict government benefits to racially defined groups.¹⁰⁹ The statute defined "minority business enterprise" as "a business at least 50 per centum of which is owned by minority group members or, in case of a publicly owned business, at least 51 per centum of the stock of which is owned by minority group members."¹¹⁰ To qualify for the set-aside, applicants had to be citizens and be Negro, Spanish-speaking, Oriental, Indian, Eskimo or Aleut.¹¹¹

The highly unusual character of the set-aside is even more remarkable in light of the complete absence of legislative history. The amendment containing the MBE proposal was made from the floor of the House. No record explains the selection of the MBE device over other alternatives to promote the growth of minority construction firms, how Congress arrived at the 10 percent figure, or its rationale in selecting the particular racial groups benefiting from the set-aside.¹¹²

Despite these considerable infirmities, the Court sustained the set-aside. It did so, however, without deciding which standard of review to apply.¹¹³ Although no single opinion commanded the

¹⁰⁸ Pub. L. No. 95-28, tit. I, § 103, 91 Stat. 116 (1977) (codified at 42 U.S.C. § 6705(b)(2) (1982)).

¹⁰⁹ *Fullilove v. Klutznick*, 448 U.S. 448, 549 (1980) (Stevens, J., dissenting).

¹¹⁰ Pub. L. No. 95-28, tit. I, § 103, 91 Stat. 116 (1977) (codified at 42 U.S.C. § 6705(f)(2) (1982)).

¹¹¹ *Id.*

¹¹² See Mary C. Daly, *Stotts' Denial of Hiring and Promotion Preferences for Nonvictims: Draining the "Spirit" from Title VII*, 14 *FORDHAM URB. L.J.* 17, 48-49 (1986).

¹¹³ Chief Justice Burger's opinion, which was joined by Justices White and Powell, concluded that Congress's action satisfied both standards. *Fullilove*, 448 U.S. at 491-92. Justice

support of a majority of the Justices, considerable consensus existed on several key issues. First, with respect to competence, the Justices agreed that the Constitution endowed Congress with an extraordinary arsenal of power by virtue of the Spending Power, the Commerce Clause and Section 5 of the Fourteenth Amendment.¹¹⁴ Second, the Court rejected the claim that before Congress could act it needed a detailed set of factual findings to support its selection of race-conscious remedies.¹¹⁵ The factual predicate needed by Congress and the one needed by the states are light years apart. The Court also rejected a corollary claim that Congress could not act without specifically considering a detailed record of failed alternatives.¹¹⁶ Finally, it emphasized the short duration of the set-aside program and its limited impact on majority contractors.¹¹⁷

Metro Broadcasting picks up where *Fullilove* left off.¹¹⁸ Under challenge in *Metro Broadcasting* were two race-conscious policies adopted by the FCC. The first policy announced that minority ownership and participation were "plus" factors in selecting among competing applicants for radio and television licenses; the second policy created an exception to the FCC's no-transfer rule, prohib-

Powell continued to adhere to his position in *Bakke* that strict scrutiny was called for, but found that standard satisfied. *Id.* at 507-10 (Powell, J., concurring). Justices Marshall, Brennan and Blackmun applied the intermediate test standard and concluded Congress's enactment of the 10% set-aside was constitutional. *Id.* at 517-21 (Marshall, J., concurring).

¹¹⁴ *Id.* at 472-80; *id.* at 499-502, 508-10 (Powell, J., concurring).

¹¹⁵ Chief Justice Burger noted the numerous studies before Congress. *Id.* at 478. Justice Powell was insistent that adjudicatory-type procedures were not required. *Id.* at 503 (Powell, J., concurring).

¹¹⁶ *Id.* at 478; *id.* at 502-06 (Powell, J., concurring).

¹¹⁷ *Id.* at 484-85; *id.* at 513 (Powell, J., concurring).

¹¹⁸ How durable *Metro Broadcasting* turns out to be is an open question. It was a 5-4 decision, with Chief Justice Rehnquist and Justices O'Connor, Scalia and Kennedy dissenting. Two of the five Justices in the majority have now retired. Justice Brennan, the author of the opinion, was replaced by Justice Souter, whose views on affirmative action are not known. Justice Thomas replaced Justice Marshall. In his confirmation hearings, when asked about *Metro Broadcasting*, Justice Thomas carefully couched his reply: "I have no basis as a judge to disagree with it." Stuart Taylor, Jr., *Beware the Judicial Override*, N.Y. TIMES, Oct. 3, 1991, at A25. After his appointment to the Supreme Court, the Court of Appeals for the District of Columbia released its decision in *Lamprecht v. FCC*, 958 F.2d 382 (D.C. Cir. 1992) (striking down a gender-based preference for women similar to the race-based preference upheld in *Metro Broadcasting*). Justice Thomas wrote the majority opinion in *Lamprecht*. In applying the intermediate standard the opinion faults the absence of "any statistically meaningful link between ownership by women and programming of any particular kind" and thus distinguishes the record before the Supreme Court in *Metro Broadcasting*. *Id.* What this opinion sharply suggests is Justice Thomas's distaste for group-based preferences and his willingness to engage in a demanding examination of the evidence relied upon by the implementing body to justify the challenged preference.

iting the sale of licenses subject to noncompliance hearings.¹¹⁹ The exception permitted the sale of such licenses if the purchaser could demonstrate minority ownership and if the sale price did not exceed 75 percent of the fair market value.¹²⁰

Relying on the consensus expressed in *Fullilove*, a five-Justice majority held both race-conscious preferences valid. Going beyond *Fullilove*, the majority adopted the intermediate standard of review. Writing for the Court Justice Brennan began his opinion on a cautionary note: "[W]e are 'bound to approach our task with appropriate deference to Congress, a co-equal branch charged by the Constitution with the power to 'provide for the . . . general Welfare of the United States' and 'to enforce, by appropriate legislation, the equal protection guarantees of the Fourteenth Amendment.'"¹²¹ From this premise, it took little constitutional energy to reach the conclusion that intermediate review, rather than strict scrutiny, was called for. To justify race-conscious preferences Congress must show that "they serve important governmental objectives within the power of Congress and are substantially related to the achievement of those objectives."¹²²

In the catechism of constitutional jurisprudence, this standard is demanding. How the Court actually applies it is an entirely different matter. In reviewing other kinds of legislation, the Court has not hesitated to employ the intermediate test as a sword striking down governmental action that rests on stereotypes or disadvantages unpopular groups.¹²³ In reviewing race-conscious preferences, the Court has used it as a shield, protecting governmental action benefiting disadvantaged groups. To paraphrase Professor Gunther, the intermediate test as applied to race-conscious preferences is strict in theory, indulgent in effect.

Metro Broadcasting demands even less of Congress than *Fullilove*. For example, the Court did not require specific statutory authorization for the FCC's race-conscious preferences. It implied such authorization from three appropriations acts that barred the FCC from reconsidering the challenged policies.¹²⁴ It casually relied on

¹¹⁹ *Metro Broadcasting, Inc. v. F.C.C.*, 110 S. Ct. 2997, 3002-05 (1990).

¹²⁰ *Id.* at 3005.

¹²¹ *Id.* at 3008 (quoting *Fullilove*, 448 U.S. at 472).

¹²² *Id.* at 3009.

¹²³ *E.g.*, *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982) (stereotyping of male and female nurses); *Lalli v. Lalli*, 439 U.S. 259 (1978) (disadvantaging illegitimate children); *Trimble v. Gordon*, 430 U.S. 762 (1977) (same); *Craig v. Boren*, 429 U.S. 190 (1976) (stereotyping of male automobile drivers, ages 18-21).

¹²⁴ 110 S. Ct. at 3016.

a number of studies and hearings showing Congress's awareness of the small number of broadcast licenses held by minorities.¹²⁵ It required very little proof to show that minority ownership promoted diversity in broadcasting, and it required no proof at all to show that prior government policies were responsible for the small number of minority licensees. In short, while the totality of the evidence in the record was certainly worthy of some weight, the indulgence of the Court's review was startling considering the race-conscious character of the FCC's policies.

III. CONGRESS'S POWER UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT TO PERMIT THE STATES TO ADOPT RACE-CONSCIOUS PREFERENCES

Both *Fullilove* and *Metro Broadcasting* stand for the proposition that Congress possesses sweeping authority to implement race-conscious preferences in federal programs. It would be a mistake to view these cases in isolation, however. Their constitutional vitality grows even more robust when they are linked to doctrine acknowledging Congress's unique power to find facts and fashion remedies under Section 5 of the Fourteenth Amendment. When fused, *Fullilove*, *Metro Broadcasting* and Section 5 furnish Congress with a powerful tool to "rebuild the City of Richmond" by allowing the states to adopt MBE programs and other race-conscious preferences.

Section 5 of the Fourteenth Amendment gives Congress "the power to enforce . . . by appropriate legislation" the equal protection guarantee of the Fourteenth Amendment.¹²⁶ The seeds of the

¹²⁵ *Id.* at 3009-16.

¹²⁶ U.S. CONST. amend. XIV, § 5. Some scholars have maintained that the 1866 Freedman's Bureau Act and other legislation enacted in the immediate post-Civil War era demonstrate an intent on the part of the framers of the Fourteenth Amendment to approve race-conscious remedies. *E.g.*, Scherer, *supra* note 34, at 285-88; Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753 (1985). There are, however, two serious flaws with this argument. First, if the statutes demonstrate anything, it is the intent of the Reconstruction Congress to aid the actual victims of slavery. Benefits to slaves who earned their freedom before the Emancipation Proclamation were incidental. Second, the statutes generally granted benefits to "refugees," a term used to describe destitute Whites loyal to the Union. Contemporary debate suggests that aid limited to the newly emancipated slaves would not have passed if refugees had been excluded. HERMAN BELZ, *A NEW BIRTH OF FREEDOM: THE REPUBLICAN PARTY AND FREEDMAN'S RIGHTS 1861-1866*, 69-112 (1976). For a comprehensive analysis of the political and constitutional ideology of the Reconstruction Congress, see Robert J. Kaczorowski, *The Enforcement Provisions of the Civil Rights Act of 1866: A Legislative History in Light of Runyon v. McCrary*, 98 YALE L.J. 565 (1989); Robert J. Kaczorowski, *To Begin the Nation Anew: Congress, Citizenship, and Civil Rights After the*

Court's modern Section 5 jurisprudence were sown in *Katzenbach v. Morgan*.¹²⁷ Prior to *Katzenbach*, the Court in *Lassiter v. Northhampton County Board of Elections*¹²⁸ had unanimously upheld the constitutionality of a North Carolina statute imposing an English language literacy test. New York State had a similar statute, the practical effect of which was to disenfranchise the state's Puerto Rican residents. When it passed the Voting Rights Act of 1965, Congress included in section 4(e) a provision requiring the states to permit any citizen to vote who possessed a sixth-grade education from a public school under the jurisdiction of the United States, including Puerto Rico.¹²⁹ Section 4(e) specifically provided that the states could not deny such citizens the right to vote because of an inability "to read, write, understand, or interpret any matter in the English language. . . ."¹³⁰ New York State challenged the constitutionality of section 4(e). Relying on *Lassiter* it argued that Congress lacked the authority to outlaw a practice the Court had previously held constitutional. The Court flatly rejected the argument. Writing for the majority, Justice Brennan observed that Section 5 "is a positive grant of legislative authority authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment."¹³¹ The Court's deference to Congress's power under Section 5 in *Katzenbach* is not idiosyncratic. It has permitted Congress to rely on Section 5 to abrogate state immunity under the Eleventh Amendment.¹³² It has acknowledged similar sweeping enforcement power under the Thirteenth and Fifteenth Amendments as well.¹³³

The majority opinion in *Katzenbach* advanced two separate theories to support the Court's holding. The first elaborated a highly controversial proposition that granted Congress the right to define constitutional wrongdoings despite a previous substantive Supreme

Civil War, 92 AM. HIST. REV. 45 (1987); Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863 (1986).

¹²⁷ 384 U.S. 641 (1966).

¹²⁸ 360 U.S. 45 (1959).

¹²⁹ 384 U.S. at 643.

¹³⁰ Voting Rights Act of 1965, Pub. L. No. 89-110, tit. I, § 4(e), 79 Stat. 438 (1965), (codified at 42 U.S.C. § 1973b(e)(2) (1988)).

¹³¹ 384 U.S. at 651.

¹³² *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

¹³³ *City of Rome v. United States*, 446 U.S. 156 (1980) (Fifteenth Amendment); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968) (Thirteenth Amendment).

Court decision to the contrary.¹³⁴ The second drew on Congress's traditional role as factfinder and its power to fashion remedies.¹³⁵

While the first theory has been the subject of great debate,¹³⁶ that debate need not be resolved to advance the conclusion reached in this article. This article argues that Congress can use its acknowledged power to find facts and fashion remedies as a basis for extending to the states the same power it possesses to adopt race-conscious preferences in federal programs.¹³⁷ Part IV specifically details the kinds of facts on which Congress should focus.

This article champions Congress's constitutional powers to authorize the states to adopt race-conscious preferences. It does not press Congress to *require* the states to implement affirmative action programs. The proposed statute leaves that decision to the states' discretion.¹³⁸ This distinction has both constitutional and political implications. Many critics of *Katzenbach v. Morgan* complained that it contained the seeds of destruction of the nation's federal system of government. They argued that the Court's deference to Congress's Section 5 authority placed no limits on the reach of the national government into the political structures of state government. Congress's Section 5 power, when joined with its Commerce Clause authority, created a behemoth capable of ousting the states from positions of political, economic and regulatory power within the federal system. The virtue of the legislation proposed in this

¹³⁴ 384 U.S. at 648-51.

¹³⁵ *Id.* at 653-56.

¹³⁶ *E.g., id.* at 659-71 (Harlan, J., dissenting); *EEOC v. Wyoming*, 460 U.S. 226, 251-59 (1983) (Burger, C.J., dissenting); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 732-33 (1983); *Oregon v. Mitchell*, 400 U.S. 112, 204-05 (1970). See also Alexander M. Bickel, *The Voting Rights Cases*, 1966 SUP. CT. REV. 79; Robert A. Bohrer, Bakke, Weber & Fullilove: *Benign Discrimination and Congressional Power to Enforce the Fourteenth Amendment*, 56 IND. L.J. 473 (1981); Stephen L. Carter, *The Morgan "Power" and the Forced Reconsideration of Constitutional Decisions*, 53 U. CHI. L. REV. 819 (1986); William Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603, 606 (1975).

¹³⁷ For a specific discussion of areas of Congressional factfinding and the scope of appropriate remedies consistent with *Fullilove* and *Metro Broadcasting*, see *infra* notes 276-95 and accompanying text.

