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JUDICIAL VERSUS LEGISLATIVE CHARTING OF NATIONAL ECONOMIC POLICY: PLOTING A DEMOCRATIC COURSE FOR MINORITY ENTREPRENEURS

*Stephen A. Plass**

I. INTRODUCTION

Historically, minority participation in entrepreneurial activities in the United States has, for the most part, been negligible or non-existent.¹ In theory, the emancipation of American blacks from slavery² should have resulted in increased opportunities for blacks to participate in the country's industrial development and growth. Although a variety of "disadvantaged firms"³ have emerged since the 1970s,⁴ purposefully dis-

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1. See H.R. REP. NO. 460, 100th Cong., 1st Sess. 18 (1987) (finding "that discrimination and the present effects of past discrimination have hurt socially and economically disadvantaged individuals in their entrepreneurial endeavors"); H.R. REP. NO. 468, 94th Cong., 1st Sess. 1-2 (1975) (finding a "long history of racial bias" resulting in "major problems" for minority-owned businesses).

2. President Lincoln issued the Emancipation Proclamation in 1863, see 6 THE WRITINGS OF ABRAHAM LINCOLN 227 (A. Lapsley ed. 1923), and the Constitution was amended in 1865 to abolish slavery. U.S. CONST. amend. XIII, § 1 (1865). Section 1 of the thirteenth amendment reads: "Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." *Id.*

3. Technically, "disadvantaged" is used to mean an economically disadvantaged [business] without considering discrimination." HOUSE COMM. ON THE JUDICIARY, 101ST CONG., 1ST SESS., MINORITY BUSINESS SET-ASIDE PROGRAMS: THE CITY OF RICHMOND V. J. A. CROSON COMPANY, A COLLECTION OF ARTICLES BY CONSTITUTIONAL SCHOLARS AND ECONOMISTS 78 (Comm. Print 1990). References to disadvantaged businesses throughout this Article, however, denote references to Disadvantaged Business Enterprises (DBEs), Minority Business Enterprises (MBEs) and Women Business Enterprises (WBEs).

4. See *Hearings on the Impact on Minority Businesses of the 1989 Supreme Court Decision in City of Richmond v. J. A. Croson Before the Comm. on Gov't Operations*, 101st Cong., 2d Sess. (1990) [hereinafter *Hearings*] (transcript on file at Loyola of Los Angeles Law Review)

criminary schemes ensured the exclusion of blacks and other minorities from America's free enterprise economy.⁵

Recognizing the harm caused by long years of discrimination and its concomitant deprivation of opportunities for minorities, the federal and state governments established "sheltered market"⁶ programs.⁷ These minority enclaves, or "set-asides,"⁸ represent goals typically set by participating government agencies to spend tax dollars on businesses that traditionally have been excluded from the government contracting process.⁹ Although the goals of such programs may be noble, the results have been inadequate.¹⁰ For example, even if all participating agencies met their five or ten percent goal each year, minority contractors would receive a disproportionately "small" piece of the economic pie.¹¹

(statement of Mr. Parren Mitchell, former chairman of the House Small Business Committee and current chairman of the Minority Business Enterprise Legal Defense and Education Fund (MBELDEF)).

5. H.R. REP. NO. 460, *supra* note 1, at 18, 20. "The presumption has been made by past Congresses and now reaffirmed by this Committee, that discrimination and the present effects of past discrimination have hurt socially and economically disadvantaged individuals in their entrepreneurial endeavors. It is a legitimate purpose of government to correct the imbalance caused by discrimination . . ." *Id.* at 18.

6. Sheltered markets, as the name suggests, refers to that percentage of contracting opportunities that are awarded to minority firms on a non-competitive basis. *See Contractors Ass'n of E. Pa. v. City of Philadelphia*, 735 F. Supp. 1274, 1279 (E.D. Pa. 1990).

7. *See, e.g.*, Small Business Act, Pub. L. No. 85-536, 72 Stat. 384 (1958) (codified as amended at 15 U.S.C. §§ 631-650 (1988)); Local Public Works Employment Act of 1976, Pub. L. No. 94-369, 90 Stat. 999 (codified as amended at 42 U.S.C. §§ 6701-6736 (1989)); ARK. STAT. ANN. § 19-11-223 (1987) (goods and services); CAL. GOV'T CODE § 14838-3(b) (West 1990) (5% procurement and construction); FLA. STAT. ANN. § 287.042 (West 1990) (15% construction, contractual services and commodities); ILL. ANN. STAT. ch. 127, para. 132.604 (Smith-Hurd 1988) (10% state contracts); IOWA CODE ANN. § 314.14(2) (West 1985) (10% highway construction); LA. REV. STAT. ANN. § 39:1955(c) (West 1989) (10% goods and services); MD. STATE FIN. & PROC. CODE ANN. § 14-302(b)(2)(i) (1988) (10% all state procurement); MICH. STAT. ANN. § 3.540(52) (Callaghan 1990) (not less than 7% construction, goods and services); N.J. STAT. ANN. § 52 (West 1987) (7% goods, equipment, construction and services, 15% purchases by casinos); N.C. GEN. STAT. § 136-28.4(b) (1989) (10% contract purchases); OHIO REV. CODE ANN. § 123.151(2)(a) (Anderson 1989) (5% construction); OKLA. STAT. ANN. tit. 74, § 85.45c (West 1989 & Supp. 1991) (10% goods and services); R.I. GEN. LAWS § 37-14.1-6 (Michie 1990) (10% all state procurement and construction projects); WIS. STAT. ANN. § 16.855(10m)(a) (West 1986) (5% of total expenditures in fiscal year, 5% bidding preference).

8. Set-aside programs reserve an amount of public contract funds for disadvantaged businesses. *See Contractors Ass'n of E. Pa.*, 735 F. Supp. at 1292 n.5.

9. *See* 15 U.S.C. § 644 (1988).

10. *See, e.g.*, Haworth, *Minority and Women's Business Set-Asides: An Appropriate Response to Discrimination? A Partial Response—Poorly Implemented*, in SELECTED AFFIRMATIVE ACTION TOPICS IN EMPLOYMENT AND BUSINESS SET-ASIDES 79 (1985).

11. For example, the Minority Business Development Agency reported that:

[I]n fiscal year 1986, total prime contracts approached \$185 billion, yet minority business received only \$5 billion in prime contracts, or about 2.7 percent of the prime

Congress understood that federal procurement was a significant vehicle for promoting and developing minority enterprises and enacted several measures to assist minority businesses, including the Small Business Act¹² and the Local Public Works Capital Development and Investment Act of 1976.¹³ Through section 8(a) of the Small Business Act, amended in 1958,¹⁴ Congress established as policy and required that government agencies take steps to ensure that a fair share of federal contracting dollars go to minority businesses.¹⁵ In particular, the Small Business Act regulations provided that American citizens who are black, Spanish-

contract dollar. Of that small amount, section 8(a) awards under the Small Business Act . . . exceeded three billion dollars or nearly 60 percent of the share of the Federal purchase dollar awarded to minority firms. Accordingly, there is a high dependence rate on the section 8(a) program to capture a significantly small share of the Federal acquisition dollar.

H.R. REP. NO. 460, *supra* note 1, at 18. Therefore, most of the protected contracting opportunities with the federal government are available through section 8(a) of the United States Small Business Administration's program. Small Business Act, § 8(a), 15 U.S.C. § 637(a) (1988). The section 8(a) program requires "direct federal procuring agencies" to provide contracts for which the SBA negotiates with "a socially or economically disadvantaged firm." Sroka, *Minority and Women's Business Set-Asides: An Appropriate Response to Discrimination?*, in SELECTED AFFIRMATIVE ACTION TOPICS IN EMPLOYMENT AND BUSINESS SET-ASIDES, *supra* note 10, at 90, 92-93.

According to the most recent statistics available, only six percent of all firms are owned by minorities; less than two percent of minorities own businesses while the comparable percent for nonminorities is over six percent; and the average receipts per minority firm is less than 10 percent the average receipts of all businesses.

A review of Federal procurement data reveals a similar pattern of economic disparity. Small businesses owned and controlled by socially and economically disadvantaged individuals (most of whom are minority) receive a disproportionately small share of Federal purchases.

H.R. REP. NO. 460, *supra* note 1, at 18. Most public sector contracting money is not being spent on minority firms. In fact, public sector programs usually only set small percentage "goals," not "guarantees," for minority businesspersons. See *supra* note 7 for documentation of the fact that federal and state measures generally strive to do only a small percentage of business with minority firms.

12. Pub. L. No. 85-536, 72 Stat. 384 (1958) (codified as amended at 15 U.S.C. §§ 631-650 (1988)). The Act states that social and economic inequalities based on ethnicity exist in our society; that "it is in the national interest to expeditiously ameliorate [such] conditions"; and, that the development of small businesses owned by members of specified disadvantaged groups can significantly contribute to redressing observed inequalities. 15 U.S.C. § 631 (f)(1) (1988).