¹³⁸ In this author's view, Congress does indeed possess the authority under Section 5 to enact legislation requiring race-conscious preferences. Several distinguished scholars have acknowledged Congress's power to fashion substantive rights under Section 5. *E.g.*, LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 5-12-15, at 330-50 (2d ed. 1988). Archibald Cox, *The Role of the Congress in Constitutional Determinations*, 40 U. CIN. L. REV. 199 (1971); Archibald Cox, *The Supreme Court, 1965 Term—Foreword: Constitutional Adjudication and Promotion of Human Rights*, 80 HARV. L. REV. 91 (1966); Lawrence G. Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

article is that it restores power to the states. The traditional federalism arguments mounted in opposition to *Katzenbach v. Morgan* are simply out of place.

The argument advanced herein draws strong support from the analogy the Court expressed in *Katzenbach* between Congress's Section 5 power and its powers under the Necessary and Proper Clause. The Court concluded that the framers of the Fourteenth Amendment intended to give Congress "the same broad powers expressed in the Necessary and Proper Clause."¹³⁹ From the stewardship of John Marshall to the present, the Court has held those powers to be plenary.¹⁴⁰ The only check that limits Congress's Necessary and Proper Clause authority is the Bill of Rights itself. Undoubtedly, opponents of race-conscious preferences will contend that the equal protection component of the Fifth Amendment trumps the Necessary and Proper Clause, cabining Congress's power to the equal access construct. *Fullilove* and *Metro Broadcasting* shatter that argument. In both cases the Court recognized a panoply of constitutional power at Congress's disposal to fashion programs embodying the equal achievement construct.

That Congress has the right to allow the states to act where they otherwise might be constitutionally prohibited from doing so is beyond dispute.¹⁴¹ Commerce Clause doctrine offers the most direct guidance. The issue first arose in 1851 in *Cooley v. Board of Wardens of the Port of Philadelphia*.¹⁴² Among the earliest statutes enacted by the first Congress was legislation permitting the states to regulate pilotage.¹⁴³ In conformity with the statutory authoriza-

¹³⁹ 384 U.S. at 650.

¹⁴⁰ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 319 (1819). Marshall formulated the classic definition of those powers in *McCulloch*:

Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adopted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional.

Id. at 421. Very similar language can be found in *Ex Parte Virginia*, 100 U.S. 339, 345-46 (1879). The Court has also held that these same principles govern Section 2 of the Fifteenth Amendment. Section 2 authorizes Congress to enforce "by appropriate legislation" that Amendment's prohibitions. *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966). *Accord* *James Everard's Breweries v. Day*, 265 U.S. 545, 558-59 (1924) (Eighteenth Amendment).

¹⁴¹ For a persuasive elaboration of the proposition that "Congress should be able to approve unconstitutional policy choices in state laws when Congress is not constitutionally prohibited from directly adopting the same policy itself," see William Cohen, *Congressional Power to Validate Unconstitutional State Laws: A Forgotten Solution to an Old Enigma*, 35 *STAN. L. REV.* 387, 388 (1983).

¹⁴² 53 U.S. (12 How.) 299 (1851).

¹⁴³ Act of Congress of Aug. 7, 1789, 1 Stat. 54.

tion, Pennsylvania required that local pilots be employed in steering ships in and out of the port of Philadelphia. A ship owner who was fined for failing to hire a local pilot appealed to the Supreme Court arguing, *inter alia*, that the Commerce Clause prevented Congress from ceding its regulatory power to the states. Setting the tone for future cases, the Court acknowledged Congress's sweeping authority in making legislative judgments pursuant to the Commerce Clause.¹⁴⁴

Cooley is important for another reason. It injected into constitutional jurisprudence the distinction between "local" and "national" matters. The states were free to regulate, despite any impact on interstate commerce, provided that the regulation's subject matter demanded diverse treatment. On the other hand, if the regulation's subject matter demanded uniform national treatment, only Congress could legislate.¹⁴⁵ While the local/national distinction is no longer the fulcrum of the Court's decision making, it remains an important consideration in modern Commerce Clause jurisprudence.

The local character of the matter being regulated and the practical unlikelihood of Congress's acting are both considerations invoked by the Court when Congress specifically delegates Commerce Clause power to the states. *Parker v. Brown*¹⁴⁶ precisely illustrates this point. In that case, California had enacted a complex scheme for marketing raisins, the effect of which gave California producers control over almost all the raisins sold in the United States and almost one-half of the world's crop. The scheme withstood what otherwise would have been a fatal constitutional attack, because Congress had enacted umbrella legislation approving similar state legislation in generic form.¹⁴⁷

The lessons from *Cooley* and *Parker* are clear. Congress can authorize the states to act using an enumerated power otherwise reserved to Congress. *Cooley* and *Parker* pave the way for a structural solution to the *City of Richmond/Metro Broadcasting* gap.

The Court's jurisprudence under Section 2 of the Fifteenth Amendment extends additional support for the Section 5, Fourteenth Amendment arguments elaborated in this section. The Fifteenth Amendment cautions the states against denying or abridging

¹⁴⁴ 53 U.S. (12 How.) at 318.

¹⁴⁵ TRIBE, *supra* note 138, §§ 6-4, at 406-07.

¹⁴⁶ 317 U.S. 341 (1943).

¹⁴⁷ *Id.* at 357-58, 365-68.

"[t]he right of citizens of the United States to vote . . . on account of race, color, or previous condition of servitude."¹⁴⁸ Section 2 gives Congress the power to enforce this provision by appropriate legislation.¹⁴⁹ Recognizing the long-standing systemic obstacles to meaningful minority participation in state and local political communities, Congress enacted the Voting Rights Act of 1965 to eradicate all forms of racial discrimination in voting.¹⁵⁰

There are a number of striking similarities between the Court's interpretation of Congress's Section 2 and Section 5 powers. Two features particularly stand out. The first is the Court's comparison of Congress's Section 2 powers to those conferred on it by the Necessary and Proper Clause.¹⁵¹ This interpretation naturally entails the proposition that Congress possesses exceedingly broad discretion to find facts and fashion remedies. The Court has labelled as "artificial" any suggestion that Section 2 limits Congress to forbidding violation of the Fifteenth Amendment in general terms.¹⁵² The second is the Court's acknowledgment that to facilitate minority political participation a state may consider race in carving electoral districts.¹⁵³ If a state may take the race of voters into account to facilitate political integration and participation, logic compels it should be able to take the race of applicants, employees and contractors into consideration to facilitate economic integration.¹⁵⁴

This conclusion, moreover, is reinforced by the Court's ready acceptance of social science data revealing racial bloc voting.¹⁵⁵ As discussed at greater length in Part IV of this article, there is ample

¹⁴⁸ U.S. CONST. amend. XV, § 1.

¹⁴⁹ Section 2 provides: "The Congress shall have power to enforce this article by appropriate legislation." *Id.* § 2. Its wording is almost identical to that of Section 5 of the Fourteenth Amendment: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

¹⁵⁰ Pub. L. No. 89-110, tit. I, § 2, 79 Stat. 437 (codified as amended at 42 U.S.C. § 1973 (1988)).

¹⁵¹ *South Carolina v. Katzenbach*, 383 U.S. 301, 326-27 (1966).

¹⁵² *Id.* at 327.

¹⁵³ *United Jewish Orgs. of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 167-68 (1977).

¹⁵⁴ The link between voting and employment was clear to the Congress that enacted the 1964 Civil Rights Act. "The right to vote, however, does not have much meaning on an empty stomach. The impetus to achieve excellence in education is lacking if gainful employment is closed to the graduate. The opportunity to enter a restaurant or hotel is shallow victory where one's pockets are empty." HOUSE COMM. ON THE JUDICIARY, CIVIL RIGHTS ACT OF 1963, H.R. REP. NO. 914, 88th Cong., 1st Sess. 26 (1963), *reprinted in* 1964 U.S.C.C.A.N. 2513.

¹⁵⁵ For an illuminating and thought-provoking discussion of this literature, see Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077 (1991).

social science literature documenting similar decision making in employment and contracting selection procedures.¹⁵⁶ The mindset that prompts white voters to reject candidates of color also prompts them to disadvantage applicants, employees and contractors of color. Unconscious racial bias does not stop at the voting booth. If Congress can authorize the states to take steps to minimize racial bloc voting, it can authorize them to act in the work and market places, especially *their own* work and market places. Principles of racial justice and fairness demand that the Court define Congress's enforcement powers under Section 2 and Section 5 in symmetric terms.

Finally, additional support for Congress's invocation of its Section 5 powers can be found in recent lower federal court decisions dismissing equal protection challenges to state race-conscious MBE programs adopted to satisfy section 106(c)(1) of the Surface Transportation and Uniform Relocation Assistance Act of 1987.¹⁵⁷ Section 106(c)(1) provides that in dispensing federal monies supplied to the states for highway construction, the states must ensure that 10 percent of the amounts appropriated are "expended with small business concerns owned and controlled by socially and economically disadvantaged individuals."¹⁵⁸ Department of Transportation regulations create a rebuttable presumption that members of designated minority groups are socially and economically disadvantaged.¹⁵⁹ Members of other groups must prove their entitlement to the designation on a case-by-case basis.¹⁶⁰ Non-minority contractors have challenged state compliance with the federal regulators, arguing that under *City of Richmond*, the states' MBE programs must satisfy the strict scrutiny test. To date no court has accepted their argument. The leading case is *Milwaukee County Pavers Ass'n*, in which Judge Posner wrote the opinion for an unanimous panel.¹⁶¹

¹⁵⁶ See *infra* notes 208-27 and accompanying text. See also generally Daniel George-Abeyie, *Law Enforcement and Racial and Ethnic Bias*, 19 FLA. ST. U. L. REV. 717 (1992).

¹⁵⁷ Pub. L. No. 100-17, § 106(c), 101 Stat. 132, 145 (1987).

¹⁵⁸ *Id.* § 106(c)(1).

¹⁵⁹ 49 C.F.R. § 23.5 (1991). Among the designated minority groups are Blacks, Hispanics, Portuguese, Asian-Americans, American Indians and Alaskan Natives. *Id.* § 23.5(a)-(e). See also *id.* pt. 23, subpt. D, app. A (offering interpretive elaboration on the term "socially and economically disadvantaged individuals").

¹⁶⁰ *Id.* § 23.5(f) (1991).

¹⁶¹ *Milwaukee County Pavers Ass'n v. Fiedler*, 922 F.2d 419 (7th Cir.), *cert. denied*, 111 S. Ct. 2261 (1991); *accord* *Tennessee Asphalt Co. v. Farris*, 942 F.2d 969, 975 (6th Cir. 1991); *Coral Constr. Co. v. King County*, 941 F.2d 910, 925 (9th Cir. 1991); *O'Donnell Constr. Co. v. District of Columbia*, 762 F. Supp. 354, 368-69 (D.D.C. 1991); *Michigan Road Builders Ass'n v. Blanchard*, 761 F. Supp. 1303, 1314-15 (W.D. Mich. 1991).

He concluded that *Fullilove* precluded a successful constitutional challenge to the statute's set-aside and that, as "agents" of the federal government, the states were entitled to similar protection. Invoking the Commerce Clause analogy discussed earlier, he concluded:

The joint lesson of *Fullilove* and *Croson* is that the federal government can, by virtue of the enforcement clause of the Fourteenth Amendment, engage in affirmative action with a freer hand than states and municipalities can do. And one way it can do that is by authorizing states to do things that they could not do without federal authorization.¹⁶²

Judge Posner's "lesson" points the way to ending the senseless bifurcation of government power over race-conscious preferences created by *City of Richmond* and *Metro-Broadcasting*. Part IV explains why Congress should act on the "lesson of *Fullilove* and *Croson*" and adopt a policy of inclusion, allowing the states to "rebuild the City of Richmond" and dismantle the glass ceilings in their own bureaucracies.

IV. WHY CONGRESS SHOULD ACT

A. *The Need for a National Policy*

The Court's selection of two substantively different standards of review to judge the constitutionality of race-conscious preferences is troubling. While, as an analytical matter, the selection may be defensible by reference to the intent of the framers of the Fourteenth Amendment, it is unsatisfying on an intuitive level. Both federal and state governments are operating with the same goal in mind—the dissolution of the infrastructure of economic apartheid that has locked minorities into low-paying, low-status jobs. It defies common sense to deny the states an effective weapon in this difficult, complex struggle. The insight of Madison, Jay and Hamilton is no less powerful today than it was in 1789: The unit of government closest to the citizenry is far more likely to understand and solve the problems of the immediate community than a distant

¹⁶² 922 F.2d at 423–24. See *supra* note 4, pointing out how the Court of Appeals, relying on *City of Richmond*, simultaneously struck down an identical set-aside adopted by the state in its sovereign capacity.

national bureaucracy cabined by ideological baggage unresponsive to local needs.¹⁶³

By lowering the standard of review for Congressional legislation and heightening it for state legislation, the Court has frustrated legitimate efforts to eradicate the economic barriers separating whites and blacks. Given the Republican Party's control of the White House and the Democratic Party's control of the Congress and their opposite views on set-asides, the likelihood of *Fullilove* MBE set-asides or *Metro Broadcasting* minority preferences being adopted on the national level is remote. The heightened standard of review virtually guarantees the failure of local initiatives. The end result is the continued exclusion of minorities from important avenues of economic opportunity.

Government paralysis on an issue as vital to the nation's continued well-being as economic apartheid is only to be regretted. That it is the result of fragmented and polarized decision making by the branch of government most completely insulated from democratic pressures simply intensifies the distress.

There is, moreover, another frequently overlooked side to the issue of race-conscious preferences that merits attention. As noted earlier, while courts and philosophers have been busy debating the statutory and constitutional legitimacy of affirmative action plans, private and public sector employers and contracting officials have been adopting them at an extraordinary rate. They are now a familiar feature of personnel and contracting decisions.¹⁶⁴

Because the issue of race-conscious preferences so acutely implicates the fundamental notion of equality which is central to the nation's psyche and to its self-definition in global politics, leaving policy decisions concerning these preferences to be made behind closed doors is an abdication of responsibility. The engine of the nation's economy is fired in significant measure by public sector employment and contracting. Allowing individual public sector officials in thousands of locales to define the contours of the nation's solution to complex social ills borders on the reckless. When Congress perceived that the concentration of economic power in the trusts was strangling competition and injuring future growth, it passed the Sherman Act.¹⁶⁵ When Congress concluded that the bargaining powers of capital tilted precipitously against the interests

¹⁶³ THE FEDERALIST NOS. 17, 46 (James Madison).

¹⁶⁴ See *supra* notes 36-37, 56-68 and accompanying text.

¹⁶⁵ Sherman Antitrust Act, ch. 647, 26 Stat. 209 (1890).

of the working class, it passed the National Labor Relations Act.¹⁶⁶ When Congress confronted the legacy of segregation that was rending the nation's social and political fabric, it passed the Civil Rights Acts of 1964, the Voting Rights Act of 1965, the Fair Housing Act of 1968 and the Equal Employment Act of 1972.¹⁶⁷ As Professor Sandalow has observed:

[I]f governmental action trenches upon values that may be regarded as fundamental, that action should be the product of a deliberately broadly based political judgment. The stronger the argument that government action does encroach upon such value, the greater the need to assure us that it is the product of a process that is entitled to speak for society. Legislation that has failed to engage the attention of Congress, like the decision of subordinate governmental institutions, does not meet that test, for it is likely to be the product of partial political pressures that are not broadly reflective of the society as a whole.¹⁶⁸

Additionally, reliance on the Court, executive agency officials and private entities "threatens to supplant the process of self-government spelled out in the constitutional plan."¹⁶⁹ Arguably, Congress has purposely decided to leave the issue of preferences in public employment and contracting to the states and local governments. No support exists for this proposition, however. Even if the proposition had support, the Court foreclosed reliance by adopting the most rigorous standard of review: strict in theory, fatal in fact.

Congress's failure to act is largely attributable to political lethargy. Once the searing images of Watts vanished from the nation's conscience and Dr. King's prophetic and eloquent voice ceased to ring, public interest shifted to different sorts of domestic woes, including, most recently, the collapse of the savings and loan industry, tax reform and the destruction of the environment. International maelstroms, such as the unending conflict in the Middle

¹⁶⁶ National Labor Relations Act, 49 Stat. 449 (1935).

¹⁶⁷ Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972); Fair Housing Act of 1968, Pub. L. No. 90-284, 82 Stat. 81 (1968); Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965); Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964).

¹⁶⁸ Terrance Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162, 1188 (1977).

¹⁶⁹ J. Edmond Nathanson, *Congressional Power to Contradict the Supreme Court's Constitutional Decisions: Accommodations of Rights in Conflict*, 27 WM. & MARY L. REV. 331, 360 (1986). See also Gerald Gunther, *Congressional Responses to Supreme Court Decisions: Distinguishing Constitutionality and Wisdom*, 18 STAN. L. REV. 24 (1983).

East, the disintegration of the Communist Party in the Soviet bloc countries and Iraq's invasion of Kuwait, seized the imagination of the nation and Congress.

Congress's indifference can also be explained by a loss of confidence. At the time of the Civil Rights Acts of 1964, 1965, and 1968 and the 1972 amendments, the legislative branch approached racial isolation in the United States as a malady curable through massive intervention. It fully anticipated eradicating discrimination in employment, housing and voting through statutory fiat and vigorous enforcement by executive agencies and private attorneys general. The end of discrimination would lead to economic advancement in public and private sector employment and to full participation in the body politic. That optimism now seems hopelessly naive. Today's Congress cannot escape the phenomenon of a permanent underclass, devastated inner cities and families without human capital to invest in the future. The Great Society has yet to emerge. Congress and the nation, like Vladimir and Estragon, wait numbly for Godot.

The complexity of these social ills cannot excuse Congress's turning its back on them. Constructing a statute permitting race-conscious preferences in state public works and employment is not as politically dangerous as a first thought might suggest. Some studies actually show widespread support for race-conscious preferences, provided they are administered fairly and with notice.¹⁷⁰ A stumbling block to their implementation has long been the perception that preferences owed their existence to pressure groups and were adopted without input from those most likely to be affected (i.e., white males) and in secret bargaining. Race-conscious preferences authorized in the open by Congress and the states, with ample opportunities for all interested parties to have their views considered, will escape that criticism.

¹⁷⁰ NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., *THE UNFINISHED AGENDA ON RACE IN AMERICA* ii-iv, 29 (1989). But see William R. Beer, *Resolute Ignorance: Social Science and Affirmative Action*, 24 *SOC'Y* 63 (May/June 1987); Frederick R. Lynch & William R. Beer, "You Ain't the Right Color, Pal": *White Resentment of Affirmative Action*, 51 *POL'Y REV.* 64 (Winter 1990); Byron M. Roth, *Social Psychology's "Racism,"* 98 *PUB. INTEREST* 26 (1990). See generally Richard T. Schaefer, *Racial Prejudice in a Capitalist State: What Has Happened to the American Creed?*, 47 *PHYLON* 192 (1986) (analyzing changes in American attitudes toward race-related issues in the United States since the publication of Gunnar Myrdal's *An American Dilemma* in 1944). Schaefer concludes that the recession and stagnant economy have played a significant role in shaping non-minority group members' negative attitude toward race-conscious preferences. *Id.* at 198. See also W. Richard Merriman & Edward G. Carmines, *The Limits of Liberal Tolerance: The Case of Racial Policies*, 20 *POL'Y* 518 (1988).

Uniformity will also lessen the perceived unfairness. Take the case of two municipal agencies, *B* and *D*, that provide identical services in adjacent counties. As it presently stands, *A*, an employee of *B* Agency holding a position identical to *C*, an employee of *D* Agency, may face radically different opportunities for advancement depending on the private decision-making choices of her public sector employer. Multiply the *As* and *Cs* of this country by the millions of jobs subject to public sector affirmative action plans, and it is easy to understand employees' frustration. The sensitivity of race-conscious issues is not an excuse powerful enough to justify delegating what are properly national issues of employment and entrepreneurial policy to local decisionmakers.

Finally, the argument for race-conscious preferences in public employment and contracting rests on two interrelated considerations. First, public bureaucracies, no matter how fair and efficient, cannot operate effectively if a significant segment of the citizenry feels unrepresented and isolated from the decision-making process.¹⁷¹ Minorities need to be employed in all state and municipal agencies to give concrete evidence of representative government. It is not enough, moreover, to have them clustered in jobs that principally involve contact with the public. These jobs are often low-level, civil service positions with limited input into administrative decision making.¹⁷² Filling only these jobs with minority employees smacks of tokenism and imports the structure of a plantation economy into state and municipal bureaucracies. Their presence in middle management positions gives witness to the value of *representative* government. As Professor Lovell has argued:

[I]n the broadest sense, a public employee group representative of the differing values and various perspectives in our total society is essential to public accountability. Any procedures which exclude multiple experience paths and disparate values from organizations *will* in these terms *lower standards* of public accountability as well as organizational effectiveness.¹⁷³

¹⁷¹ SAMUEL KRISLOV & DAVID H. ROSENBLUM, REPRESENTATIVE BUREAUCRACY AND THE AMERICAN POLITICAL SYSTEM 32 (1981); Grace H. Saltzstein, *Representative Bureaucracy and Bureaucratic Responsibility: Problems and Prospects*, 10 ADMIN. & SOC'Y 465 (1979).

¹⁷² For example, the percentage of minorities and women employed in federal government agencies is directly related to the availability of blue-collar and clerical jobs within each agency. J. Edward Kellough, *Integration in the Public Workplace: Determinants of Minority and Female Employment in Federal Agencies*, 50 PUB. ADMIN. REV. 557, 561 (1990).

¹⁷³ Catherine Lovell, *Three Key Issues in Affirmative Action*, 34 PUB. ADMIN. REV. 235, 237 (1974).

Minority members of the public perceive the administrative state as acknowledging their existence in the body politic. Minority employees, especially those at decision-making levels, can advance the interest of their community in shaping policy and expending funds. It is a bedrock principle of public personnel management that the racial and ethnic make-up of decisionmakers contributes to the character and degree of a bureaucracy's social and political demands.¹⁷⁴

Second, race-conscious preferences in public employment and contracting have succeeded in hastening the integration of minorities into the economic mainstream. Public employment has historically provided mobility for disadvantaged groups turned away by private employers.¹⁷⁵ Much remains to be done to ensure inclusion of minorities in the American free enterprise system. Building a strong minority presence in the construction industry sends a very visible message to both the minority and non-minority communities about the value of capitalism and the rewards of initiative, hard work and self-employment. That the government is lending these minority enterprises a helping hand does not detract from this message. The government is always lending capitalism and free enterprise a helping hand. How else do you explain capital gains taxes as a friendly alternative to income taxes, accelerated depreciation and research and development deductions—to name only a few forms of governmental assistance?

While the statistics reflecting minority employment and entrepreneurship are bleak, they do not on their own make the case for race-conscious preferences. They will not cure the ills of families headed by single women who live on the edge of, or below, the poverty line; they will not make up for the informational and technological deficiencies of inner-city schools. What they can and will do is boost the economic integration of minorities who already possess work and marketplace skills.¹⁷⁶ Critics have often charged

¹⁷⁴ William R. McKinney, *Public Personnel Selection: Issues and Choice Points*, 16 PUB. PERSONNEL MGMT. 243, 254 (1987); Charles H. Levine & Lloyd G. Nigro, *The Public Personnel System: Can Judicial Administration and Major Management Coexist?*, 35 PUB. ADMIN. REV. 99 (1975).

¹⁷⁵ *Id.* See Brent S. Steel & Nicholas P. Lovrich, Jr., *Equality and Efficiency Tradeoffs in Affirmative Action—Real or Imagined? The Case of Women in Policing*, 24 SOC. SCI. J. 51, 52 (1987).

¹⁷⁶ Studies evaluating race-conscious programs have documented their success in accelerating and solidifying the economic integration of minority group members. *E.g.*, HAMMERMAN, *supra* note 62, at 5; EMPLOYMENT STANDARDS ADMINISTRATION, U.S. DEP'T OF LABOR, EMPLOYMENT PATTERNS OF MINORITIES AND WOMEN IN FEDERAL CONTRACTOR AND NON-

that race-conscious preferences are flawed precisely for this reason. That criticism misses the mark. Economic integration should not be confused with the goal of reconstructing devastated inner cities or routing the social pathologies that plague the underclass.

What affirmative action is *not* about is as important as what it is about. Affirmative action is *not* a safety net. It is not designed to improve the lot of the underclass or compensate for deficient educational systems. It is about remedying societal discrimination in employment, especially the subconscious race-premised expectations of employers and contractors. Its achievements become even more meaningful in light of minority poverty, the social and economic collapse of the inner cities, economic stagnation and the rise of households headed by single females. Adverse treatment and adverse impact have kept minorities at the margins of markets and workplaces for generations. Race-conscious preferences propel them toward the market and workplace centers. As a Rand Corporation study commissioned by the Department of Labor observed:

The essential purpose of affirmative action is to increase the employment of blacks in jobs where they had previously been scarce. Since there is an abundance of blacks in low-skill jobs, the main pressures will be concentrated in the skilled jobs, where blacks had previously been scarce. Thus, if there is a story to be told of effects of affirmative action on relative wages of black men, its main plot must be one of nonneutrality with respect to education, with strong positive effects for college graduates and

CONTRACTOR ESTABLISHMENTS (1984): OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, EMPLOYMENT PATTERNS OF MINORITIES AND WOMEN IN FEDERAL CONTRACTOR AND NON-CONTRACTOR ESTABLISHMENTS, 1974-1980 37 (1984). See also Jonathan S. Leonard, *The Impact of Affirmative Action Regulation and Equal Employment Law on Black Employment*, 4 J. ECON. PERSPS. 47 (1990); William E. Feinberg, *Are Affirmative Action and Economic Growth Alternative Paths to Racial Equality?*, 50 AM. SOC. REV. 561 (1985); Jonathan S. Leonard, *What Was Affirmative Action?*, 76 AM. ECON. REV. 359 (1986). See generally ANDREW HACKER, *TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL* 107-33 (1992).

Raw numbers tell a powerful story. In 1962, IBM employed 750 African-Americans. As a federal contractor, it was required to conduct underutilization reviews of its workforce and implement a program of goals and timetables. By 1968, it had increased the number of black employees almost tenfold, to 7,251. By 1980, the number had risen to 16,546. Even more significant than the increase is that many IBM employees of color held middle-level managerial positions. Before the OFCCP adopted the Philadelphia Plan, fewer than 1% of the construction workers in the Philadelphia area were minority group members. See *supra* notes 30, 62. By 1982, that number had increased to 12%. Robinson & Spitz, *Affirmative Action: Evolving Case Law and Shifting Philosophy*, 10 URB. LEAGUE REV. 84, 89 (1986-87).

less strong, not necessarily positive, effects at lower educational levels.¹⁷⁷

B. *Accelerating the Economic Integration of Minorities*

The dramatic demographic shift that is occurring in employment in the United States is well documented. Economists have even coined a term to describe it: "the browning of the labor force." In 1986, the Department of Labor commissioned a study—Workforce 2000—examining in detail the impact of demographics, education and economics in shaping America's workforce.¹⁷⁸ That study brought the changing landscape of the nation's labor pool into sharp relief. In 1990, white males constituted 47 percent of the new entrants in the workforce. By the year 2000, that percentage will drop to 30 percent.¹⁷⁹ Within the present decade, Latinos will make up 30 percent of the new entrants to the labor force; African-Americans 17 percent and Asian Americans 11 percent.¹⁸⁰ The gender shift is equally dramatic. By 2000, 47 percent of the American labor force will be women.¹⁸¹ Pointing to the aging of the Baby Boom generation, the general decline in the birthrate over the last twenty years, the higher birthrate among minority groups, and the need for two wage earners to maintain the purchasing power of middle class families,¹⁸² the Department of Labor study warned the public and private sector that they could no longer rely on laissez-faire approaches to human capital. Business groups have acknowledged the need for formidable affirmative action programs, including race-conscious preferences, to ensure equality of achievement in the workforce.¹⁸³

¹⁷⁷ JAMES P. SMITH & FINIS R. WELCH, CLOSING THE GAP: FORTY YEARS OF ECONOMIC PROGRESS FOR BLACKS 93-94 (1986). *Accord* James P. Smith & Finis R. Welch, *Black Economic Progress After Myrdal*, 27 J. ECON. LIT. 519, 557 (1989).

¹⁷⁸ HUDSON INSTITUTE, WORKFORCE 2000: WORK AND WORKERS FOR THE TWENTY-FIRST CENTURY (1987) [hereinafter WORKFORCE 2000]. *See also* U.S. DEP'T OF LABOR, INVESTING IN PEOPLE: A STRATEGY TO ADDRESS AMERICA'S WORKFORCE CRISIS (1989); GLASS CEILING, *supra* note 13.

¹⁷⁹ Lynne Duke, *Cultural Shifts Bring Anxiety for White Men; Growing Diversity Imposing New Dynamic in Workplace*, WASH. POST, Jan. 1, 1991, at A1 (citing Bureau of Labor Statistics).

¹⁸⁰ *The New Worker*, L.A. TIMES, Dec. 28, 1990, (City Monthly Labor Review), at 3.

¹⁸¹ WORKFORCE 2000, *supra* note 178, at 85-89.

¹⁸² The study's findings include: in 1985, men and women ages 35-54 held 38% of the jobs in the United States; by 2000 they will hold 51%. By the year 2000, there will be over 30 million new workers between ages 16-24; in 1980, there were 37.2 million such workers. Because of higher birthrates, minorities will make up 33.2% of the nation's new workers between 1988 and 2000. WORKFORCE 2000, *supra* note 178, at 78-82, 89-90.