13. Pub. L. No. 94-369, 90 Stat. 999 (1976) (codified as amended at 42 U.S.C. §§ 6701-6710 (1988)).

14. Pub. L. No. 85-536, § 8(a), 72 Stat. 384, 389 (1958) (codified at 15 U.S.C. § 637(a) (1988)).

15. See *id.* Section 8(a) gave the Small Business Administration (SBA) authority to enter into contracts with government agencies which it then could subcontract to small businesses. *Id.* Through implementing regulations, section 8(a) was initially used for the benefit of small businesses generally, with contracts being awarded on a competitive basis. See 13 C.F.R. § 124.8-1 (1970). Later revisions to the regulations provided social and economic criteria for section 8(a) eligibility, and thereby eliminated the competition requirement. See 13 C.F.R. §§ 124.101, .105-.106 (1990).

speaking, Oriental, Eskimo or Aleut were automatically eligible for minority programs under the "socially and economically disadvantaged" criteria.¹⁶

During the 1970s, some majority businesses challenged, on constitutional grounds, the Small Business Administration (SBA) regulation allowing government agencies to consider race when awarding construction contracts.¹⁷ They alleged that administering the program for the benefit of certain racial and ethnic groups violated the fifth and fourteenth amendments' guarantee of equal protection.¹⁸ Courts never adjudicated the merits of the equal protection issue, however, because in each case the plaintiff lacked standing.¹⁹ Nonetheless, the SBA was sufficiently pressured²⁰ so that it revised its rules relating to the socially and economically disadvantaged. The new rules incorporate factors unrelated to race or ethnicity and thereby prohibit government agencies from relying exclusively on race in determining eligibility.²¹ Despite these attempts to accommodate majority businesses, minorities remain the program's primary beneficiaries because government agencies determine social and economic disadvantage primarily through evidence of deprivation of opportunities due to race.²²

Nevertheless, the section 8(a) program is more of a hope than a panacea, with a consistent record of falling short of its goals.²³ Congress

16. See 13 C.F.R. § 124.8-1(c) (1977).

17. See *Ray Baillie Trash Hauling v. Kleppe*, 477 F.2d 696, 700 (5th Cir. 1973), cert. denied, 415 U.S. 914 (1974); *Massey Servs. v. Fletcher*, 348 F. Supp. 171, 175-76 (N.D. Cal. 1972).

18. *Ray Baillie*, 477 F.2d at 700; *Massey Servs.*, 348 F. Supp. at 174.

19. *Ray Baillie*, 477 F.2d at 710 (plaintiff never applied to participate and merely had "generalized interest in the fair administration of the program"); *Massey Servs.*, 348 F. Supp. at 176 (corporation found not to be small business concern under SBA regulations and consequently lacked standing to maintain action).

20. See *Hearings Before the Senate Select Comm. on Small Business Administration 8(a) Contract Procurement Program*, 94th Cong., 2d Sess. 249-57 (1976).

21. See 13 C.F.R. §§ 124.101-109 (1990).

22. See 15 U.S.C. § 637(a)(5) (1988). Social disadvantage can be established by "those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities." *Id.* Economic disadvantage can be established by "those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged." *Id.* § 637(a)(6)(A).

23. See S. REP. NO. 1070, 95th Cong., 2d Sess. 14, 16-17, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 3835, 3848-49, 3851.

Reports prepared by the General Accounting Office and investigations conducted by both the executive and legislative branches have disclosed that the 8(a) program has fallen far short of its goal to develop strong and growing disadvantaged small businesses. Only 33 of the more than 3700 firms which have participated in the

established the program not as a set-aside, but as a mechanism for the encouragement, creation and development of long-term minority business enterprises to survive and compete once they graduate from the program.²⁴ The 8(a) program, however, retains a checkered history of political uses²⁵ and abuses²⁶ and is still struggling to achieve its original

program have both completed the 8(a) program and are known to have a positive net worth.

Id. at 14, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS at 3438. These findings are further buttressed by Senator Bumper's statement made when introducing the proposed Minority Business Development Program Reform Act of 1988:

"The 8(a) program, established to assist the development of minority and disadvantaged businesses by providing Federal contracts and business development resources to these firms, has been crippled by fraud and mismanagement . . . yet the program retains great promise as a tool to strengthen disadvantaged businesses and provide greater economic opportunity if corrective measures are taken to restore the integrity of the program."

SENATE COMM. ON SMALL BUSINESS, BUSINESS OPPORTUNITY DEVELOPMENT REFORM ACT OF 1988, S. REP. NO. 394, 100th Cong., 2d Sess. 38, *reprinted in* 1988 U.S. CODE CONG. & ADMIN. NEWS 5401, 5414.

24. S. REP. NO. 1070, *supra* note 23, at 16, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS at 3850.

[T]he development of small business ownership among socially and economically disadvantaged persons has been a very slow process and . . . it is in the national interest to expeditiously improve this condition. The fact that minority small businesses have had an especially difficult time in fully participating in the economic system is also recognized. It finds, therefore, that the procurement authority under section 8(a) of the Small Business Act should be used only for developing minority and other socially and economically disadvantaged businesses. The purpose of the 8(a) program is to foster the development of socially and economically disadvantaged businesses and to promote the competitive viability of these businesses by providing necessary contract, financial, technical and management assistance.

Id.

25. In late 1968 the program was used to quell urban unrest by channelling contracts to firms in inner cities; as an employment device in poverty stricken areas; as a contracting vehicle for "disadvantaged" small businesses not owned by minority or disadvantaged individuals; and to promote the particular Administration's political agenda which usually meant subordinating business development to some other priority. *See* SENATE COMM. ON SMALL BUSINESS, *supra* note 23, at 1-2, 28-29, *reprinted in* 1988 U.S. CODE CONG. & ADMIN. NEWS at 5401-04 (legislative history and purpose of program).

26. Probably the most notorious case of abuse was the highly publicized "Wedtech scandal." *See id.* at 36-37, *reprinted in* 1988 U.S. CODE CONG. & ADMIN. NEWS at 5412. In reviewing Wedtech's eligibility for the 8(a) program and its award of two major contracts in 1982 and 1984, the Subcommittee on Oversight of Government Management of the Senate Governmental Affairs Committee investigated the White House, Navy, Army and Small Business Administration. *Id.* at 36, *reprinted in* 1988 U.S. CODE CONG. & ADMIN. NEWS at 5412. That investigation revealed that Wedtech did not qualify as minority or disadvantaged, and the contracts award process was controlled by unethical conduct, favoritism, political influence, mismanagement, and improper and irregular decision-making of federal employees and agencies. *Id.* at 36-37, *reprinted in* 1988 U.S. CODE CONG. & ADMIN. NEWS at 5412. The Senate Report on the Business Opportunity Development Reform Act of 1988 noted that the Wedtech scandal has "provided the public, the Courts and the Congress with an appalling spectacle of greed, fraud and abuse in both industry and government. The [scandal] . . . has undermined public confidence in government at the highest levels and threatens to erode public-

purposes and goals.

Congress established another program to assist minority business enterprises in the 1970s under the Local Public Works Capital Development and Investment Act of 1976.²⁷ There, Congress required grantees of federal construction money to ensure ten percent minority participation in each project.²⁸ Majority contractors subsequently challenged this requirement, contending it was unconstitutional because it was not predicated on specific findings of discrimination.²⁹ The ten percent requirement was upheld in the federal courts³⁰ based on congressional findings of discrimination.³¹ These findings indicated that this minority participation program was remedial and therefore constitutional.³²

Equal protection challenges to federal programs designed to assist minority businesses continued in *Fullilove v. Klutznick*.³³ At issue in *Fullilove* was a ten percent Minority Business Enterprise (MBE) set-aside program established through the Public Works Employment Act of 1977.³⁴ In upholding this program, the Supreme Court found that congressional findings of nationwide discrimination in the construction industry justified the creation of a federal minority preference program.³⁵ Since *Fullilove*, challenges to economic practices designed to benefit minorities have increased in scope and intensity.³⁶

This Article explores the constitutionality and desirability of sheltered markets for minority entrepreneurs. It suggests that the Supreme Court is charting economic policy via the Constitution and notes that the

lic commitment to the purposes of the [8(a)] program." *Id.* at 2, reprinted in U.S. CODE CONG. & ADMIN. NEWS at 5403. In addition, the 8(a) program was misused by majority firms that generally were ineligible to participate, but secured 8(a) contracting opportunities by using minority contractors as "fronts" for their operation. See, e.g., Taylor, *Minority Contract System Critics Blame Government*, L.A. Times, Dec. 28, 1990, at A1, col. 1; Hurst & Taylor, *Fraction of Indian Blood Worth Millions in Business*, L.A. Times, Dec. 27, 1990, at A1, col. 5. Fronts remain a concern for legitimate minority contractors seeking business opportunities.

27. Pub. L. No. 94-369, 90 Stat. 999 (codified as amended at 42 U.S.C. §§ 6701-6710 (1988)).

28. 42 U.S.C. § 6705(f)(2) (1988).

29. *Wright Farms Constr. v. Kreps*, 444 F. Supp. 1023, 1039 (D. Vt. 1977). The equal protection clause of the Constitution, U.S. CONST. amends. V, XIV, proscribes discrimination even for the benefit of disadvantaged minorities unless specific findings have been made to support a remedial effort. *Wright Farms Constr.*, 444 F. Supp. at 1037.

30. See, e.g., *Associated Gen. Contractors v. Kreps*, 450 F. Supp. 338, 366 (D.R.I. 1978).

31. *Id.* at 352-55.

32. *Id.* at 363-64; *Wright Farms Constr.*, 444 F. Supp. at 1037.

33. 448 U.S. 448 (1980).

34. *Id.* at 453-54 (discussing 42 U.S.C. §§ 6701-6710 (1977)).