¹⁸³ *E.g.*, Howard Gleckman et al., *Race in the Workplace*, BUS. WK., July 8, 1991, at 50. As

The need to cultivate the integration of minority group members into the economic mainstream can hardly be disputed. While the economic well-being of minority group members has improved since the enactment of Title VII in 1964, they are far from full participants in the workforce and entrepreneurial sectors of the economy.¹⁸⁴ In 1988, for example, the disparity between a typical white family's income and a typical black family's income exceeded that of the years 1969–1981. The disparity, moreover, is a shockingly high 56.1 percent.¹⁸⁵ The black unemployment rate remains basically unchanged since 1978 and in 1987 ran as high as 2.45 times the rate for whites. That rate, moreover, fails to measure the impact of the significant decrease in the participation rates for blacks, particularly black men, in the lower range of the wage spectrum.¹⁸⁶

Almost one-third of all African-Americans live below the poverty line. Less than 11 percent of whites do. The percentage of African-Americans participating in the labor force has declined, and unemployment has risen. Two sets of statistics offer a bleak prognosis for ameliorating the poverty depicted by this data. First, only 28 percent of recent black high school graduates are likely to

the Chairman of American Telephone & Telegraph Company observed, affirmative action "is not just the right thing to do. It's a business necessity." *Id.* BUSINESS-HIGHER EDUCATION FORUM, cited in Sam Fullwood III, *Broad Attack on Poverty Proposed*, L.A. TIMES, June 6, 1990, pt. A, at 14. See also *Talks on Affirmative Action Order for Federal Contractors Still Continuing*, Daily Lab. Rep. (BNA), No. 243, A-1 (Dec. 18, 1985).

¹⁸⁴ Bureau of Labor Statistics, Dep't of Labor, 37 EMPL. & EARNINGS 183 (Jan. 1990). For a fuller analysis of these statistics, see Alfred W. Blumrosen, *Society in Transition I: A Broader Congressional Agenda for Equal Employment—The Peace Dividend, Leapfrogging, and Other Matters*, 8 YALE L. & POL'Y REV. 257, 260–65 (1990); James J. Heckman & J. Hoult Verkerke, *Racial Disparity and Employment Discrimination Law: An Economic Perspective*, 8 YALE L. & POL'Y REV. 276, 281–82 (1990). See also HACKER, *supra* note 177, at 93–106; SMITH & WELCH, *supra* note 177, at 6; JUNE O'NEILL, U.S. COMM'N ON CIVIL RIGHTS, *THE ECONOMIC PROGRESS OF BLACK MEN IN AMERICA* 12 (1986); Cain, *The Economic Analysis of Labor Market Discrimination: A Survey*, in 1 HANDBOOK OF LABOR ECONOMICS (1986); John J. Donohue III & James Heckman, *Continuous Versus Episodic Change: The Impact of Civil Rights Policy on the Economic Status of Blacks*, 29 J. ECON. LIT. 1603 (1991); Smith & Welch, *supra* note 177, at 522.

For an excellent review of the economic status of minorities and especially that of African-Americans, see Robert E. Suggs, *Rethinking Minority Business Development Strategies*, 25 HARV. C.R.-C.L. REV. 101 (1990). The author was alerted to much of the data identified in this article in the Suggs piece.

¹⁸⁵ CENTER FOR BUDGET AND POLICY PRIORITIES, *STILL FAR FROM THE DREAM: RECENT DEVELOPMENTS IN BLACK INCOME, EMPLOYMENT AND POVERTY* 17 (1988) [hereinafter *RECENT DEVELOPMENTS IN BLACK INCOME*]; Blumrosen, *supra* note 184, at 262 & n.26.

¹⁸⁶ *RECENT DEVELOPMENTS IN BLACK INCOME*, *supra* note 185, at 30–31; WORKFORCE 2000, *supra* note 178, at 90; Blumrosen, *supra* note 184, at 262 & n.27; Heckman & Verkerke, *supra* note 184, at 278 n.7.

go on to college.¹⁸⁷ Within that group the percentage of black males attending college is declining.¹⁸⁸

A high school diploma does not offer much hope for entry into the middle class, much less wealth acquisition. Black youth are increasingly locked into low-paying jobs despite a high school diploma. Most high schools, especially those in inner cities, lack the resources to prepare students for jobs with prospects for advancement. These jobs require computer literacy, competency in reasoning skills and proficiency in communication. In communities where school financing depends on local property taxes for revenue, the likelihood of education providing a vehicle to escape poverty-line employment is dim.¹⁸⁹ Viewed against the shrinking job-market for unskilled workers and employers' demand for technologically proficient workers, these statistics have ominous overtones.¹⁹⁰

Second, the percentage of black children in families headed by single women has now risen to a startling 43 percent.¹⁹¹ Because these families are far more likely to live at or below the poverty line, their chances of educational and occupational mobility are restricted.

Employment without regard to the quality of employment is no guarantor of economic success for minorities. The statistics are sobering. The income of African-Americans has rarely exceeded three-fifths that of Caucasians.¹⁹² The ratio of black incomes to

¹⁸⁷ See Jason DeParle, *Without Fanfare, Blacks March to Greater High School Success*, N.Y. TIMES, June 9, 1991, § 1, at 1. Statistics show that in 1989 the dropout rate for blacks was 13.8%. In 1970, it was 27.9%. *Id.* at 26L. While the percentage of black students completing high school is on the rise, that statistic merits less optimism than a first reading suggests. For the reasons noted in the text, the actual monetary value of a high school diploma in terms of potential earnings is much less in the 1990s than it was in the 1950s and 1960s.

¹⁸⁸ *Id.* What is also disturbing about this figure is that the absolute number of black males going on to higher education is significantly smaller than the number of black females. In 1988, for example, 687,000 black women were enrolled in college, as compared with 443,000 black men. *Id.* See also HACKER, *supra* note 177 at 177-78.

¹⁸⁹ See Michael M. Burns, *Lessons from the Third World: Spirituality as the Source of Affirmative Action*, 14 VT. L. REV. 401, 401 n.2 (1990).

¹⁹⁰ WORKFORCE 2000, *supra* note 178, at 91. Michael A. Lawrence, *Technology and the Workplace*, 92 CRISIS 23, 38 (April 1985); John D. Kasarda, *Urban Industrial Transition and the Underclass*, 501 ANNALS 26, 26-47 (1989); Robert M. Moroney & Jesse McClure, *Social Welfare and the Permanent Underclass*, 19 URB. & SOC. CHANGE REV. 25 (1986). But see Norman Fainstein, *The Underclass/Mismatch Hypothesis as an Explanation for Black Economic Deprivation*, 15 POL. & SOC. 403 (1986-87); Williams, *Solving the Unemployment Problem: A Case for Full Employment*, 10 URB. LEAGUE REV. 25 (1986).

¹⁹¹ WORKFORCE 2000, *supra* note 178, at 90.

¹⁹² U.S. BUREAU OF THE CENSUS, CENSUS OF POPULATION: GENERAL SOCIAL AND ECONOMIC CHARACTERISTICS, U.S. SUMMARY, PC 80-1-C1, tables 164, 170, 180 (1983).

white incomes declined from 61.3 percent to 56.3 percent in the years 1970–1983.¹⁹³

Even when white and black households have the same annual income, the net worth of the black household is one-third that of the white household.¹⁹⁴ Investment profiles reveal a similar disparity. Less than 1 percent of black wealth is invested in stocks and bonds compared to 7 percent of white wealth.¹⁹⁵ Black wealth is concentrated in equity in homes, cars and trucks (64.4 percent for blacks versus 37.4 percent for whites). A much larger percentage of white than black wealth holdings are placed in financial assets (30.1 percent for whites versus 10.2 percent for blacks).¹⁹⁶ The explanation for the stark difference is not hard to plumb. Until recently, society continued to engage in overt racial discrimination, denying blacks a decent education,¹⁹⁷ access to blue-collar jobs and the professions, and occasions for the kinds of social networking with whites that open up entrepreneurial opportunities. This limited or non-existent window of opportunity precluded blacks from amassing capital that could be invested in stocks and bonds or passed down from generation to generation.

The entrepreneurial participation of minorities is equally bleak. Twelve out of every one hundred Americans is an African-American. Yet only 2 percent of all businesses are owned by African-Americans. That 2 percent generates less than 2 percent of all business receipts;¹⁹⁸ those receipts represent less than 1 percent of

¹⁹³ U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS, Series P-60, No. 145, *Money Income and Poverty Status of Families and Persons in the United States: 1983*, table 3 (1984).

¹⁹⁴ Walter Updegrave, *Race and Money*, MONEY, Dec. 1989, at 152.

¹⁹⁵ A COMMON DESTINY: BLACKS AND AMERICAN SOCIETY 291–94 (Gerald D. Jaynes & Robin M. Williams, Jr. eds., 1989).

¹⁹⁶ Henry S. Terrell, *Wealth Accumulations of Black and White Families*, 26 J. FIN. 363 (1971). While this data is over 20 years old, it is consistent with more recent statistical studies. See TIMOTHY BATES, MAJOR STUDIES OF MINORITY BUSINESSES: A BIBLIOGRAPHIC ESSAY (Joint Center for Political and Economic Studies ed., 1990) (on file with the author).

¹⁹⁷ Schools that serve minority group children are notoriously underfunded in terms of per pupil expenditures in comparison to schools that serve majority group children. In *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973), the Supreme Court refused (1) to characterize the right to education as fundamental for equal protection purposes and (2) to subject unequal funding with a disproportionate effect on minorities to a heightened degree of scrutiny. Challenges under state constitutions have proved far more successful. Approximately 24 state courts have declared unequal funding a violation of their state constitutions. Jack Y. Perry, *Financing Education in Minnesota: Equality and Constitutional Questions Raised by State Referendum Levy*, 8 L. & INEQ. J. 229, 235 n.25 (1989).

¹⁹⁸ ROBERT E. SUGGS, RECENT CHANGES IN BLACK-OWNED BUSINESSES 2, 6 (Joint Center for Political Studies, Washington, D.C. 1986). See also P. BEARSE, AN ECONOMETRIC ANALYSIS OF MINORITY ENTREPRENEURSHIP (U.S. Dep't of Commerce Minority Business Development Agency 1983).

the nation's business revenues.¹⁹⁹ While minority business enterprises number approximately 800,000, only 14 percent have paid employees.²⁰⁰

The very limited success of minorities in the entrepreneurial sector is directly linked to the disparity in net worth of minority households, especially those of African-Americans. A principle obstacle to the health and growth of minority enterprises is their lack of access to capital. The major determinant of success in analyzing white and black enterprises is the availability of initial investment capital.²⁰¹ Obviously, access to capital is considerably limited by both the size and form of personal wealth holdings. The absence of accessible capital explains in large measure the concentration of blacks in industries that require minimal capital contributions. Lastly, personal wealth holdings limit established MBEs to industries that operate with little capital; the absence of assets makes the MBEs unattractive loan applicants to commercial banks. Cut off from capital, MBEs can neither weather economic storms nor take advantage of new opportunities.²⁰²

There is an important link between MBEs and minority employment. Repeatedly, studies have shown that almost all employees of MBEs are minority group members.²⁰³ This is true irrespective of the MBE's location in a minority community. Businesses owned by non-minorities but located in minority communities employ a larger percentage of non-minorities than minorities.²⁰⁴

Two other factors deserve mention in considering the relative weaknesses of MBEs vis-a-vis non-minority enterprises. The Civil Rights movement of the 1960s and 1970s, braced by legislative and judicial activism, enabled a significant number of middle-class minorities to escape from racially isolated neighborhoods and racially stratified job categories. Their progress, with its attendant flight of

¹⁹⁹ U.S. BUREAU OF THE CENSUS, 1982 SURVEY OF MINORITY OWNED BUSINESS ENTERPRISES MB82-1, MB82-2, MB82-3 (1985-1986).

²⁰⁰ U.S. BUREAU OF THE CENSUS, 1977 SURVEY OF MINORITY OWNED BUSINESS ENTERPRISES MB77-1, MB77-2, MB77-3 (1979-1980); U.S. BUREAU OF THE CENSUS, 1982 SURVEY OF MINORITY OWNED BUSINESS ENTERPRISES MB82-1, MB82-2, MB82-3 (1985-1987).

²⁰¹ TIMOTHY BATES, THE ROLE OF BLACK ENTERPRISE IN URBAN ECONOMIC DEVELOPMENT (Joint Center for Political and Economic Studies ed., 1990). See Diana B. Henriques, *Piercing Wall Street's 'Lucite Ceiling'*, N.Y. TIMES, Aug. 11, 1991, § 3, at 6.

²⁰² Helen Bradford, *Wealth, Assets and Income in Black Households*, AFRO-AMERICAN STUDIES PROGRAM, UNIVERSITY OF MARYLAND (Feb. 1990) (working paper on file with the author).

²⁰³ BATES, *supra* note 201; Timothy M. Bates, *Do Black-Owned Businesses Employ Minority Workers? New Evidence*, 16 REV. BLACK POL. ECON. 51 (1988).

²⁰⁴ BATES, *supra* note 201.

capital, had a negative impact on MBEs and the availability of jobs for unskilled minority workers.²⁰⁵ The concentration of blacks in blue-collar manufacturing jobs and in unskilled jobs in general made them particularly vulnerable to job shrinkages caused by the restructuring of the United States economy in response to global competition.²⁰⁶ Furthermore, the recession in the late 1980s and early 1990s hit minority communities more harshly than non-minority communities, contributing significantly to drying up the already limited pool of capital. The failure of the savings and loan industry only made matters worse.²⁰⁷

C. Recognizing Racism in the Work and Market Places

What Congress needs to emphasize is the link between racial status and racial economic inequality. While most Americans are sympathetic to the notion of legal redress for personalized claims of discrimination and support outlawing discriminatory treatment, individualism still occupies a revered spot in the nation's consciousness. The stronger the belief in individualism, the easier it is to attribute the poor economic status of minorities to a "lack of effort," "indolence," "welfare dependence," and so forth.²⁰⁸ From this perspective, culture, institutional barriers and societal expectations²⁰⁹

²⁰⁵ Creigs C. Beverly & Howard J. Stanback, *The Black Underclass Theory and Reality*, 17 BLACK SCHOLAR 24 (Sept./Oct. 1986); Sheldon Danziger & Peter Gottschalk, *Earnings Inequality, the Spatial Concentration of Poverty and the Underclass*, 77 AM. ECON. REV. 211 (1987). See also James E. Ellis, *The Black Middle Class*, BUS. WK., Mar. 14, 1988, at 62.

²⁰⁶ Peter Passell, *Why Black Men Have Lost Ground*, N.Y. TIMES, Aug. 28, 1991, at D2. See also Williams, *supra* note 190.

²⁰⁷ John D. Abell, *The Impact of Demand Management Policies on Black vs. White Employment*, 18 REV. BLACK POL. ECON. 43, 57-58 (1989).

²⁰⁸ Livingston, *supra* note 107, at 99-100. See also HOWARD SCHUMAN ET AL., RACIAL ATTITUDES IN AMERICA: TRENDS AND INTERPRETATIONS (1985); James R. Kluegel & Eliot R. Smith, *Whites' Beliefs About Blacks' Opportunity*, 47 AM. SOC. REV. 518 (1982); Address by John E. Jacob, National Urban League Annual Conference (July 21, 1991), reprinted in VITAL SPEECHES OF THE DAY 58-63 (1992).