35. *Id.* at 478.

36. See *infra* notes 64-70 and accompanying text for a discussion of the challenges to minority business protection programs.

Constitution lends itself readily to minority protective economic legislation. Further, it considers the protection afforded majority businesses when they are disadvantaged in the marketplace, and attempts to reconcile the legitimacy of such protection versus that afforded minority businesses.

II. CURRENT CASE LAW ON AFFIRMATIVE ACTION

A. City of Richmond v. J.A. Croson Co.

In 1989, the Supreme Court addressed the constitutionality of a local government affirmative action program in *City of Richmond v. J.A. Croson Co.*³⁷ *Croson* dealt with a city ordinance which required prime contractors who were awarded city construction contracts to subcontract at least thirty percent of the dollar value of such contracts to one or more minority businesses.³⁸ In order for a business to qualify as a "minority" enterprise, the ordinance required the firm to be *owned and controlled*³⁹ by members of certain ethnic groups.⁴⁰ Black, Hispanic, Oriental, Native Americans, Eskimo and Aleut Americans were eligible candidates.⁴¹ If the prime contractor could not identify a qualified minority subcontractor, the minority participation requirements were waived.⁴²

In the *Croson* case, J.A. Croson, a majority contractor, applied for and was denied a waiver from the minority enterprise requirement for its bid on a city construction project.⁴³ After bidding the project, the city awarded it to another contractor and Croson sued contending that the

37. 488 U.S. 469 (1989). Although *Croson* involved racial classifications established through a legislative process, *id.* at 477-78, its principles are applicable to all racial classifications by private or public bodies. The decision's impact may, therefore, reach employment and promotion plans, university admission policies, and even court-ordered remedial schemes. Gender-based schemes intended to remedy the effects of discrimination against women were not addressed in *Croson*. See *id.* at 493.

38. *Id.* at 477.

39. The "owned and controlled" requirement was incorporated into legislation or ordinances establishing contracting programs to protect against past or projected minority abuses by majority firms. See *id.* at 530 (Marshall, J., dissenting). For a discussion of the deceptive process of creating "fronts" in order to obtain contracting opportunities intended for minorities, see *supra* note 25.

40. *Croson*, 488 U.S. at 478.

41. *Id.*

42. *Id.* at 478-79. Many majority contractors view the "qualified" requirement as an "out" rather than a mechanism to ensure that competent minority firms are used. See *Hearings*, *supra* note 4 (statement of Mr. Parren Mitchell). In that spirit, many majority contractors routinely attempt to obtain a waiver without making any meaningful attempts to identify a qualified minority firm. *Id.*

43. *Croson*, 488 U.S. at 483.

city plan violated the equal protection clause.⁴⁴ Both the trial and appellate courts upheld the plan as constitutional.⁴⁵ The appellate court's decision, however, was remanded for consideration in light of *Wygant v. Jackson Board of Education*,⁴⁶ where the Court had held that race-conscious remedies must be measured by the strict scrutiny standard⁴⁷ and supported by specific evidence of discrimination.⁴⁸ On remand, the court of appeals determined that the Plan was unconstitutional because the city did not rely on "prior discrimination by the government unit" as justification for enacting a race-conscious set-aside law.⁴⁹

On rehearing, the Supreme Court rejected the Fourth Circuit's reasoning, noting that the court had misread *Wygant*.⁵⁰ The *Croson* Court noted that *Wygant* does not simply require a governmental unit to show

44. *Id.*

45. *J.A. Croson Co. v. City of Richmond*, 779 F.2d 181, 182 (4th Cir. 1985). The circuit court relied on the standards outlined in *Fullilove v. Klutznick*, 448 U.S. 448 (1980), where the Court had upheld a federal MBE program premised on national findings of past discrimination in the construction industry. *Croson*, 779 F.2d at 187. After considering national and local findings of discrimination the court concluded that the Richmond Plan was reasonable and therefore constitutional. *Id.* at 194. The Supreme Court went on to disagree with the circuit court's reliance on *Fullilove*, see *Croson*, 488 U.S. at 491, but has still not drawn a bright line in this area.

46. 476 U.S. 267 (1986).

47. *Id.* at 273-74.

48. *Id.* at 276. *Wygant* was a suit brought by tenured white professors who were laid off under a collective bargaining agreement that protected less senior minority teachers over more senior majority teachers. *Id.* at 270-71. The layoff agreement entered into between the Board of Education and the teachers' union was designed to increase the number of minority teachers in the school system. *Id.* at 272. The white professors claimed that the School Board's decision to lay them off and retain less senior minority teachers violated the equal protection clause. *Id.* In a plurality opinion, the Supreme Court held that any racial preference or race-conscious remedy must be measured by the strict scrutiny standard. *Id.* at 274. The preference must, therefore, serve a compelling state interest and be narrowly tailored to address the problem. *Id.* Justice Powell, writing for the plurality, found that the reliance on societal, as opposed to specific, evidence of discrimination was too amorphous to support the layoff of innocent people. *Id.* at 276.

Members of the Court generally agreed that an affirmative action plan is permissible if the local government has a history of racial discrimination. See *id.* at 274, 295 (White, J., concurring); *id.* at 297 (Marshall, J., dissenting). There was also a general consensus that the locality need not convince a court that its prior discrimination rose to the level of a constitutional or statutory violation. See *id.* at 274-75; *id.* at 289 (O'Connor, J., concurring); *id.* at 303-06 (Marshall J., dissenting). There is, however, disagreement between the Justices as to exactly what type of evidence is needed to justify a locality's administrative conclusion of discrimination and its consequent affirmative action plan. See *Johnson v. Transportation Agency*, 480 U.S. 616, 632 (1987) (plurality's position that race conscious remediation need not be conditioned on showing of prima facie title VII violation).

49. *J.A. Croson Co. v. City of Richmond*, 822 F.2d 1355, 1358 (4th Cir. 1987), *aff'd*, 488 U.S. 469 (1989).

50. *Croson*, 488 U.S. at 492.

prior discriminatory acts in order to adopt a remedial race-conscious plan,⁵¹ but that such plans must also satisfy a strict scrutiny analysis because they involve racial classification.⁵² Consequently, a set-aside plan would be upheld only if the city could demonstrate that it satisfied a compelling interest and was narrowly tailored to meet that interest.⁵³ Remedying "societal" discrimination, the Court noted, would not suffice as a compelling interest,⁵⁴ which is present only when racial discrimination has been specifically identified.⁵⁵

In applying this standard, the *Croson* Court found that the city of Richmond did not present evidence of identified discrimination in the construction industry.⁵⁶ Furthermore, the Court found that the Plan was not narrowly tailored because it was not linked to identified discrimination, and it gave minority entrepreneurs in Richmond an absolute preference over other citizens solely on the basis of their race.⁵⁷ In addition, the Court found that the city had randomly included racial groups for coverage, thereby making the Plan overinclusive.⁵⁸ The Court determined that the Plan was, in effect, an attempt at racial balancing.⁵⁹ Further, the fact that the city had failed to consider race-neutral alternatives—such as helping minority entrepreneurs raise capital and meet bonding requirements—also contributed to the Court's finding that the Plan was not tailored to meet the city's goals.⁶⁰

The *Croson* Court, however, did not explicitly strike a death blow to minority entrepreneurs.⁶¹ Since *Croson*, at least two lower court deci-

51. *Id.*

52. *Id.* at 493.

53. *Id.*

54. *Id.* at 498-99.

55. *Id.* at 504. This standard, however, relates to voluntary affirmative action plans only. *Id.* A court-ordered affirmative action plan, may need to satisfy strict scrutiny, but the Court has thus far left it an open question. See *United States v. Paradise*, 480 U.S. 149, 166-67 (1987).

56. *Croson*, 488 U.S. at 505-08. The Court also found that Richmond had improperly relied on conclusory statements alleging discrimination by councilpersons in adopting the affirmative action plan; failed to show how many qualified minority firms were in the relevant market; failed to show that low minority membership in the contractors' trade associations was due to discrimination; and improperly relied on congressional findings of national discrimination in the industry. *Id.* at 498-505.

57. *Id.* at 507.

58. *Id.* at 506.

59. *Id.* at 507.

60. *Id.*

61. See Joint Statement, *Constitutional Scholars' Statement on Affirmative Action After City of Richmond v. J. A. Croson Co.*, 98 YALE L.J. 1711, 1712 (1989). Those commentators noted:

In light of the Supreme Court's January 1989 decision in *City of Richmond v. J.A.*

sions have demonstrated that set-aside plans can pass constitutional muster.⁶²

Other decisions refusing to halt or dismantle challenged programs have also been encouraging.⁶³ In reality, however, the Court has cut off the life blood of minority entrepreneurs and jeopardized approximately 236 state and local set-aside programs with *Croson*.⁶⁴ In the wake of *Croson*, numerous lower courts have struck down challenged plans,⁶⁵

Croson Co., some have recently argued that race-conscious remedies by local and state governments should be regarded as conflicting with the Constitution. As long-time students of constitutional law, we regard this assessment as wrong. The Supreme Court has insisted that affirmative action programs be carefully designed—not dismantled. A call for fairness and flexibility in affirmative action programs should never be equated with a call for retrenchment and retreat. It would defy not only the Supreme Court's decisions but the fundamental purposes of the equal protection clause to conclude that the Constitution forbids all such inclusive remedial measures, or requires that such measures be treated in exactly the same way as the invidious discrimination of the nation's past.