²⁰⁹ See Jeff Howard & Ray Hammond, *Rumors of Inferiority*, in RACIAL PREFERENCE AND RACIAL JUSTICE: THE NEW AFFIRMATIVE ACTION CONTROVERSY 369 (Russell Nieli ed., 1991). See also WILLIAM BRINK & LOUIS HARRIS, BLACK & WHITE (1976); ANGUS CAMPBELL, WHITE ATTITUDES TOWARD BLACK PEOPLE (1971).

The legal literature exploring unconscious racism is incredibly rich. E.g., Richard Delgado, *When a Story is Just a Story: Does Voice Really Matter?*, 76 VA. L. REV. 95 (1990); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987). Mari I. Matsuda, *Voices of America: Accent, Antidiscrimination Law and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329 (1991); Thomas Ross, *Innocence and Affirmative Action*, 43 VAND. L. REV. 297 (1990); Patricia Williams, *The Obliging Shell: An Informal Essay on Formal Equal Opportunity*, 87 MICH. L. REV. 2128 (1989).

are unobserved forces. What Congress needs to do is make the invisible visible.²¹⁰

Social science literature and behavioral management studies point the way. Among the most pertinent findings are those demonstrating the critical role of race in the choice of occupation and in the selection of competing applicants for jobs.²¹¹ Fortune 500 and 1000 companies often responded to the need for integrating middle management by channeling African-Americans into personnel and public relations jobs.²¹² Although highly visible, these positions frequently cluster at the edge of an organization's power structure and are rarely rungs to positions of prestige and influence along the corporate ladder.²¹³ African-Americans experience more difficulty than their white peers in finding and maintaining mentoring relationships, which are invaluable tools for advancement in public and private sector organizations.²¹⁴ Mentors provide career guidance specific to the organization and critical psychological support.²¹⁵ The absence of African-Americans at high levels within organizations tends to make it especially difficult for other African-Americans to enter into the kinds of mentoring relationships that make the critical difference in advancement. While cross-race mentoring occurs, it is simply not as effective as same-race mentoring.²¹⁶ African-Americans are also particularly vulnerable to the vicissi-

²¹⁰ For an illuminating study of the relationship between the ethic of individualism and non-minority opposition to race-conscious preferences, see James R. Kluegel, "If There Isn't a Problem, You Don't Need a Solution": *The Bases of Contemporary Affirmative Action Attitudes*, 28 AM. BEHAVIORAL SCIENTIST 761 (1985). Professor Kluegel specifically concludes: "[T]here is a need to extend whites' sense of the problem to include an understanding of how class conditions and other structural forces may limit chances for economic advancement, and thereby to escape the narrowness of defining the problem as involving only individually protected racial discrimination." *Id.* at 780. See also Kluegel & Smith, *supra* note 208.

²¹¹ Andrew M. Gill, *The Role of Discrimination in Determining Occupational Structure*, 42 INDUS. & LAB. REL. REV. 610 (1989).

²¹² Howard Gleckman et al., *Race in the Workplace*, Bus. Wk., July 8, 1991, at 50. This section of the text specifically describes the experience of African-Americans in the workplace to the exclusion of members of other racial groups. The pertinent organizational behavior studies focus almost exclusively on African-Americans. Research is critically needed with respect to other minorities, especially Latinos. Thomas & Alderfer, *The Influence of Race on Career Dynamics: Theory and Research on Minority Career Choices*, in HANDBOOK OF CAREER THEORY 133, 134, 151 (Michael Arthur et al. eds., 1989).

²¹³ Sharon M. Collins, *The Marginalization of Black Executives*, 36 SOC. PROBS. 317 (1989).

²¹⁴ FLOYD DICKENS, JR. & JACQUELINE B. DICKENS, *THE BLACK MANAGER: MAKING IT IN THE CORPORATE WORLD* 307-10 (1982); DANIEL R. LEVINSON ET AL., *THE SEASONS OF A MAN'S LIFE* (1978); Karmel, *Why Blacks Still Haven't Made It on Wall Street*, AM. LAW., Apr. 1984, at 1. But see Thomas & Alderfer, *supra* note 212, at 141.

²¹⁵ Thomas & Alderfer, *supra* note 212, at 141.

²¹⁶ *Id.* at 143.

tudes of recessionary market conditions and corporate restructurings.²¹⁷

Subtle, unconscious discrimination affects not only what jobs minorities hold but also how they are judged in those jobs. Non-minorities frequently evaluate minority workers on their ability to "fit in" rather than their competence.²¹⁸ Studies show that minorities are frequently subject to a dual set of performance standards. Their color inevitably puts them at a disadvantage regardless of the decisionmaker's intent not to discriminate. For example, supervisors frequently rate African-Americans more harshly on job performance evaluations, especially if the supervisors are white.²¹⁹ Customers also discriminate, preferring white to black employees.²²⁰ Black males are often more harshly judged than black females.²²¹ The influence of race on promotion criteria is particularly striking. Predominantly white-male selection committees tend to ignore the racial and ethnic diversity of the workforce that the promoted employee will supervise, whereas racially balanced committees pay close attention to this factor.²²²

Minorities in the academic world often fare no better than their peers in the corporate world. They too suffer from marginalization and isolation from decision-making units and are judged more harshly.²²³ One major study compared the hiring patterns of uni-

²¹⁷ Norman Riley, *Attitudes of the New Black Middle Class*, 94 CRISIS 14, 18, 31-32 (Dec. 1986).

²¹⁸ GEORGE DAVIS & GLEGG WATSON, *BLACK LIFE IN CORPORATE AMERICA: SWIMMING IN THE MAINSTREAM* (1982); DICKENS & DICKENS, *supra* note 214; Dale Belman & John S. Heywood, *Incentive Schemes and Racial Wage Discrimination*, 17 REV. BLACK POL. ECON. 47, 47-49 (1988).

²¹⁹ Jeffrey H. Greenhaus et al., *Effects of Race on Organizational Experiences, Job Performance Evaluations, and Career Outcomes*, 33 ACAD. MGMT. J. 64-86 (1990); Richard Hudson, *Nonsense Clouds Affirmative Action Debate*, N.Y. TIMES, Sept. 30, 1991, at A16 (letter to the editor). The same is also true for women. GLASS CEILING, *supra* note 13, at 15.

²²⁰ George J. Borjas & Stephen G. Bronars, *Consumer Discrimination and Self-Employment*, 97 J. POL. ECON. 581 (1989); Belman & Heywood, *supra* note 218.

²²¹ Cf. Felicia Kessel, *Black Men and Women in the Corporate Playground: Is the Competition Real?*, 94 CRISIS 19, 23 (Apr./May 1987).

²²² Clayton Alderfer & R.C. Tucker, *Measuring Managerial Potential and Intervening to Improve the Racial Equity of Upward Mobility Decisions*, Technical Report No. 6, Yale Sch. of Org. and Mgmt.

²²³ Talmadge Anderson, *Black Encounters of Racism and Elitism in White Academe: A Critique of the System*, 18 J. BLACK STUD. 259 (1988). For trenchant discussions of racism encountered by minority law professors, see Derrick Bell, *Strangers in Academic Paradise: Law Teachers of Color in Still White Law Schools*, 20 U.S.F. L. REV. 385 (1986); Andrew W. Haines, *Minority Law Professors and the Myth of Sisyphus: Consciousness and Praxis Within the Special Teaching Challenge in American Law Schools*, 10 NAT'L BLACK L.J. 247 (1988); Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745 (1989). See also Richard Delgado, *Rodrigo's Chronicle*, 101 YALE L.J. 1357 (1992). Objections to race- and gender-conscious

versity search committees.²²⁴ It showed that committees with more than token female representation made a greater number of offers to female candidates than committees with few or no female representatives. Two observations stand out: first, the study challenges the assumption that affirmative action considerations propel departments with few women to hire more; and second, it solidly supports the proposition that "the presence of moderate numbers of women influences hiring decisions that promote women's opportunities."²²⁵ The observations' transference to minority hiring in the academic world presents no difficulty. The observations, moreover, are entirely consistent with patterns of decision making in the corporate and business environment.²²⁶

Arguing for race-conscious preferences is not the same as arguing for non-merit hiring and promotions. Adding race as a consideration to the employer's or contracting authority's decision-making calculus is simply to recognize that membership in a racially identifiable group inevitably puts employees and entrepreneurs at a disadvantage. Racial preferences help to level the playing field by making up for dysfunctional mentoring relationships, more severe evaluation systems and biased customer selections.

In short, affirmative action plans, if properly constructed, make good economic sense for the nation. By correcting for unconscious racism they will accelerate the entry of minority group members into the middle class and solidify the place of those who are already there. They will stimulate the growth of MBEs which, in turn, will result in greater labor force participation by minorities.²²⁷

preferences in the academic world spring from the same well of individualism and meritocracy as do the objections raised in the corporate and business community. Witt, *Affirmative Action and Job Satisfaction: Self-Interested v. Public Spirited Perspectives on Social Equity—Some Sobering Findings from the Academic Workplace*, 10 REV. PERSONNEL ADMIN. 73, 74-77 (1990).

²²⁴ Yoder et al., *The Power of Numbers in Influencing Hiring Decisions*, 3 GENDER & SOC. 269 (1989).

²²⁵ *Id.*

²²⁶ See *supra* notes 209-22 and accompanying text.

²²⁷ Some critics of affirmative action question its success and contend that race-conscious programs have actually narrowed avenues of economic opportunity for minorities. Thomas Sowell, a black conservative economist, has been a particularly vocal opponent. THOMAS SOWELL, *CIVIL RIGHTS: RHETORIC OF REALITY?* (1984); THOMAS SOWELL, *THE ECONOMICS AND POLITICS OF RACE: AN INTERNATIONAL PERSPECTIVE* (1983); THOMAS SOWELL, *ETHNIC AMERICA: A HISTORY* (1981); THOMAS SOWELL, *MARKETS AND MINORITIES* (1981); Thomas Sowell, *Are Quotas Good for Blacks?*, 65 COMMENTARY 39 (June 1978). See also Smith & Welch, *supra* note 177, at 555. See generally WILLIAM J. WILSON, *THE DECLINING SIGNIFICANCE OF RACE: BLACKS AND CHANGING AMERICAN INSTITUTIONS* (2d ed. 1980); Christopher Jencks, *Affirmative Action for Blacks: Past, Present, and Future*, 28 AM. BEHAVIORAL SCIENTIST 731 (1985).

Other black critics base their objection on the stigma of being an affirmative action beneficiary. E.g., Shelby Steele, *A Negative Vote on Affirmative Action*, N.Y. TIMES, May 13, 1990, § 6 (Magazine), at 46. See also *infra* notes 272-73.

D. *The Court, Diversification and Constitutional Values*

The preceding arguments directly address the employment and entrepreneurial benefits of race-conscious preferences. Such preferences also provide a benefit of a different dimension: diversification in the work and market places. Objectors to race-conscious preferences will immediately protest, "There is no such thing as a 'minority' viewpoint." Congress rejected precisely that protest, however, in the legislative scheme upheld in *Metro Broadcasting*. The experience of being an African-American, a Latino or an Asian-American mediates an individual's consciousness in a way that is simply unknowable to non-minorities.²²⁸ The experience of racial separateness is present regardless of the individual's education, social status or financial well-being. Like gender it is a constant of being. Admittedly, some minorities experience their race more intensely than others. That psychological reality does not detract from their presence as an agency of diversity.

Complete acceptance of diversity as a constitutional value adequate to justify race-conscious preferences is not yet a *fait accompli*. The Court's initial hostility toward diversity justifications is diminishing, however. Judicial acceptance depends upon factors resembling the ones noted earlier: the identity of the implementing body within the federal structure and the justificatory purpose. Significantly, the Court favors congressionally mandated diversity.

The Court's original attitude toward race-conscious preferences based on a diversity justification reflected a deep-seated suspicion and antagonism. Wary of government attempts at social engineering, the Court rejected justifications based on role-modeling²²⁹ and societal discrimination.²³⁰ The Court questioned whether "diversity" in employment and in contracting was anything more than an attempt to distribute economic opportunities along racial lines. Promoting different perspectives and new ways of analyzing familiar data simply did not seem to be pertinent considerations in an employer's calculus of hiring and promotion values. Nor did a public contracting authority's desire to eradicate entrepreneurial isolation for racially identifiable groups satisfy the Court's scrutiny.

²²⁸ See the legal literature cited *supra* note 209.

²²⁹ *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 275-76 (1986); *id.* at 288 n.* (O'Connor, J., concurring in part and concurring in the judgment).

²³⁰ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 496-97 (1989); *Wygant*, 476 U.S. at 274, 276; *id.* at 288 (O'Connor, J., concurring in part and in the judgment).

On occasion, however, the Court *sub silencio* recognized diversity as a legitimate goal of government. Some of these cases specifically concerned equal protection; others did not. Justice Powell's decision in *Bakke* turned on his perception that ethnic and racial diversity in the college classroom promoted greater self-knowledge which, in turn, benefited society as a whole.²³¹ Diversity also played a role in *Mississippi University for Women v. Hogan*.²³² Justice O'Connor's majority opinion viewed with extreme skepticism the all-female school of nursing's claim that the presence of male students would retard the development of leadership capacities in women.

The Court's tacit support for diversity was not confined to professional training. In *Johnson v. Transportation Agency*, a Title VII affirmative action case, the Court acknowledged the harassment and lack of support Ms. Joyce had received at the hands of the all-male workforce, which resented her employment in jobs traditionally held by men.²³³ The Court acknowledged that diversity served not only to guarantee that different voices were heard in the workplace; diversity also served as a watchdog to guard against those who would silence different voices.

The Court's reluctance to embrace a diversity justification wholeheartedly was severely criticized by Justice Stevens and by the academic community.²³⁴ In *Metro Broadcasting, Inc.*, the Court finally responded to the criticism, and "diversity" entered the constitutional lexicon as an acceptable synonym for remediation, at least where Congress is implementing authority.

In *Metro Broadcasting, Inc.*, diversity carried with it legal baggage not present in the earlier cases. In that case, the Court confronted two sets of race-conscious preferences against the backdrop of a well-established First Amendment jurisprudence allowing the FCC considerable freedom to promote diversity of viewpoint. Because of spectrum scarcity, the Court had long acknowledged the FCC's right to impose criteria in awarding broadcast licenses which would certainly offend the free speech clause of the First Amendment had the government applied them to the print media.²³⁵ Central to the

²³¹ *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 314 (1978). The link between Powell's opinion and republican civic virtue needs to be explored in greater detail. See Derrick Bell & Preeta Bansal, *The Republican Revival and Racial Politics*, 97 YALE L.J. 1609 (1988).

²³² 458 U.S. 718, 730 n.16 (1982).

²³³ 480 U.S. 616, 624 n.5 (1987).

²³⁴ See *Wygant*, 476 U.S. at 313-20 (Stevens, J., dissenting); Sullivan, *supra* note 82.