Therefore, while it would be irresponsible for local governments to avoid whatever steps are necessary to adjust their minority contract programs to the Supreme Court's ruling in the *Croson* decision, it would be equally irresponsible for others to claim that this opinion casts doubt on the overall constitutionality of properly constructed race-conscious remedies.

Id. at 1712. *But see* Fried, *Affirmative Action After City of Richmond v. J.A. Croson Co.*: A Response to the Scholars' Statement, 99 YALE L.J. 155, 160-61 (1989) (*Croson's* greatest importance "is the unequivocal affirmation that the Equal Protection clause protects all equally" therefore strict scrutiny is applied to all quotas save those remedying identified acts of discrimination).

62. *See* Coral Constr. Co. v. King County, 729 F. Supp. 734, 739-40 (W.D. Wash. 1989) (county set-aside program for minority and women-owned business held narrowly tailored to remedy identified past discrimination in construction industry); *State v. Taylor*, Nos. 36,709-36,714, slip op. at 16-18 (Anne Arundel County Ct., Md., Aug. 14, 1990) (Maryland MBE statute satisfies requirements of equal protection clause because it is supported by statistical data, does not set quotas and is revised annually).

63. *See, e.g.*, *Cone Corp. v. Hillsborough County*, 908 F.2d 908 (11th Cir.), *cert. denied*, 111 S. Ct. 516 (1990) (reversing summary judgment invalidating county's program); *North-eastern Fla. Chapter v. Jacksonville*, 896 F.2d 1283 (11th Cir. 1990) (reversing preliminary injunction prohibiting enforcement of municipality's set-aside ordinance).

64. Letter from Tyrone D. Press, Chief, Investigation and Research, Office of Chief Counsel for the Minority Business Enterprise Legal Defense and Education Fund (MBELDEF), to Marnie Carlin, Articles Editor, *Loyola of Los Angeles Law Review* (Jan. 10, 1991) [hereinafter MBELDEF Research] (available at *Loyola of Los Angeles Law Review*) (discussing research compiled by the MBELDEF from verbal and written correspondence with various sources). In addition to state legislative initiatives, over 150 localities established programs which constitute the bulk of available contracting opportunities. *Id.*

65. *See* *Michigan Rd. Builders Ass'n v. Milliken*, 834 F.2d 583 (6th Cir. 1987), *aff'd*, 489 U.S. 1061 (1989) (holding Michigan lacked compelling governmental interest for its MBE program); *Main Line Paving v. Board of Educ.*, 725 F. Supp. 1349 (E.D. Pa. 1989) (holding that program was only supported by generalized findings of discrimination and failed to focus on discrimination in local construction industry; that there was absence of specific evidence of discrimination against beneficiaries of program; program was not narrowly tailored; race- and gender-neutral alternatives were not considered; and remedies not limited to identified victims); *Milwaukee County Pavers Ass'n v. Fiedler*, 710 F. Supp. 1532 (W.D. Wis.) (enjoining

while other plans are still being litigated.⁶⁶ Even plaintiffs without standing have joined in the fray,⁶⁷ and mootness of the issue has not deterred challenges.⁶⁸ Additionally, some jurisdictions have viewed *Croson* as a clear statement that set-asides are no longer legally acceptable and therefore should be abolished.⁶⁹ Other jurisdictions have suspended or otherwise modified their programs by reducing goals or allowing only "voluntary" approaches.⁷⁰ Some localities are currently reviewing another group of programs.⁷¹ The economic impact of *Croson* on minor-

state program which could not meet *Croson*'s strict scrutiny standard, but modified on basis of state program being subsidiary of federal DBE program not subject to *Croson*'s tough standards; state funded projects remain enjoined), *modifying* 707 F. Supp. 1016 (W.D. Wis. 1989); *L.D. Mattson, Inc. v. Multnomah County*, 703 F. Supp. 66 (D. Ore. 1988) (county's MBE and WBE programs struck down as unsupported by findings of discrimination and not narrowly tailored due to inadequate consideration of less restrictive alternatives); *American Subcontractors Ass'n v. City of Atlanta*, 376 S.E.2d 662, 665-67 (Ga. 1989) (Atlanta's MBE program held unconstitutional because there was no evidence of discrimination, no consideration of race-neutral remedies and was overinclusive in its coverage of ethnic groups).

66. See *United Fence & Guardrail Corp. v. Cuomo*, 878 F.2d 588 (2d Cir. 1989) (remanded for consideration on merits after district judge abstained from exercising jurisdiction and deferred to state court resolution of same suit); *American Sewer Servs. v. Bolden*, No. 90-C-872 (E.D. Wis. filed Aug. 31, 1990); *F. Buddie Contracting Co. v. City of Elyria*, No. 1:90CV1067 (N.D. Ohio filed June 19, 1990); *John R. Jurgensen Co. v. City of Dayton*, No. C3-89-295 (S.D. Ohio filed July 19, 1989); *Association of Gen. Contractors v. City of New Haven*, No. N89-303 PCD (D. Conn. filed June 26, 1989); *Contractors Ass'n of E. Pa. v. Philadelphia*, No. 89-2737 (E.D. Pa. filed Apr. 14, 1989); *Concrete Gen. v. Washington Suburban Sanitary Comm.*, No. MJG 88-1356 (D. Md. filed May 11, 1988).

67. See, e.g., *Rocks v. City of Philadelphia*, 868 F.2d 644 (3d Cir. 1989); *Capeletti Bros. v. Broward County*, 738 F. Supp. 1415 (S.D. Fla. 1990).

68. See, e.g., *Reynolds v. Montgomery County*, Ohio, No. C-3-89-423, slip op. at 1 (S.D. Ohio Apr. 27, 1990) (suit by contractor against county alleging affirmative action plan unconstitutional because it accorded minority- and women-owned businesses preference for county contracts); *Illinois Rd. Builders Ass'n v. City of Chicago*, No. 90C0623 (N.D. Ill. filed Feb. 2, 1990) (suit by contractors against city alleging affirmative action provisions violate fourteenth amendment by according racial and ethnic minorities and women preference in bid process).

69. Colorado, Minnesota (city of Minneapolis), North Carolina (city of Durham and Guilford County), Oregon (Portland Public Schools, Salem County and Lane County) and Virginia (Richmond School Board and Richmond Redevelopment Housing Authority) are examples. MBELDEF Research, *supra* note 64.

70. Barnett, *In Richmond's Wake*, MINORITY BUS. ENTERPRISE, Jan.-Feb. 1990, at 10, 10 (By the end of 1989, the year of the *Croson* decision "15 municipal minority set aside programs had been suspended. . ."); see, e.g., Delaware (city of Wilmington and New Castle County), Florida (city of Fort Lauderdale), Indiana (city of South Bend), Illinois (Greater Chicago Water Reclamation District), Michigan (Genesee County), New Jersey (New Jersey Port Authority) and New York (New York Port Authority). MBELDEF Research, *supra* note 64. The City of Yakima, Washington, is currently seeking suspension of its program. *Id.*

71. See programs in the following jurisdictions: Arizona (Maricopa County); California (city of Hayward, city and county of Los Angeles, city of San Jose, city of Oakland, and Contra Costa and Alameda Counties); Colorado (city of Denver); Florida (Dade County, city of Ft. Myers, Greater Orlando Aviation Authority, Hillsborough County, Jacksonville, Orange County, Palm Beach County, St. Petersburg, Tampa, and Tallahassee); Georgia (Atlanta

ity businesspersons will run into billions of dollars, both directly⁷² and through the rippling effect on minority employment.⁷³

For now, minority entrepreneurs are essentially left only with the federal sheltered market. The *Croson* decision suggests that not only does the federal government have greater authority and responsibility than state governments to deal with this issue, but that it also has some

and Fulton County); Illinois (Chicago, Chicago Board of Education, Greater Chicago Water Reclamation District); Maryland (city of Baltimore, Prince George's County, Prince George's County Board of Education, Maryland National Capital Park and Planning Commission and Washington Suburban Sanitary Commission); Minnesota (city of St. Paul); Missouri (St. Louis); New Jersey (Atlantic City, city of Newark); New York (New York, Metropolitan Transportation Authority, city of Rochester, and city of Syracuse); North Carolina (Durham County); Ohio (Cincinnati, Cleveland, Dayton and Montgomery County); Texas (city of Dallas, Dallas/Fort Worth Airport Authority, Dallas Area Rapid Transit, City of San Antonio); Washington State (King County, Municipality of Metropolitan Seattle, Pierce County, Pierce Transit, city of Tacoma, Tacoma School District, Metropolitan Park District, Port of Seattle, Seattle Metro, Seattle School District); Wisconsin (city of Milwaukee, county of Milwaukee and Milwaukee Metropolitan Sewage District). MBELDEF Research, *supra* note 64.

72. A survey of a few jurisdictions' spending illuminates what is at stake. From 1982 to 1988 minority businesses in Atlanta received over \$200 million in revenues from public sector contracting. *Id.* In 1988 alone, MBE's received approximately 34.5% of the \$55 million expended by the city. *Id.* In Chicago the aviation industry alone expended over \$307 million on minority contractors for the years 1985 through 1989. *Id.* In 1989, minority firms in Philadelphia obtained approximately 25% or \$61.9 million from city contract awards. *Id.* Washington, D.C. spent \$233 million on minority firms in 1988. *Id.* From 1982 to 1989, black contractors in Dade County Florida received 3.8% or \$44 million in contracting opportunities. *Id.* One need only do simple addition to figure out what is at stake here. Data from the city of Richmond itself bears out the economic magnitude of the *Croson* decision. Specifically, in January 1989 contracts and purchase order awards to minority contractors hovered just above 11%. *Id.* By November 1989 awards dropped to just over 6%. *Id.* The city also spent \$9.3 million during the same period on construction contracts. *Id.* Of this sum, minorities shared 13%. *Id.* This is in sharp contrast to the 40% participation minorities enjoyed in prior years under the Richmond Plan. *Id.* In fact, when the Richmond Plan was first rejected by the lower court in 1987, *J.A. Croson Co. v. City of Richmond*, 822 F.2d 1355, 1356 (4th Cir. 1987), *aff'd*, 488 U.S. 469 (1989), participation dropped from 40% to 15% and then on to an all-time low of less than 3% during the first six months of 1988. MBELDEF Research, *supra* note 64. In Tampa, Florida, minorities saw their participation level drop from 22% for the 1988 fiscal year to 5.2% during the first quarter of 1989 after their 25% goal was suspended. *Id.* Total contract awards dropped by 99% for black firms and 50% for hispanic firms. *Id.* Hillsborough County Florida's minority contracting program was struck down in 1989. *Cone Corp. v. Hillsborough County*, 723 F. Supp. 669, 678 (N.D. Fla. 1989), *rev'd*, 908 F.2d 908 (11th Cir.), *cert. denied*, 111 S. Ct. 516 (1990). Following the program's termination, the county saw a 99% decrease in minority contracting opportunities. MBELDEF Research, *supra* note 64.

73. In Atlanta alone, minority firms employ more than 7200 individuals, most of whom are black. See Barnett, *Just the Facts Ma'am*, MINORITY BUS. ENTERPRISE, Jan.-Feb. 1990, at 22, 23. Blacks represent about 60% of the population and a significant part of the workforce, particularly in the construction industry. *Id.* One black-owned construction company has already reported laying off 20% of its work force due to revenue losses. *Id.*

special or unique expertise in dealing with discrimination.⁷⁴

B. Federal/State Distinction

Although the Richmond Plan at issue in *City of Richmond v. J.A. Croson Co.*⁷⁵ was modeled after the congressional ten percent set-aside program that was upheld in *Fullilove v. Klutznick*,⁷⁶ it did not pass constitutional muster.⁷⁷ The *Croson* Court distinguished the two plans primarily on the basis of the "nature and authority" of the acting governmental body.⁷⁸ It noted that congressional authority under the commerce clause⁷⁹ and section 5 of the fourteenth amendment⁸⁰ is unique and broad.⁸¹ As a result, congressional reliance on generalized data of discrimination in the construction industry, in conjunction with Congress' experience under the Small Business Administration's 8(a) program, was sufficient in *Fullilove* to justify a plan that remedied the effects of past discrimination.⁸²

74. The *Croson* Court distinguished the remedial powers of Congress and its authority to implement remedial schemes in upholding the fourteenth amendment from those enjoyed by the city. *Croson*, 488 U.S. at 489-90. In this regard, the Court mentioned the legislative history and findings that led to the establishment of the 8(a) program under the Small Business Act. *Id.* at 488. To suggest that the ability to remedy known discrimination falls into a category of federal or non-federal expertise is to engage in legal calisthenics. *See id.* at 487-88. There has never been any question, and it has been well documented, that discrimination is responsible for the paucity and weakness of minority entrepreneurs in America. H.R. REP. NO. 460, *supra* note 1, at 18; H.R. REP. NO. 468, *supra* note 1, at 1-2. The federal government acted to remediate the problem, not because of special expertise, but because it was in the national interest. H.R. REP. NO. 460, *supra* note 1, at 20. State and local governments followed with their own programs that in some instances paralleled federal programs. *See supra* note 7 and accompanying text. In light of this, one would think that state and local reliance on federal findings would be given *great weight* if one were to buy the "federal expertise" argument. After all, Congress' findings that were the predicate for federal programs, related to the same majority individuals, firms, and organizations that pursue and hold hostage state and local contracting opportunities. *See, e.g., Croson*, 488 U.S. at 499 (Richmond used congressional findings of discrimination in construction industry and Court found those findings insufficient for local use).

75. 488 U.S. 469 (1989).

76. 448 U.S. 448 (1980).

77. *Croson*, 488 U.S. at 492.

78. *Id.* at 489. This distinction was intended to demonstrate that all parties should have been on notice that *Fullilove* was not controlling for race-based remedial schemes other than those established by the federal government. *See Days, Fullilove*, 96 YALE L.J. 453, 474 (1987) (*Fullilove* clearly focused on the congressionally mandated set-aside program). It also gave the *Croson* Court a way to uphold *Fullilove* but strike down the plan in *Croson*.

79. U.S. CONST. art. I, § 8, cl. 3. ("To regulate commerce with foreign nations and among the several states, and with the Indian tribes.")

80. U.S. CONST. amend. XIV, § 5. ("Congress shall have power to enforce, by appropriate legislation, the provisions of this article.")

81. *Croson*, 488 U.S. at 487-88.

82. *Id.* at 488.

Justice O'Connor, writing for the *Croson* Court, remarked that by contrast, state and local governments have no constitutional mandate similar or equal to section 5 to enforce the fourteenth amendment.⁸³ Rather, she stated, section 1 of the fourteenth amendment took power away from the states and gave it to Congress.⁸⁴ States must operate within that relinquishment of power, O'Connor stated.⁸⁵ Consequently, section 1 restrictions require more stringent judicial review for state-created programs.⁸⁶ Based on this distinction, the Court concluded that the findings Congress must make to establish race-based remedial schemes differ greatly from those findings that state and local governments must make.⁸⁷ The net result is that states must make their own specific findings of discrimination within the profession and jurisdiction in which they are trying to remediate, and cannot merely rely on congressional findings of discrimination in that industry.⁸⁸ The local findings must also show that the particular minority groups benefitting from the program suffered discrimination.⁸⁹ Justice O'Connor rationalized her result by suggesting that even without affirmative action programs, white contractors will hire minority firms;⁹⁰ that the paucity of minority firm membership in local contractors' associations may have been due to "career and entrepreneurial choices;"⁹¹ and that minority contractors' limited access (0.67%) to the city's contracting opportunities may be a product of "bureaucratic inertia" as opposed to discrimination.⁹²

Of course, O'Connor's opinion outlines a perfect strategy to put minorities in the position of a dog chasing its tail. All the time and money previously and currently being spent documenting discrimination⁹³

83. *Id.* at 490.

84. *Id.*

85. *Id.*

86. *Id.* at 469.

87. *Id.* at 498-506. The Court did not articulate what evidentiary requirements are imposed on Congress to establish a factual predicate for a set-aside program. *See id.* at 488-89 (referring to evidence of nationwide history of past discrimination deemed sufficient in *Fullilove*). However, some quantum of proof appears to be necessary. *See id.* The spectrum ranges from general evidence of discrimination against minorities nationally, to specific evidence of previous or current discrimination by the body utilizing a remedial scheme. *See id.* (past societal discrimination deemed sufficient for congressionally set quotas while state entities must show specific evidence of identified past or present discrimination).

88. *Id.* at 499, 504.

89. *Id.* at 506.

90. *Id.* at 502.

91. *Id.* at 503.

92. *Id.* at 510.

93. On May 9, 1990, the first of a series of hearings to assess the nature and extent of discrimination against minority businesses, and to determine what the federal response should be, began before the United States House of Representatives Committee on Government Oper-

translates into time and money lost in contracting opportunities.

The *Croson* Court further found that the city's failure to consider "race neutral alternatives" made the Richmond Plan even more problematic.⁹⁴ It suggested as such alternatives, the "[s]implification of bidding procedures, relaxation of bonding requirements, and training and financial aid for disadvantaged entrepreneurs of all races"⁹⁵ The Court noted that even when the federal government was acting in *Fullilove*, race-neutral alternatives were considered and rejected prior to the

ations. See *Hearings*, *supra* note 4. Joshua I. Smith, Chairman and Chief Executive Officer of the Maxima Corporation, one of the few successful black firms, stated that:

Because many black owned businesses began during the era of racial segregation, they had no access to the larger and more lucrative white markets. Businesses that depend on black customers alone face a market where potential customers have only 60% of the income and one-third of the wealth of white customers. In addition, the abolition of Jim Crow laws did not eliminate the difficulties black businesses face in breaking through entrenched customer-supplier relationships and overcoming deeply held negative stereotypes.

Id. E. Mitchell Sr., founder of an Atlanta based construction firm, commented, among other things, on the issue of bonding:

We would get projects with the City, but surety companies wouldn't bond us. Bonding became the barrier we had to handle and frankly, we haven't jumped over that yet. . . . We essentially bond ourselves to meet insurance requirements. For instance, we put up a \$300,000 letter of credit to get a job of \$8 million.