²³⁵ *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969); *National Broadcasting Co. v. United States*, 319 U.S. 190, 215 (1943). See also *FCC v. League of Women Voters of*

Court's jurisprudence was the right of the *public* to receive "a balanced presentation of information on issues of public importance that otherwise might not be addressed if control of the medium were left entirely in the hands of those who own and operate broadcasting stations."²³⁶

Extending the diversity rationale of *Bakke*, *Hogan*, *Johnson* and *Metro Broadcasting* to public contracting and even state and municipal employment is not an impossible task. Private and public sector employers and contracting officials have championed the diversity rationale for years.²³⁷ They have recognized that a racially mixed workforce offers a more balanced perspective on internal operating procedures and on customer and client needs. The "browning" of the United States labor force and the new challenge of a truly global marketplace more than constitutionally justify Congress's permitting the states to adopt race-conscious affirmative action plans.

The Court has endorsed diversity as a constitutional value with respect to other provisions as well. While these cases are obviously distinguishable, they offer additional support for the arguments advanced in this article, particularly because they address marketplace issues. Diversity in the marketplace is a core value in much of the Court's Commerce Clause jurisprudence. Since *Gibbons v. Ogden*,²³⁸ the Court has assiduously sought to promote the nation as one economic unit, scrupulously striking down efforts by the states to restrict access to goods and natural resources to their own residents.²³⁹ Despite the Court's devotion to the concept of a national common market unimpeded by state rivalries and jealousies, it has carved out the market participant exception to the Commerce Clause, that allows the states under certain circumstances to insulate their residents from the vicissitudes of the forces of supply and demand. The market participant exception to the Commerce Clause permits the states to enter into the hurly-burly of the capitalist system by activities as diverse as building cement plants and pur-

Cal., 468 U.S. 364, 377 (1984); *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 795 (1978); *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 122 (1973). See generally *TRIBE*, *supra* note 138, §§ 12-25, at 998-1010.

²³⁶ *Red Lion Broadcasting Co.*, 395 U.S. at 390.

²³⁷ See *supra* notes 56-68 and accompanying text.

²³⁸ 22 U.S. (9 Wheat.) 1 (1824).

²³⁹ *E.g.*, *Hughes v. Oklahoma*, 441 U.S. 322 (1979) (minnows); *Philadelphia v. New Jersey*, 437 U.S. 617 (1978) (landfill sites); *H.P. Hood & Sons, Inc. v. Dumond*, 336 U.S. 525 (1949) (milk); *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1 (1928) (shrimp). *Cf. Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) (cantaloupes).

chasing hulks of abandoned automobiles.²⁴⁰ The market participant exception allows the states to experiment with different economic models to stimulate growth. Direct intervention in the marketplace stands side by side with regulation and taxation as tools for economic development.

The Court's rationale in *Reeves, Inc. v. Stake*,²⁴¹ one of the leading market participant cases, argues for precisely the same degree of local control over expenditures as proposed in this article. The state is the "guardian and trustee for its people."²⁴² It "may fairly claim some measure of sovereign interest in retaining freedom to decide how, and with whom and for whose benefit to deal."²⁴³ What the Court so freely acknowledges in its market participant jurisprudence it should acknowledge as well in reviewing race-conscious preferences. The same "healthy regard for federalism," respect for "a state's ability to structure relations exclusively with its own citizens," and preference for "solving local problems and distributing government largesse"²⁴⁴ at immediate levels of government should support state efforts to insure racial diversity in employment and the marketplace.

Reeves, Inc. also addresses another argument made in this article, the value of Congressional policy making over judicial decision making. Acknowledging the "competing considerations . . . subtle, complex, politically charged, and difficult to assess," it concluded "the adjustments of interests in this context is a task better suited for Congress than this Court."²⁴⁵ No different rule should apply if Congress enacts a statute permitting the states to adopt race-conscious preferences in employment and public contracting.

Closely linked to the market participant exception is the Court's Article IV jurisprudence.²⁴⁶ In analyzing the restraints imposed on state regulation by the Privileges and Immunities Clause, the Court has not been unsympathetic to the efforts of the inner cities in their public works appropriations to foster the employment of, and skills

²⁴⁰ *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980) (state-owned and operated cement plant); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976) (state purchasing of crushed car frames).

²⁴¹ 447 U.S. 429 (1980).

²⁴² *Id.* at 438.

²⁴³ *Id.* at 438 n.10.

²⁴⁴ *Id.* at 441.

²⁴⁵ *Id.* at 439.

²⁴⁶ The Privileges and Immunities Clause of Article IV provides: "The citizens of each state shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. CONST. art. IV, § 2, cl. 1.

training for, their residents.²⁴⁷ Local and state officials have long recognized that building and repairing an infrastructure accomplishes very little unless accompanied by a significant investment in human capital. In permitting officials to insist that local residents be hired on public works projects, the Court has approved state-mandated diversity in construction-related employment. As is the case with its market participant jurisprudence, the Court, in analyzing the restraints of Article IV, genuflects before the altar of federalism. "Every inquiry under the Privileges and Immunities Clause 'must . . . be conducted with due regard for the principle that the States should have considerable leeway in analyzing local evils and in prescribing appropriate cures.' . . . This caution is particularly appropriate when a government body is merely setting conditions on the expenditure of funds it controls."²⁴⁸

Diversity is at the heart of First Amendment freedom of association cases in marketplace contexts. The Court has displayed acute sensitivity to state and local efforts to break down admission barriers that have kept women and minorities from full access to business opportunities. These barriers, frequently resting on stereotypical assumptions, have constantly deprived women and minorities of occasions to meet potential clients, customers, colleagues and investors in social settings. In unlocking the clubhouse doors, the Court has unmistakably given state and municipal officials a powerful tool to promote diversity in social settings which will in turn facilitate economic advancement. Organizations such as Rotary Clubs, the Jaycees and local business clubs can no longer protect themselves from claims of economic equality by hiding behind a First Amendment shield of freedom of association.²⁴⁹ The Court has boldly rejected their claims of constitutional protection, emphasizing the state's interest in ensuring diversity in the marketplace.

The commercial free speech cases of the First Amendment also betray a bias in favor of diversity in the marketplace. When the

²⁴⁷ *United Bldg. & Constr. Trades Council v. Mayor of Camden*, 465 U.S. 208 (1984). Where the Court has been unsympathetic, it has been because of a statute's too sweeping reach. *E.g.*, *Hicklin v. Orbeck*, 437 U.S. 518 (1978). The Court's concern for the reach of the legislation resembles its concern in affirmative action cases that the race-conscious preferences benefit members of those minority groups likely to have been targets of discrimination be tied to the percentage of qualified minority group members in the local labor pool, and not trammel the interests of "innocent" white males.

²⁴⁸ 465 U.S. at 222-23.

²⁴⁹ *E.g.*, *New York State Club Ass'n, Inc. v. City of N.Y.*, 487 U.S. 1 (1988); *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987); *Roberts v. United States Jaycees*, 468 U.S. 609 (1984).

Court strikes down state laws that restrict advertising by pharmacies or prohibit promoting one form of energy use over another, the ultimate result opens up the channels of communication for different voices (e.g., chain drugstores versus "mom and pop" drugstores; chain drugstores and "mom and pop" drugstores versus mailhouse drug distributors; gas utilities versus electric utilities; nuclear utilities versus gas and electric utilities; conservationists versus energy expansionists).²⁵⁰ The Court has always espoused the notion that "the best means . . . is to open the channels of communications, rather than to close them."²⁵¹ Thus, the Court has vigilantly applied the protection of the First Amendment to advertisements by lawyers, encouraging diversity in describing services and charging for them.²⁵² It has been singularly unreceptive to the invocation of dignity as an anti-diversity concept to block exchanges of commercial communication between lawyers and their potential clients.²⁵³

Assuring diversity of voices and limiting government attempts to silence particular voices are important themes in First Amendment cases involving campaign financing as well. The Court has not hesitated to strike down national, state and local legislation if it curtailed speakers' ability to make their views known on matters of political controversy.²⁵⁴ It has refused to allow the states to frustrate the voices of advocacy groups under the guise of protecting the public from fraudulent solicitations for charitable organizations.²⁵⁵ Finally, it has protected diversity of views by denying government attempts to prohibit the expression of, or force delivery of, views inconsistent with the speaker's perspectives.²⁵⁶

V. A PROPOSAL FOR CONGRESSIONAL ACTION

Critics of affirmative action have often argued that programs designed to compensate for "disadvantage" will achieve the same

²⁵⁰ *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980) (utility promotion of electrical energy); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976) (advertising of prescription drug prices).

²⁵¹ *Central Hudson Gas & Elec. Corp.*, 447 U.S. at 562; *Virginia State Bd. of Pharmacy*, 425 U.S. at 770.

²⁵² *In re R.M.J.*, 455 U.S. 191 (1982); *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977).

²⁵³ *Zauder v. Office of Disciplinary Counsel*, 471 U.S. 626, 647-48 (1985).

²⁵⁴ *FEC v. National Conservative Political Action Comm.*, 470 U.S. 480 (1985); *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290 (1981); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 75 (1978); *Buckley v. Valeo*, 424 U.S. 1 (1976).

²⁵⁵ *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620 (1980).

²⁵⁶ *Pacific Gas & Elec. Co. v. Public Util. Comm'n*, 475 U.S. 1 (1986); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980); *Consolidated Edison Co. of N.Y., Inc. v. Public Serv. Comm'n*, 447 U.S. 530 (1980).

results without government endorsement of allocations along racial lines. Justice Scalia is a proponent of such a solution.

I do not, on the other hand, oppose—indeed, I strongly favor—what might be called . . . 'affirmative action programs' of many types of help for the poor and disadvantaged. It may well be that many, or even most, of those benefitted . . . would be members of minority races. . . . I would not care if all of them were.²⁵⁷

Justice Scalia's solution is attractive for two reasons. First, it sends a clear message that race is irrelevant in the marketplace. Second, it takes the public sector out of the "race business." No weary hours must be spent in determining whether a construction company whose owner's great-great-grandmother was one-quarter Native American and one-quarter Guatemalan qualifies as a minority business enterprise, or whether a preference benefiting "Hispanics" includes descents of Portuguese immigrants who lived in Brazil for only three years before immigrating to the United States.²⁵⁸ Of course, other weary hours may have to be spent determining whether the "disadvantaged" companies claiming the preferences truly fit the criteria (whatever they may be) and are not "fronts." Proving disadvantage can be complicated.²⁵⁹

Justice Scalia's solution, however, smacks of the ostrich-in-the-sand syndrome of constitutional interpretation. It requires the

²⁵⁷ Scalia, *supra* note 47, at 156. He reiterated this view in *City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469, 528 (1989) (Scalia, J., concurring in the judgment). In this regard Justice Scalia may be the intellectual heir of Justice Douglas. In dissenting from the majority's dismissal on mootness grounds of the very first affirmative action plan to reach the Court, Justice Douglas argued against exclusive racial preferences. He favored "evaluating an applicant's prior achievements in light of the barriers that he had to overcome." *DeFunis v. Odegaard*, 416 U.S. 312, 331 (1974) (Douglas, J., dissenting).

The concept of race-neutral affirmative action programs conditioned on economic deprivation has gained political support in recent years. See Steven A. Holmes, *Mulling the Idea of Affirmative Action for Poor Whites*, N.Y. TIMES, Aug. 18, 1991, § E, at 3; Don Wycliff, *Blacks Debate the Costs of Affirmative Action*, N.Y. TIMES, June 10, 1990, § 4, at 3. See also Richard Delgado, *Commentary: Zero-Based Racial Politics: An Evaluation of Three Best-Case Arguments on Behalf of the Nonwhite Underclass*, 78 GEO. L.J. 1929 (1990).

The Surface Transportation and Uniform Relocation Assistance Act of 1987 combines an "economically and socially disadvantaged" model with a race-conscious model by creating a rebuttable presumption that members of certain designated minorities are socially and economically disadvantaged. See *supra* notes 157-62 and accompanying text. It is highly doubtful that Justice Scalia would find the statute's racially determined rebuttable presumption consistent with the mandates of the equal protection component of the Due Process Clause of the Fifth Amendment.

²⁵⁸ Cf. *Fullilove v. Klutznick*, 448 U.S. 448, 534 n.5 (1980) (Stevens, J., dissenting).

²⁵⁹ See *supra* note 159.

courts to ignore a legislature's or agency's overriding motivation to benefit minorities or women at the expense of whites and males and the masking of that intent in the language of "disadvantage."²⁶⁰ While the norms enunciated in *Washington v. Davis*²⁶¹ and *Personnel Administrator of Massachusetts v. Feeney*²⁶² may protect such a statute against constitutional challenge,²⁶³ the Supreme Court should not encourage government deception. Certainly, the Court does not look favorably on facially neutral legislation enacted to disadvantage minorities.²⁶⁴ Interestingly, the Association of General Contractors, which has challenged many MBE programs, also disapproves programs designed to aid small businesses irrespective of their owner's race or gender.²⁶⁵

This article will not argue for the moral imperative of affirmative action. That brief has been well and eloquently argued by others.²⁶⁶ In the words of Justice Marshall:

The position of the Negro today in America is the tragic but inevitable consequence of centuries of unequal treatment. Measured by any benchmark of comfort or achievement, meaningful equality remains a distant dream for the Negro.

A Negro child today has a life expectancy which is shorter by more than five years than that of a white child.

²⁶⁰ For example, one commentator has noted, "[f]lexible procurement goals that put forth goals for assisting disadvantaged businesses, of course, can be effective minority business set-aside programs *only* if they are administered by procurement officials that truly want to assist minority-owned firms." BATES, *supra* note 196, at 101 (emphasis in the original).

²⁶¹ 426 U.S. 229 (1976).

²⁶² 442 U.S. 256 (1979).

²⁶³ In *Washington v. Davis*, the Court held that a facially neutral statute that had a disparate impact on minority group members did not violate the equal protection component of the Fifth Amendment's Due Process Clause in the absence of purposeful intent on the part of the legislature to disadvantage them. 426 U.S. at 246-47. In *Feeney*, the Court made a constitutional challenge to a facially neutral statute even more difficult by adopting a "'because of,' not merely 'in spite of'" standard. 442 U.S. at 279.

²⁶⁴ *Hunter v. Underwood*, 471 U.S. 222 (1985). For Justice Scalia, the intent question, at least as it relates to legislation, is simply not an issue at all. Justice Scalia has long argued that legislative intent is essentially unknowable and its manifestation in committee reports and speeches unreliable due to ease of political manipulation. *E.g.*, *Blanchard v. Bergeron*, 489 U.S. 87, 98-99 (1989). (Scalia, J., concurring in part and concurring in the judgment). *See also* *H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 251-56 (1989) (Scalia, J., concurring in the judgment).

²⁶⁵ Michael deCourcy Hinds, *Minority Business Set Back Sharply by Court's Rulings*, N.Y. TIMES, Dec. 23, 1991, at A15.