We joint venture with white firms not because we need to be apprentices like some smaller black construction firms, but because we need their bonding capacity. One of the white-owned construction firms we've joint ventured with is about the same size as our firm, and it was founded at about the same time. . . . Conditions of the joint venture are such that we exchange financial statements and this is what we found out. This majority firm we work with is bonded at \$30 million. The largest bond that E.R. Mitchell has ever obtained is \$4 million, and our bonding capacity today is \$4 million, one-seventh of that of this comparable white construction firm. Heck, I thought, maybe we've just been dealing with the wrong folks. So we went to our joint venture partner's bonding company. We were flatly turned down.

Id.

The statements provided by the minority contractors reflected similar experiences, and also highlighted the need for a regulatory scheme to control discriminatory bonding practices. See *id.* (unpublished testimony of E. Mitchell, Sr., founder and former president of E. Mitchell Construction Co.). There is also a sense that majority contractors submit bids at lower rates than they can actually perform, with the implicit understanding that they will be allowed "add-ons" when difficulties arise in performing at the contract price. It is possible that minority contractors, however, are typically held to the contract price so they cannot afford to underbid projects.

94. *Croson*, 488 U.S. at 507. The *Croson* Court has now made consideration of race-neutral alternatives a "prerequisite" for the implementation of a plan. This requirement decreases the likelihood that plans will survive Court scrutiny. In the past, alternative remedies were just one of many factors the Court considered in determining whether a plan was "narrowly tailored." *Fullilove*, 448 U.S. at 510-11; *Vulcan Soc. of N.Y. City Fire Dep't v. Civil Serv. Comm'n*, 490 F.2d 387, 398-99 (2d Cir. 1973). As a result, this consideration did not take on a preeminent importance. The only solace in this development is that the governmental body is not required to experiment with, or try possible alternatives, but only "consider" them. *Croson*, 488 U.S. at 507.

95. *Croson*, 488 U.S. at 509-10.

implementation of a plan.⁹⁶

On paper, the Court's suggestions seem meaningful. In fact, the Court misses the point. The *Croson* Court seemed to think that relaxation of the bonding requirements and simplification of the bidding procedures were race-neutral alternatives that would remedy minorities' inability to get construction contracts.⁹⁷ The real problem, however, is a system of control and favoritism between the letting agencies and majority contractors.⁹⁸ Before contracts were publicized in trade journals, minorities were not even aware of their existence because the letting agencies purposefully deprived minorities of this information.⁹⁹ Even though most public contracts are public information now, the awarding practices strongly suggest that the advertising procedure is merely pro forma.¹⁰⁰

C. *The Return to Lochnerism*

The economic fallout of *City of Richmond v. J.A. Croson Co.*¹⁰¹ is that the interests of blacks and other minorities now fall into a low category on the Court's list of priorities. Using an old tactic, the Court willingly concedes the wrong meted out to minorities,¹⁰² but on the issue of who must right it, the answer is—not us! The explanation given for the Court's roll-back is "constraints of the constitution."¹⁰³ The reasoning proffered is that a law which uses race as a factor in decision-making forces the Court to review that decision in the most searching way.¹⁰⁴

96. *Id.* at 507.

97. *Id.* at 509-10.

98. *Hearings, supra* note 4 (testimony of E. Mitchell).

99. *Id.* (testimony of E. Mitchell).

100. *Id.* (testimony of Parren Mitchell).

101. 488 U.S. 469 (1989). See *supra* note 72 for a discussion of the economic fallout of *Croson*.

102. See *Croson*, 488 U.S. at 499. The *Croson* Court seems always willing to concede the country's sad history of discrimination. For example, Justice O'Connor notes that "there is no doubt that the sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for black entrepreneurs . . ." *Id.* Additionally, Justice Scalia notes, "It is plainly true that in our society blacks have suffered discrimination immeasurably greater than any directed at other racial groups." *Id.* at 527 (Scalia, J., concurring); accord *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 278 (1986) ("No one disputes that there has been race discrimination in this country."); see also *General Bldg. Contractors v. Pennsylvania*, 458 U.S. 375, 386-87 (1982) (holding that suits under 42 U.S.C. § 1981 (1988) require proof of discriminatory intent, notwithstanding Court's recognition that principal object of legislation was eradication of discriminatory laws and conduct reminiscent of slavery).

103. *Johnson v. Transportation Agency*, 480 U.S. 616, 628 n.6 (1987).

104. *Croson*, 488 U.S. at 493-94. The tight standards of review being applied in the government contracting arena have their genesis in the Court's employment decisions. See, e.g., *Wygant*, 476 U.S. 267 (school board's protection of African-American teachers from layoffs held

This jurisprudential posture offends the original purpose of the fourteenth amendment which was essentially concerned with racial equality¹⁰⁵ and ensuring opportunities for material self-development.¹⁰⁶ *Croson* represents a continuing stingy attitude in formulating equal protection doctrine as it relates to minorities, despite the Court's history of not being similarly constrained in fleshing out other aspects of the fourteenth amendment¹⁰⁷ and the Constitution generally.¹⁰⁸

At the turn of this century, the Court shaped and defined economic policy by using the Constitution to thwart progressive state legislation. In *Lochner v. New York*,¹⁰⁹ the Court elevated freedom of contract to the status of a fundamental right.¹¹⁰ In *Lochner*, the Court invalidated a state regulation that limited the number of hours bakers could work on a daily or weekly basis, on the ground that the regulation violated the con-

unconstitutional because not an appropriate means to meet compelling state interest); *Hazelwood School Dist. v. United States*, 433 U.S. 299 (1977) (district must compare percentage of blacks in employer's work ranks with percentage of qualified black labor force in determining underrepresentation in teaching positions). A heightened standard of proof for minorities began when the court withdrew from a broad reading of fair employment laws. See *Sheet Metal Workers v. EEOC*, 478 U.S. 421 (1986) (holding that remedial provisions of title VII, 42 U.S.C. § 2000e-5(g), empower courts to order race conscious relief under narrowly confined circumstances). Specifically, the factual predicate upon which the public entity can rely for an affirmative action program was enunciated prior to *Croson*, in *Johnson*, where the employer's affirmative action plan was upheld, partly because its remedial measures were based on specific versus generalized population statistics. *Johnson*, 480 U.S. at 634-37. Public employers therefore should reasonably conclude that if standards from the employment context are applicable to public contracting, the converse may also be true.

105. See *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 81 (1873) (amendment intended to protect class of citizens who were slighted when the Constitution was framed and ratified).

106. See CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866) (purpose of amendment was to secure rights granted by Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (codified as amended at 42 U.S.C. §§ 1981-1982 (1988))), and grant equal opportunity for material self-development and equal standing before the law).

107. Equal protection has been the source of rights in the concepts of privacy and fundamental liberty. See, e.g., *Zablocki v. Redhail*, 434 U.S. 374 (1978) (marriage); *Moore v. City of East Cleveland*, 431 U.S. 494 (1971) (family); *Roe v. Wade*, 410 U.S. 113 (1973) (abortion).

108. For example, the right to privacy is a far more attenuated outgrowth of the Bill of Rights than economic protection for minorities is of the equal protection clause. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 481-85 (1965) (establishing right to privacy as penumbra of several enumerated constitutional rights). Using its own sense of values, the Court has demonstrated its versatility with the free speech clause, U.S. CONST. amend. I. See, e.g., *Central Hudson Gas & Elec. Co. v. Public Serv. Comm'n*, 447 U.S. 557 (1980) (commercial speech granted constitutional protection); *Roth v. United States*, 354 U.S. 476 (1957) (obscene speech unprotected). It should also be noted that the Court blames the Constitution for creating these constraints on affirmative action while using it readily to promote the economic agenda of majority groups. See, e.g., *Allgeyer v. Louisiana*, 165 U.S. 578, 591 (1897) (use of fourteenth amendment to promote principles of economic liberty).

109. 198 U.S. 45 (1905).

110. *Id.* at 53.

tractual freedom of employers and employees.¹¹¹ The Court was able to reach this result through its own interpretation of the "liberty" element of the fourteenth amendment, despite the fact that the framers left this provision undefined.¹¹²

After decimating the state's ability to respond to popular will through protective legislation, the Court pronounced that liberty of contract is not absolute.¹¹³ *Croson* has left similarly cramped space for states to operate in structuring set-aside programs. While declaring that its decision did not represent an absolute prohibition of state and local programs,¹¹⁴ the Court simultaneously instituted standards that are virtually impossible to meet. The Court in *Croson*, like in *Lochner*, deferred to federal affirmative action legislation,¹¹⁵ even though it was in many respects identical to that of the states.¹¹⁶ By limiting states to acting in purely local matters,¹¹⁷ the *Lochner* Court severely curtailed the states' ability to participate in protective legislative schemes that negatively affect business interests.¹¹⁸

111. *Id.* at 64.

112. *Id.* at 53.

113. *Id.* (discussing police powers of state to enforce health and safety laws).

114. *Croson*, 488 U.S. at 509. While the opportunity for material self development can be traced directly to the fourteenth amendment, *see supra* notes 105-08 and accompanying text, antitrust protection has its genesis in the commerce clause, U.S. CONST., art. I, § 8, cl. 3. This constitutional provision gives Congress the power to regulate interstate commerce, and has been interpreted to provide the basis for regulating monopolies and other trade practices through the necessary and proper clause. U.S. CONST., art. I, § 8, cl. 18; *see Wickard v. Filburn*, 317 U.S. 111, 121 (1942); *Adair v. United States*, 208 U.S. 161, 183 (1908); *Northern Sec. Co. v. United States*, 193 U.S. 197, 337 (1904). This use of "implied" versus apparent power to legislate in a specific area, places antitrust analysis in the penumbra, *see Kohl v. United States*, 91 U.S. 367, 372 (1875); *Griswold v. Connecticut*, 381 U.S. 479 (1965), while affirmative action schemes are directly traceable to the fourteenth amendment.