²⁶⁶ *E.g.*, Roy L. Brooks, *The Affirmative Action Issue: Law, Policy, and Morality*, 22 CONN. L. REV. 323, 351-72 (1990). Sullivan, *supra* note 82. *See also* Joel J. Kupperman, *Relations Between the Sexes: Timely vs. Timeless Principles*, 25 SAN DIEGO L. REV. 1027 (1988).

The Negro child's mother is over three times more likely to die of complications in childbirth, and the infant mortality rate for Negroes is nearly twice that for whites. The median income of the Negro family is only 60% that of the median of a white family, and the percentage of Negroes who live in families with incomes below the poverty line is nearly four times greater than that of whites.

When the Negro child reaches working age, he finds that America offers him significantly less than it offers his white counterpart. For Negro adults, the unemployment rate is twice that of whites, and the unemployment rate for Negro teenagers is nearly three times that of white teenagers. A Negro male who completes four years of college can expect a median annual income of merely \$110 more than a white male who has only a high school diploma. Although Negroes represent 11.5% of the population, they are only 1.2% of the lawyers and judges, 2% of the physicians, 2.3% of the dentists, 1.1% of the engineers and 2.6% of the college and university professors.

The relationship between those figures and the history of unequal treatment afforded to the Negro cannot be denied. At every point from birth to death the impact of the past is reflected in the still disfavored position of the Negro.

In light of the sorry history of discrimination and its devastating impact on the lives of Negroes, bringing the Negro into the mainstream of American life should be a state interest of the highest order. To fail to do so is to ensure that America will forever remain a divided society.²⁶⁷

Regrettably very little has changed in the economic status of African-Americans since Justice Marshall's remarks in 1978.²⁶⁸ In this author's view, Congress need not rely on Justice Marshall's moral imperatives, although it is certainly free to do so: witness the Reparations Act for the Japanese wrongfully interned by the United States in World War II.²⁶⁹

A. *The Important Governmental Purpose*

To satisfy the Court's demand for an "important governmental purpose" as articulated in *Metro Broadcasting*, Congress should cite

²⁶⁷ *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 395-96 (1978) (Marshall, J., concurring) (footnotes omitted).

²⁶⁸ See *supra* notes 178-207 and accompanying text.

²⁶⁹ 50 U.S.C. app. §§ 1989-1989c-8 (1988).

the shifting workplace demographics, the poor quality of educational opportunity often found in minority schools and the need for workplace diversity. Race-conscious preferences subject to the kinds of limitations discussed below are a powerful and effective way of integrating minorities into the economic mainstream. That their integration is necessary can hardly be debated. Minority group members and women are the workforce of the twenty-first century. The aging of the white-male workforce, the continued entry of women into the marketplace and the high birthrate of minority groups all point to an irreversible trend. The "browning" of the American labor market is inevitable. Steps must be taken, however, to insure that minority group members are not concentrated in entry- and low-level supervisory positions. The "browning" of the labor force contains within itself the seeds of an apartheid economy.

The absence of persons of color from positions of power and influence hinders the ability of the United States to compete in world markets. To survive in a global economy, the American workforce must be global in color. For American companies to sell their products and services in an integrated world economy, the American workforce must be integrated. Government must point the way.

Permitting the states to use race as a plus in making employment and contracting decisions serves the psychic and social needs of the nation. By helping to place men and women of color in civil service positions, especially upper and middle management, it furthers the notion of a representative bureaucracy.²⁷⁰ It ensures that the economic and class mobility these jobs provided in the past to ethnic groups excluded by discrimination from private sector jobs remains available to members of racial groups. On a day-to-day basis, it bears witness to the non-minority community of minorities' competence and work ethic. It stands as a rebuke to private sector employers who fear giving minority managers the latitude and discretion they readily cede to non-minorities. Similar benefits flow from MBE programs. In addition, such programs almost always increase the availability of jobs in minority communities. They bring home the values of free enterprise and capitalism in ways a thousand times more powerful than any government program or civics course.²⁷¹

A national policy approving race-conscious plans under pre-determined conditions would also serve to alleviate concerns about

²⁷⁰ See *supra* notes 171-74 and accompanying text.

²⁷¹ See Robert L. Boyd, *Black and Asian Self-Employment in Large Metropolitan Areas: A Comparative Analysis*, 37 Soc. PROBS. 258, 269 (1990).

the alleged social stigma attached to receipt of such preferences. From *Bakke* to the present, the Court has asserted that race-based classifications must not stigmatize their beneficiaries, branding them incapable of competing on their own merits.²⁷² The standard reply to the stigma charge invoked compensatory justifications based on historical and contemporary discrimination. Some prominent minority scholars have recently revived the charge, however, and tendered their support.²⁷³ Congressional legislation would lessen that charge's sting by acknowledging the impact of unconscious racism and prejudice.

Fullilove and *Metro Broadcasting* confirmed the sweeping powers vested in Congress by Section 5 of the Fourteenth Amendment.²⁷⁴ The various opinions of the "majority" Justices in *Fullilove* carefully noted the data available to, and actually used by, Congress in enacting the MBE set-aside.²⁷⁵ In *Metro Broadcasting*, the majority opinion placed great weight on the information available to Congress and the FCC demonstrating the connection between minority ownership and "diversity" programming.²⁷⁶ Unless the Court were to do a complete about-face in an openly political decision, the principled application of precedent would compel it to defer to a Congressional determination that the benefits of race-conscious preferences constitute an "important interest" sufficient to satisfy the first prong of the intermediate test.

B. Substantially Related Means

At the heart of affirmative action lies the Gordian knot of fairness: how to ensure equality of opportunity in employment and public contracting without depriving non-minorities of jobs, promotions and contracts that the market might otherwise award them. Attempts to unfasten the knot without fraying its laces have occupied too much judicial, legislative and administrative time. Neither

²⁷² E.g., *City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469, 493-94 (1989); *Bakke*, 438 U.S. at 298 (Powell, J., concurring).

²⁷³ STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY (1991); Steele, *supra* note 227. See also Don Wycliff, *Blacks Debate the Cost of Affirmative Action*, N.Y. TIMES, June 10, 1990, § 4, at 3. But see Hosea L. Martin, *A Few Kind Words for Affirmative Action*, WALL ST. J., Apr. 25, 1991, at A15.

²⁷⁴ See *supra* notes 126-62 and accompanying text.

²⁷⁵ *Fullilove v. Klutznick*, 448 U.S. 448, 463-67 (1980); *id.* at 504-05 (Powell, J., concurring).

²⁷⁶ *Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997, 3011-25 (1990).

political theory nor moral discourse has proved capable of supplying the dexterity needed.

Rather than despair, Congress should codify the principles the Court has laid down in cases approving the implementation of race-conscious preferences. Its jurisprudence of affirmative action strives for fairness and hews a standard for rough justice. "Innocence," "trammeling" and "self-destruction" function as measures of statutory and constitutional fairness. By adopting the Court's measures, Congress could easily satisfy *Metro Broadcasting's* demand for a substantial relationship between the proposed legislation's end and means.

The contours of such a statute are not hard to imagine. To protect "innocent" non-minorities,²⁷⁷ Congress should outlaw two frequently criticized (but rarely occurring) devices: race-conscious layoffs and quotas.²⁷⁸ The Court has clearly signalled its deep-seated hostility to race-conscious layoffs in the absence of clear proof of prior discrimination.²⁷⁹ Prudence as well as fairness dictate that Congress eliminate manipulation of layoff rules from a list of acceptable race-conscious devices available to public sector employers. Because quotas suggest rigidity and resemble a command to fill slots regardless of the applicant's qualifications, the Court views them as *per se* invalid. Quotas, moreover, seem particularly harmful to innocence by denying individual review and consideration. Congress therefore should outlaw them.

Outlawing quotas and layoffs may protect innocent non-minorities but it is not sufficient to prevent the trammeling of their interests. Congress must also address the use of goals and timetables. As noted earlier, critics, including Justice Scalia, have argued that, at their worst, goals and timetables result in the hiring "by the numbers" of unqualified candidates and, at their best, result in the hiring of minimally qualified candidates.²⁸⁰ A ban on goals and timetables makes no practical sense, however. They are valuable

²⁷⁷ In pressing this suggestion, I do not disavow the powerful argument that non-minorities are never really "innocent" because they have benefited from the systematic suppression of minorities. *E.g.*, Ross, *supra* note 82; Sullivan, *supra* note 82. The suggestion is a pragmatic concession to political reality.

²⁷⁸ Congress used precisely this technique in the Civil Rights Act of 1992, section 106 of which prohibits race norming of employment-related tests. *See supra* note 46. Section 106 does not, however, require employers to hire on a test performance scale. It leaves enormous discretion with employers to decide how much weight to give test results.

²⁷⁹ *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 282-83 (1986) (Powell, J.); *id.* at 294-95 (White, J., concurring in the judgment).

²⁸⁰ *See supra* note 47.

tools of measurement and accountability.²⁸¹ They provide concrete benchmarks with which to counteract the intangible "built-in headwinds" Griggs decried. Goals and timetables measure the fairness of selection processes. They can also prod an otherwise reluctant bureaucracy in which resistance to change is institutionalized.²⁸² They enable upper-level corporate employees to formulate concrete objectives for middle-management implementation. As Professor Davidson has observed:

All institutions have plans for finances or employment that utilize numbers and timetables. If such procedures make sense to measure cash flow and production goals in our business and educational institutions, then why would they not be considered appropriate to measure the inclusion of underrepresented minorities and women in the workplace?²⁸³

Justice Scalia's charge, moreover, merits rebuttal. No company in the face of a recessionary economy and unprecedented competition from foreign industries and no state bureaucracy in the face of declining budgetary resources can sacrifice productivity for the benefit of distribution of employment opportunities along racial lines. While this kind of abuse undoubtedly existed in some instances, when industry and government personnel offices were first experimenting with goals and timetables, such abuses are most unlikely after nearly twenty-five years of experience and implementation. Using goals and timetables as measurements of accountability does not drive the marketplace into hiring by the numbers. It drives the marketplace to more efficient recruiting of qualified minorities, to more effective in-house career development programs and to closer attention to the talents of minority employees and applicants.²⁸⁴

In *Metro Broadcasting*, the Court warned against race-conscious preferences not tightly moored to the qualified minority population of the implementing jurisdiction. While sound policy dictates that Congress should not enact detailed, encumbered legislation, Con-

²⁸¹ See generally HAMMERMAN, *supra* note 62, at 14-15; David H. Rosenbloom, *What Have Policy Studies Told Us About Affirmative Action and Where Can We Go from Here?*, 4 POL'Y STUD. REV. 43 (1984).

²⁸² Herbert Hammerman, *Affirmative Action Stalemate: A Second Perspective*, 93 PUB. INTEREST 130, 133 (1988).

²⁸³ Mary Davidson, *Reflections on Affirmative Action—1987*, 15 J. INTERGROUP REL. 22, 24-25 (1987-88).

²⁸⁴ *Id.* at 2-4, 14-15.

gress certainly should heed the Court's warning by providing guidance for state and municipal determinations of factual predicates. It should instruct state officials to consider the eight factors identified by the Office of Federal Contract Compliance (OFCCP) for conducting an underutilization analysis of a federal contractor's workforce.²⁸⁵

Consideration of these factors meets another trammeling objection as well. In *City of Richmond*, the Court faulted the MBE program for allowing "Eskimos, Aleuts, and Native-Americans" to claim preferred status.²⁸⁶ The Court reasoned that if Richmond had discriminated at all, it had discriminated against members of its principal minority population, i.e., African-Americans. That conclusion strikes both an intuitive and rational chord. One reason why race-conscious plans have provoked the ire of so many non-minorities is the inclusion of beneficiaries whose designation has no historical justification. It is one thing to acknowledge the discrimination suffered by African-Americans over the years at the hands of the public and private sector in Richmond. After all, it is historically indisputable that Richmond was the former capital of the Confederacy and a staunch opponent of *Brown* and the Voting Rights Act. It is quite another thing to suggest that Eskimos, Aleuts, Native Americans—and perhaps even Latinos—have suffered the same egregious treatment. By the same token, race-conscious preferences for Asian-Americans—but not for African-Americans—may make sense in the state of Washington.²⁸⁷ By structuring race-conscious preferences around the actual minority presence in the local labor

²⁸⁵ Those eight factors are:

1. the minority population of the labor area surrounding the facility;
2. the size of the minority unemployment force in the labor area surrounding the facility;
3. the percentage of the minority workforce as compared with the total workforce in the immediate labor area;
4. the general availability of minorities having the requisite skills in the immediate labor area;
5. the availability of minorities having the requisite skills in an area in which the contractor can reasonably recruit;
6. the availability of promotable and transferable minorities within the contractor's organization;
7. the existence of training institutions capable of training persons in the requisite skills; and
8. the degree of training which the contractor is reasonably able to undertake as a means of making all job classes available to minorities.

Revised Order No. 4, 41 C.F.R. § 60-2.11(b)(1) (1990).

²⁸⁶ 488 U.S. 469, 506 (1989).

²⁸⁷ See *Defunis v. Ogedaard*, 416 U.S. 312, 338-40 (1974) (Douglas, J., dissenting).

and entrepreneurial market, Congress not only satisfies constitutional imperatives, but it also diminishes public perceptions of unfairness. History, geography and common sense combine to sap accusations of trammeling of their vitality.

Statutory adoption of guidelines like the OFCCP's will require public sector employers and contracting officials to undertake sophisticated measurements of local labor and entrepreneurial resources. To measure availability, employers and contracting officials must survey both the existing and potential pool in terms of numbers and percentages of qualified candidates and entrepreneurs.²⁸⁸ This survey extends far beyond a passing familiarity with census tables and statistical abstracts. It requires officials first to inventory job and task content and then to match that inventory against data showing the number and percentage of minorities who possess the skills identified.²⁸⁹ Admittedly, this is not an easy task. But crafting race-conscious preference plans should not be easy. Their political acceptability rests on their being carefully constructed in terms of reach as well as beneficiaries.

Notions of fairness, however, dictate upward adjustments from the status quo in some instances. Congress should make one adjustment to the OFCCP factors. Reliance on the present racial stratification of the local labor and entrepreneurial pools rewards years of disparate treatment, disparate impact and identified discrimination.²⁹⁰ In considering the legislation proposed in this article, Congress should invite expert testimony on mechanisms that would allow for adjusting goals and timetables to compensate for past exclusion without forcing hiring or promotion of unqualified or minimally qualified candidates, or contracting with unqualified or minimally qualified MBEs.²⁹¹

²⁸⁸ WALTER B. CONNOLLY, JR. & MICHAEL J. CONNOLLY, *A PRACTICAL GUIDE TO EQUAL EMPLOYMENT OPPORTUNITY* 508 (rev. ed. 1979).