115. *Croson*, 488 U.S. at 490; *see Lochner*, 198 U.S. at 61 (stating there must be material danger to health before state can interfere with right to contract).

116. *See, e.g., Baltimore & Ohio R.R. v. Interstate Commerce Comm'n*, 221 U.S. 612 (1911).

117. *Lochner*, 198 U.S. at 61-64.

118. After *Lochner*, the Court went further and began applying legislation intended to regulate business of labor unions. Notwithstanding legislative initiatives to curtail the Court's perceived hostility to workers, the Court continued to protect business interests by issuing injunctive relief. *See, e.g., Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921) (granting injunction against union boycott of employer on ground that Clayton and Sherman Acts forbid employee boycotts and strikes as a legal restraint of trade).

In response, Congress passed the Norris-La Guardia Act which included a section that curtailed the courts' use of the injunction against unions. Ch. 90, § 4, 47 Stat. 70 (1932) (codified as amended at 29 U.S.C. § 104 (1988)). The Supreme Court recently explained that the Norris-La Guardia Act "was enacted in response to federal court intervention on behalf of employers through the use of injunctive powers against unions and other associations of em-

Changed economic circumstances¹¹⁹ and political pressure¹²⁰ in the 1930s highlighted the Constitution's malleability as the Court began to relinquish control of economic policy and abandon "Lochnerism."¹²¹ Institutional weakening of the Court due partly to the *Lochner* era, has kept it from using the fourteenth amendment to tamper with more recent state economic regulation.¹²² Since the 1930s, the Court has subjected state regulation to a less stringent standard of scrutiny, and, therefore, it has been justifiable on less compelling grounds.¹²³

The lesson of *Lochner* should not be lost in *Croson*. Since *Lochner*, Justice Brennan has conceded that the Court's intrusion into economic matters comes at a high price.¹²⁴ Furthermore, the Court has recognized that its legitimacy comes only from pronouncements grounded in the words or ideals of the Constitution.¹²⁵ The Court did not insist on color-

ployees." *Jacksonville Bulk Terminals v. International Longshoremen's Ass'n*, 457 U.S. 702, 715 (1982) (citations omitted).

Then, as now, the Court maintained its philosophy and control of national economic policy, deeming that the Constitution prohibited legislation which inhibited freedom of contract. *See Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229 (1917) (enjoining union from persuading employees to join union and upholding employee agreement with employer not to join union as freedom to contract); *see also United Mine Workers of Am. v. Red Jacket Consol. Coal & Coke Co.*, 18 F.2d 839 (4th Cir. 1927) (restraining union employees from persuading non-union coal mine operators from breaking employment contracts).

119. The country was recovering from the Great Depression, and New Deal initiatives were taking shape. The Great Depression's beginning can be traced to the stock market crash of 1929 and its ending be traced to the start of World War II in 1939. 5 *THE NEW ENCYCLOPAEDIA BRITANNICA* 443 (15th ed. 1988). However, the American economy had gradually begun to recover from the ills of the Great Depression since the late 1930s. L. VALENTINE & C. DAUTEN, *BUSINESS CYCLES AND FORECASTING* 36 (1983); *see also* Keyserling, *The New Deal and Its Current Significance In Re National Economic and Social Policy*, 59 WASH. L. REV. 795, 796-97 (1984).

120. President Roosevelt faced with a Court predisposed against his New Deal initiatives, attempted to reconstitute that body by proposing the addition of one justice for each justice that was at least seventy years old and had ten years of service. H. ABRAHAM, *JUSTICES & PRESIDENTS* 208 (2d ed. 1985). This act heightened the Court's awareness that a coordinate branch of government was not going to leave any stone unturned in its attempt to limit the Court's excursions into the economic policy arena. *Id.* It is very likely that this event was partly responsible for the Court's charting of a new course soon thereafter. *Id.*

121. *See, e.g., NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (employers cannot restrain or coerce employees from exercising their fundamental rights to organize and select a representative).

122. Since *Lochner*, there has been only one such determination. *See Morey v. Doud*, 354 U.S. 457 (1957), *overruled in City of New Orleans v. Dukes*, 472 U.S. 297 (1976).

123. *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

124. *United States Trust Co. v. New Jersey*, 431 U.S. 1, 62 (1978) (Brennan, J., dissenting) ("this Court should have learned long ago that the Constitution — be it through the Contract or Due Process Clause — can actively intrude into . . . economic and policy matters only if my Brethren are prepared to bear enormous institutional and social costs").

125. *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986) ("The Court is most vulnerable and

blind criteria to dethrone official segregation,¹²⁶ and the use of such criteria to defeat set-aside programs, therefore, is hypocritical. Set asides present an opportunity for the Court to uphold the fourteenth amendment and its goal of equality. This cannot be achieved without consideration of race.¹²⁷

III. MAJORITARIAN PROTECTIONISM

Before emancipation, most states had laws severely curtailing the types of businesses in which blacks could engage. For example, some southern states prohibited blacks from engaging in businesses that required "competitive skills."¹²⁸ Upon the emancipation of blacks, white entrepreneurs had to compete with freed blacks entering into business. Yet, despite the freedom achieved through emancipation, blacks were subject to discriminatory laws¹²⁹ and processes¹³⁰ that ensured their exclusion from the marketplace. Blacks were, therefore, forced to compete in an "illegal" free market—in businesses associated with subservient status.¹³¹ Today, more than a century later, businesses owned by both whites and blacks continue to receive certain protection in the market-

comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.").

126. See, e.g., *Crosby*, 488 U.S. at 507 (city did not consider any race-neutral means to increase minority business participation). Color-blindness was relegated to the status of dissent in *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

127. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 407 (1978) (Blackmun, J., dissenting) (stating that it is virtually impossible to get beyond racism without consideration of race).

128. R. RANSOM & R. SUTCH, *ONE KIND OF FREEDOM* 36 (1977) (discussing post-1865 South Carolina requirement that black artisans purchase licenses, while whites were exempted); see also Bates, *The Potential of Black Capitalism*, 21 PUB. POL. 135 (1973).

129. See *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 70 (1873):

Among the first acts of legislation adopted by several of the States in the legislative bodies which claimed to be in their normal relations with the Federal government, were laws which imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty and property to such an extent that their freedom was of little value They were in some States forbidden to appear in the towns in any other character than menial servants. They were required to reside on and cultivate the soil without the right to purchase or own it. They were excluded from many occupations of gain. . . .

Id.

130. Craft unionism was an effective tool for excluding blacks from acquiring trade skills which served as a stepping stone to entrepreneurship. See R. RANSOM & R. SUTCH, *supra* note 128, at 31-39.

131. See generally A. HARRIS, *THE NEGRO AS CAPITALIST*, A Study of Banking and Business Among American Negroes 9-13 (1968) (businesses such as barbershop/beauty parlor operation, cooking, cleaning, and shoe shine and repair were avoided by white entrepreneurs and deemed more suitable for individuals with skills and personality traits of a servient class).

place, albeit on more creative and democratic grounds. The following subsections discuss such protection.

A. Antitrust Legislation

Experience teaches us that if businesses were left to pure market competition without any interfering legislation, the entrepreneurial landscape would look quite different.¹³² Early in this country's history, the federal government recognized this and responded with antitrust legislation.¹³³ The pressing concern that led to the passage of the Sherman Antitrust Act over a century ago was that small enterprises could be crushed by larger businesses, resulting in great inequality of wealth and opportunity.¹³⁴ Congress feared that the country would suffer if its powers of production and economic affairs were controlled by only a few people.¹³⁵ Congress followed up on the economic opportunity issue with subsequent legislation such as the Clayton Act,¹³⁶ the Federal Trade Commission Act,¹³⁷ and the Robinson-Patman Act.¹³⁸ These pro-competition legislative initiatives have continually received strong support from the Court¹³⁹ despite the fact that their constitutional foundation

132. See *infra* note 134.

133. See Sherman Antitrust Act, ch. 64.7, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-7 (1988)).

134. See 21 CONG. REC. 2598 (1890). Senator George stated:

These evils have grown within the last few years to an enormous magnitude; enormous also in their numbers. They cover nearly all the great branches of trade and of production in which our country is interested. They grow out of the present tendency of economic affairs throughout the world. It is a sad thought to the philanthropist that the present system of production and of exchange is having that tendency which is sure at some not very distant day to crush out all small men, all small capitalists, all small enterprises. This is being done now. We find everywhere over our land the wrecks of small, independent enterprises thrown in our pathway. So now the American Congress and the American people are brought face to face with this sad, this great problem. Is production, is trade, to be taken away from the great mass of the people and concentrated in the hands of a few men who, I am obliged to add, by the policies pursued by our Government, have been enabled to aggregate to themselves large, enormous fortunes?

Id. During the debates on this issue, Senator Sherman further elaborated:

The popular mind is agitated with problems that may disturb social order, and among them all none is more threatening than the inequality of condition, of wealth, and opportunity that has grown within a single generation out of the concentration of capital into vast combinations to control production and trade and to break down competition.

Id. at 2460.