²⁸⁹ One of the fatal flaws in the City of Richmond's plan was its selection of a 30% set-aside. While that figure was roughly between the percentage of minority group members in the general population and the percentage of local minority contractors, the Court found that figure too imprecise. School boards too have ignored this requirement, resulting in the Supreme Court's invalidating plans whose goals corresponded to the percentage of minority group students in the school district and not the percentage of qualified minority teachers in the appropriate labor area. *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299 (1977). See also *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274-76 (1986).

²⁹⁰ For an explanation of these terms, see *supra* notes 24-26 and accompanying text; Daly, *supra* note 34, at 1111 n.267.

²⁹¹ Proponents of race-conscious preferences must accept, however, that adjustment may not be feasible. Authentic sociological and statistical objections may interpose themselves. Political realities may present insurmountable barriers.

Finally, Congress must insist upon the self-destruction of programs containing race-conscious preferences. Haunting the Court's jurisprudence is the specter of entrenched distribution of social goods along racial lines. To dispel this possibility, the Court has insisted that race-conscious preferences are tolerable only to achieve racial parity and not to maintain it. Thus, it has examined affirmative action plans to insure a projected termination date or event. If the implementing official has taken care in setting the plan's percentage goals, the official should have little difficulty in fixing a termination date or event.

The concept of self-destruction is hard to apply to MBE programs. Most programs last only a few years or sometimes only one. They terminate by expenditure of appropriated funds, not by achievement of a percentage goal in a job category. MBE programs are also different from race-conscious plans in employment because one critical goal of MBE programs is to assist minority businesses in moving from servicing the public sector to servicing the private sector. Critics have charged that too often MBEs remain government contractors and never move into the private sector as originally intended. In contrast, public sector race-conscious employment plans are never adopted with the goal of encouraging their beneficiaries to abandon public sector employment. In light of these differences, Congress should encourage the states to adopt additional measures designed to integrate MBEs into the private sector construction industry. Rewarding majority construction companies for using minority subcontractors on private sector jobs would easily advance this goal. Congress should specifically permit the states, if they so wish, to add to their calculus of most responsible bidder a formula for crediting non-minority firms for doing business with MBEs on private sector jobs.

By insisting upon criteria for plans' self-destruction, Congress would be sending a very important message to society at large, not merely to the individuals and institutions affected by the new legislation. The message needs little elaboration: "[I]t is both too late and too soon to be color-blind."²⁹² The inclusion of a specific terminating event or criteria is a powerful symbol of the legislation's remedial purpose. The legislation does not represent a permanent parceling out of benefits. It is a temporary measure. It reminds society that race-conscious preferences are not "endless in their

²⁹² NAT HENTOFF, *THE NEW EQUALITY* 114 (1964).

reach into the future."²⁹³ They are a tool of limited temporal existence. Society is color-conscious today in order to be color-blind in the future.²⁹⁴

Even more important than any particular substantive provision suggested in this article is the national consensus that Congress must forge ahead to create a policy of economic inclusion. All members of society suffer burdens peculiar to their economic or social status to enable the state to operate for the good of the entire body politic. In time of war, for example, the draft targets young healthy men. The old and infirm escape this military obligation. The explanation for the distinction is utilitarian. The young and healthy make better soldiers. The criteria neither stigmatizes the draftees nor those excluded. If the draft does not constitute an impermissible burden, neither should race-conscious preferences.²⁹⁵

CONCLUSION

Both the Court and the Bush Administration have castigated affirmative action programs as leading to, in Justice O'Connor's words, "a politics of racial hostility."²⁹⁶ President Bush described them as the "pit[ting] of one [racial] group against another."²⁹⁷ To the extent a politics of racial hostility exists, it is because politicians have exploited affirmative action for their own purposes.²⁹⁸ Rather than create a national consensus on the need to foster the economic integration of minorities, one part of which would involve the limited use of race-conscious preferences, politicians have used affirmative action as a tool of divisiveness. If they stopped fueling the

²⁹³ See *City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469, 497—98 (1989); *Wygant*, 476 U.S. at 275—76.

²⁹⁴ LIVINGSTON, *supra* note 107, at 99. Race-conscious preferences resemble a vaccine. In order to avoid the serious illness of racism, with its fatal political, social and economic consequences, the body politic voluntarily submits itself to a controlled dose of racism.

²⁹⁵ I am indebted to Professor Fullinwider for the draft analogy. FULLINWIDER, *supra* note 40, at 247.

²⁹⁶ *City of Richmond*, 488 U.S. at 493.

²⁹⁷ Adam Clymer, *Bush Assails 'Quota Bill' at West Point Graduation*, N.Y. TIMES, June 2, 1991, at L32.

²⁹⁸ The "politics of racial hostility" was sharply demonstrated in the debate over the Civil Rights Bill of 1990. See S. REP. NO. 2104, 101st Cong., 2d Sess. (1990); H.R. REP. NO. 4000, 101st Cong., 2d Sess. (1990). The President vetoed the bill, insisting its language would encourage employers to adopt race/gender quotas to avoid the expense of discrimination lawsuits. Steven A. Holmes, *President Vetoes Bill On Jobs Rights; Showdown Is Set*, N.Y. TIMES, Oct. 23, 1990, at A1. Efforts to achieve a politically acceptable compromise to accommodate the President's concerns took months.

fire with denunciations, the issue itself would lose much of its contentiousness.

While the "politics of racial hostility" has a nice rhetorical ring to it, upon analysis the threat is hollow. Racial hostility is what occurred after *Brown v. Board of Education*. The violence and physical unrest that marked the South's resistance to integration are politics of racial hostility.²⁹⁹ George Wallace's campaigning on a platform calling for an end to the life tenure of Supreme Court Justices is politics of racial hostility. The "impeach Earl Warren" platform of the John Birch Society is politics of racial hostility.

There has been no large-scale outcry against MBE set-asides. Indeed, the primary opposition comes from contractor associations who are interested more in preserving the status quo than in politics, racial or otherwise. Empirical data collected before *City of Richmond* suggested that 75 percent of implementing authorities encounter no opposition and the remainder "some" difficulty. Only approximately 10 percent had their program challenged in judicial proceedings.³⁰⁰ The same is true of race-conscious preferences in public employment.

In enacting legislation permitting the states to adopt race-conscious preferences, Congress must point to the social and economic enhancement flowing from its decision. The economic benefits are not hard to describe. Employment opportunities that improve the economic mobility of minority group members will obviously rebound to the benefit of the minority community. As increasing numbers of minorities hold more responsible and better-paying jobs, the minority community gains greater average income and stronger ties to the marketplace. Economic success generates "immediate" role models in the community. They are immediate in the sense that they can be seen, talked with, and solicited for advice—unlike distant role models such as major league sports figures and entertainers. These immediate role models are daily witnesses to the rewards flowing from education, employment and entrepreneurship. They celebrate the value of steady toil as a union member, a civil servant, a private contractor.

²⁹⁹ *E.g.*, *Cooper v. Aaron*, 358 U.S. 1 (1958) ("extreme public hostility" manifested by the Governor of Arkansas calling out the National Guard to prevent integration of a local high school); *Griffin v. County Sch. Bd.*, 377 U.S. 218 (1964) (school board closed public schools and funded segregated private schools for white children).

³⁰⁰ Leslie A. Nay & James E. Jones, Jr., *Equal Employment and Affirmative Action in Local Governments: A Profile*, 8 L. & INEQ. J. 103, 120-21 (1989).

Failing to take into account the changing racial composition of the United States labor force has serious and immediate consequences to the individual job holder or entrepreneur, to the employing enterprise or marketplace and to the nation as a whole. From the perspective of the minority job holder or the entrepreneur, the work and market places are stagnant, holding no promise of growth. Little reason exists to work hard and efficiently if the reward system does not function because of unconscious racism and bias. From the perspective of the employer or the marketplace, poor morale takes a heavy toll, damaging human as well as physical capital. From the perspective of the nation, the Department of Labor has well summed up the damage. Exclusion

hinders not only individuals, but society as a whole. It effectively cuts our pool of potential corporate leaders by eliminating over one-half of our population. It deprives our economy of new leaders, new sources of creativity—the 'would be' pioneers of the business world. If our end game is to compete successfully in today's global market, then we have to unleash the full potential of the American workforce.³⁰¹

In exercising its factfinding powers Congress must make it clear that the benefits of affirmative action extend beyond the minority community. As minorities in increasing numbers occupy higher-level positions in public employment and obtain a fairer share of public sector contracting, racism will be sapped of some of its strength. As increasing numbers of minority groups enter the middle class, the stereotype of minority (and the less than subtle charges of shiftlessness, welfare dependency, etc.) will diminish. The more minorities are seen in positions of economic regularity, the more tolerant majority group members will become, and the more private sector careers will become accessible.

Congress must recognize that the equal access construct has lost its potency as an antidiscrimination remedy. New strategies to ensure the economic inclusion of minorities are desperately needed as the nation approaches the twenty-first century. A racially just society requires equality of opportunity. Only Congress can give back to the states what the Supreme Court has taken away. Now is the time to rebuild the City of Richmond.

³⁰¹ GLASS CEILING, *supra* note 13, at 2.

APPENDIX

<i>Case</i>	<i>Equal Access</i>	<i>Equal Achievement</i>	<i>Comment</i>
Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (Equal Protection Clause claim brought by a rejected white applicant challenging a special admissions program to a state medical school that reserved 16 out of a 100 seats exclusively for minority applicants).	x	x	The striking down of the exclusive reservation of 16 seats for minorities is an endorsement of the equal access construct; the approval of race as a "plus" is an endorsement of the equal achievement construct.
United Steelworkers of Am. v. Weber, 443 U.S. 193 (1979) (Title VII claim brought by a white employee challenging the implementation by a private sector employer of a training program, admission to which was determined by the applicant's race).		x	The Court's approval of the setting aside of trainee slots based on race is an endorsement of the equal achievement construct. Supporting this characterization is the Court's refusal to condition the selection of the black trainees on proof of actual victimization by the employer and its choice of a sweeping statistical baseline to measure the racial composition of the employer's workforce.
Fullilove v. Klutznick, 448 U.S. 448 (1980) (Equal Protection Clause claim brought by white contractors challenging a provision of the Public Works Employment Act of 1977 that set aside 10% of the funds appropriated pursuant to the statute for minority business enterprises).		x	The Court's approval of the 10% MBE set-aside is an endorsement of the equal achievement construct. Supporting this characterization are: the Court's quick, unquestioning approval of Congress's selection of the 10% figure; its relaxed, almost nonexistent, requirement of government responsibility for the low participation of minority business enterprises in public contracting; and its casual discussion of whether the participating minority business enterprises had to be actual victims of discrimination by the government.

APPENDIX

<i>Case</i>	<i>Equal Access</i>	<i>Equal Achievement</i>	<i>Comment</i>
Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984) (Title VII claim brought by a union objecting to a district court order modifying a consent judgment to prevent the layoff of recently hired minority firefighters).	x		By restricting the district court's authority to modify a consent judgment to protect newly hired minority firefighters, the Court gave greater weight to the equal access construct (i.e., minority and non-minority firefighters were being treated in the same fashion). It refused to allow the district to give minorities "catch-up" points that would have had the effect of recognizing how long the city had excluded them from access these jobs. Its refusal constituted a rejection of the equal achievement construct. Furthermore, the Court's opinion contained dicta suggesting that Title VII relief was limited to actual victims of discrimination. This dicta clearly manifested an endorsement of the equal access construct. Note, however, that a majority of the Justices disavowed the <i>Stotts</i> dicta in <i>Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC</i>, 478 U.S. at 471-75 (1986) (four-Justice plurality opinion); <i>id.</i> at 484 (Powell, J., concurring); <i>id.</i> at 499 (White, J., dissenting).
Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) (Equal Protection Clause claim brought by non-minority school teachers challenging a modified layoff procedure that retained minority teachers with less seniority at the expense of non-minority teachers with greater seniority).	x		The Court's disapproval of a layoff provision designed to retain newly hired minority teachers reflects an endorsement of the equal access construct. Supporting this characterization are: the opinion's rejection of remediation of societal discrimination and the role-model justification for race/gender-conscious preferences; and its refusal to remand the case for factual clarification in light of the unseemly state of the record.

APPENDIX

<i>Case</i>	<i>Equal Access</i>	<i>Equal Achievement</i>	<i>Comment</i>
Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421 (1986) (Title VII claim brought by non-minority union members to set aside a judicially mandated 29% membership goal that the district court imposed following a finding of egregious discrimination).	x	x	The Court's opinion displayed a decided preference for the equal achievement construct (1) by permitting the district court to order preferential relief for individuals who were not specifically the object of the union's discriminatory practices; and (2) by refusing to consider the union's claim that the district court's selection of a 29% minority membership goal far exceeded the percentage of minorities in the relevant labor force. Tempering this preference is the Court's emphasis on the egregious character of the defendant's refusal to observe the strictures of Title VII and its contumacy in face of repeated court orders to cease its discriminatory practices. The Court appears to be endorsing the equal achievement construct as a last resort, when all else to achieve equal access.
Local Number 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501 (1986) (Title VII claim brought by non-minority firefighters challenging a consent judgment, signed by the city and a black firefighters association, that called for promotion quotas).		x	In holding that section 706(g) did not apply to consent judgments, the Court endorsed the equal achievement construct by allowing employers to use race-conscious preferences without fear of challenge under that provision. In addition, it used <i>City of Cleveland</i> as a vehicle for retreating from the sweeping equal access language it used in <i>Stotts</i> .
United States v. Paradise, 480 U.S. 149 (1987) (Equal Protection Clause Claim brought by non-minority state troopers to upset a judicially mandated 50/50 promotion plan that the district court imposed following a finding of egregious discrimination).	x	x	The Court's approval of a race-conscious, one-for-one promotion quota reflects the equal achievement construct. At the same time, its repeated insistence on the outrageous character of defendant's behavior and the qualifications of the minority troopers benefited by the quota reflect values consistent with the equal access construct.

APPENDIX

<i>Case</i>	<i>Equal Access</i>	<i>Equal Achievement</i>	<i>Comment</i>
Johnson v. Transportation Agency, Santa Clara County, Cal., 480 U.S. 616 (1987) (Title VII claim brought by a male whose supervisor denied him a promotion, selecting an arguably less qualified woman).		x	The Court's approval of an immutable characteristic (sex) as a "plus" is an endorsement of the equal achievement construct, as is the Court's selection of general population statistics to measure the discriminatory impact the employer's personnel decisions.
City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (Equal Protection Clause claim brought by white contractors challenging a municipal ordinance setting aside 30% of certain public works appropriations for minority business enterprises).	x		The Court's championing of the strict scrutiny standard of review for state-sponsored race-conscious plans effectively bars their adoption. It amounts to a complete triumph for the equal access construct.
Metro Broadcasting, Inc. v. FCC, 110 S. Ct. 2997 (1990) (Equal Protection challenge to two FCC policies using race-conscious features in awarding licenses for radio and television stations).		x	By adopting the intermediate standard of review, liberally reviewing evidence of Congress's approval of the challenged FCC policies, and broadly interpreting Congress's power to eradicate societal discrimination, the Court embraced the equal achievement construct.