135. See *id.* at 2460.

136. Ch. 323, 38 Stat. 730 (1914) (current version at 15 U.S.C. §§ 12-27 (1988)).

137. Ch. 311, 38 Stat. 717 (1914) (current version at 15 U.S.C. §§ 41-58 (1988)).

138. Ch. 592, 49 Stat. 1526 (1936) (codified as amended at 15 U.S.C. §§ 13-13b, 21a (1988)).

139. In *United States v. American Tel. and Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd*

may not be as solid and compelling as the fourteenth amendment is for affirmative action.¹⁴⁰

mem., 460 U.S. 1001 (1983), the court strongly reaffirmed the pro-competition principles of the Sherman Act as well as the Act's constitutional foundation under the commerce clause in the highly publicized breakup of AT&T. *See id.* More recently, in *California v. American Stores*, 110 S. Ct. 1853 (1990), the Clayton Act was reinvigorated by a holding that section 16 of that Act can be used by states and consumers to challenge anti-competitive mergers. *Id.* at 1866-67 (construing 15 U.S.C. § 16 (1973)), *amended by* 15 U.S.C. § 25 (1988)). Similarly, in *Texaco v. Hasbrouck*, 110 S. Ct. 2535 (1990), the Court found that the Robinson-Patman Act prohibited manufacturers from discounting merchandise to wholesalers and not retailers when such discounts have no relationship to costs incurred by the manufacturer or wholesaler. *Id.* at 2514-42.

The Court's reaffirmation of competitive opportunity principles is particularly notable in light of continuing federal initiatives that limit or dilute antitrust legislation in order to facilitate global competition. *See, e.g.*, Export Trading Company Act of 1982, Pub. L. No. 97-290, 96 Stat. 1233 (codified as amended at 15 U.S.C. §§ 4001-4053 (1988)) (granting broad antitrust immunity when anti-competitive effects of activity essentially only occurs abroad); National Cooperative Research Act of 1984, Pub. L. No. 98-462, 98 Stat. 1815 (codified as amended at 15 U.S.C. §§ 4301-4305 (1988)) (lessening standard for evaluating research and development ventures and reducing damage limit for civil actions); Cooperative Productivity and Competitiveness Act of 1989, H.R. 423, 101st Cong., 1st Sess.; National Cooperative Innovation and Commercialization Act of 1989, H.R. 1024, 101st Cong., 1st Sess. (1989). Despite contentions by American companies that they need to join forces in order to survive international competition, the Court has stayed its course on antitrust principles. *See United States v. Ivaco, Inc.*, 704 F. Supp. 1409, 1427-28 (W.D. Mich. 1989) (enjoining merger that would have resulted in 70% control of market for railroad tamping equipment and rejecting contention that merger was necessary to compete in Europe). These principles are equally applicable when the competition is between local concerns in different states. *See United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 370 (1963) (rejecting contention that consolidation justifiable because anti-competitive effects fell on out-of-state banks). Concerns about harm to innocent victims, stigmatization, stereotyping and the like, were not articulated as constitutionally limiting factors by the Court. *See id.* The economic impact of these decisions, however, greatly exceeds the reach or potential of all set-aside programs combined. This results because set-aside programs represent a small percentage of American contracting dollars. *See, e.g.*, *Fullilove v. Klutznick*, 448 U.S. 448, 459 (1980) ("in the year 1976 less than 1% of all federal procurement was concluded with minority business enterprises, although minorities comprised 15-18% of the population"). *Hearings, supra* note 4 (unpublished testimony of Parren Mitchell, "minority business participation remained fixed at about 1/10 of 1%" between 1972 and 1987), while antitrust decisions affect the economic vitality of *all* small business. If large numbers of majority small businesses were forced to close because of inability to compete with trusts, the resultant economic impact would logically be even greater.

140. The goals of the framers of the fourteenth amendment were, in general, to guarantee certain civil liberties against government action; to apply these liberties to all citizens equally; to give Congress wide power to expand civil rights and enforce the amendment; and to make the federal government the guarantor of individual civil rights. *See* 2 R. ROTUNDA, J. NOWAK & J. YOUNG, *TREATISE ON CONSTITUTIONAL LAW SUBSTANCE AND PROCEDURE* § 18.72, at 378-79 (1986). The opportunity for material self-development can, consequently, be traced directly to the fourteenth amendment and its purposes. Antitrust law, on the other hand, has its genesis in the commerce clause, U.S. CONST. art. I, § 8, cl. 3. *See Wickard v. Filburn*, 317 U.S. 111, 121 (1942); *Adair v. United States*, 208 U.S. 161, 183 (1908); *Northern Sec. Co. v. United States*, 197 U.S. 197, 337 (1904). This constitutional provision gives Congress the power to regulate interstate commerce, and has been interpreted to provide the basis

B. *The Small Business Act*

Congress also demonstrated its willingness to protect small, majority-owned businesses by enacting the Small Business Act.¹⁴¹ Recognizing the special survival and competitive needs of small majority businesses, Congress stepped in with assistance.¹⁴² The congressional findings which triggered "protective" legislation for majority firms are identical in many respects with its findings that support the 8(a) program of the Small Business Act, minus, of course, the element of discrimination on the basis of race.¹⁴³ Spurned by complaints of small, majority businesspersons, Congress examined the federal procurement process and concluded that:

Small business is the bulwark of free competitive enterprise Congress recognizes the importance of small business to our free competitive economy and in this bill declares as its policy—that the Government should aid, counsel, assist, and protect insofar as is possible the interest of small business concerns in order to preserve free competitive enterprise, to ensure that a fair proportion of the total purchases and contracts for supplies and services for the Government be placed with small business enterprises, and to maintain and strengthen the overall economy of the Nation.¹⁴⁴

These principles should also serve to justify similar protection for minorities and have been regarded as consistent with the democratic principles upon which this country was founded.¹⁴⁵

for regulating monopolies and other trade practices through the necessary and proper clause, U.S. CONST. art. I, § 8, cl. 18. *Washington Brewer Inst. v. United States*, 137 F.2d 964 (9th Cir.), *cert. denied*, 320 U.S. 776 (1943). This use of "implied" versus apparent power to legislate in a specific area, places antitrust analysis in the penumbra. *See Kohl v. United States*, 91 U.S. 367, 372 (1875). Affirmative action schemes, however, are directly traceable to the fourteenth amendment. *See supra* notes 105-08 and accompanying text.

141. Pub. L. No. 85-536, 92 Stat. 384 (1958) (codified as amended at 15 U.S.C. §§ 631-650 (1988)).

142. *See* H.R. REP. NO. 494, 83d Cong., 1st Sess. 1-3, *reprinted in* 1953 U.S. CODE CONG. & ADMIN. NEWS, 2020, 2020-22.

143. Problems such as limited working capital, difficulty obtaining bonding and lack of experience plague most small firms. *See id.* at 2-3, *reprinted in* 1953 U.S. CODE CONG. & ADMIN. NEWS at 2021-22.

144. *Id.* at 3, *reprinted in* 1953 U.S. CODE CONG. & ADMIN. NEWS at 2022.

145. 21 CONG. REC. 2547 (1890).

If the concentrated powers of this combination are entrusted to a single man, it is a *kingly prerogative, inconsistent with our form of government*, and should be subject to strong resistance of the State and national authorities. If anything is wrong this is wrong. If we will not endure a king as a political power we should not endure a king over the production, transportation, and sale of any of the necessities of life. If we

C. *The Buy American Act*

Majority businesspersons receive further protection from the Buy American Act.¹⁴⁶ Regulations promulgated pursuant to this legislation subject foreign bidders to a six or twelve percent surcharge¹⁴⁷ when pursuing government procurement¹⁴⁸ and construction¹⁴⁹ projects, thereby increasing the competitive edge of domestic entrepreneurs over foreign businesses. Domestic entrepreneurs have attempted to broaden this preserve through self-serving interpretations of the Act.¹⁵⁰ Although the for-

would not submit to an emperor we should not submit to an autocrat of trade, with power to prevent competition and to fix the price of any commodity.

Id. (emphasis added). To highlight the magnitude of abuse and the need for action, Senator Sherman also played on America's worst fears. He stated:

Sir, now the people of the United States as well as of other countries are feeling the power and grasp of these combinations, and are demanding of every Legislature and of Congress a remedy for this evil, only grown into huge proportions in recent times. They had monopolies and mortmains of old, but never before such giants as in our day. You must heed their appeal or be ready for the *socialist*, the *communist*, and the *nihilist*. Society is now disturbed by forces never felt before.

Id. at 2460.

146. 41 U.S.C. §§ 10a-10c (1987). The Act was a product of the depression, and designed to foster and protect American industry, workers, and invested capital. *See* 76 CONG. REC. 1896 (1933) (statement of Rep. Eaton).

147. *See* 41 U.S.C. § 10a.

148. 41 U.S.C. § 10a provides:

Notwithstanding any other provision of law, and unless the head of the federal agency concerned shall determine it to be inconsistent with the public interest, or the cost to be unreasonable, only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States, shall be acquired for public use. This section shall not apply with respect to articles, materials, or supplies for use outside the United States, or if articles, materials, or supplies of the class or kind to be used or the articles, materials, or supplies from which they are manufactured are not mined, produced, or manufactured, as the case may be, in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality.

149. *Id.* § 10b(a). This section provides:

Every contract for the construction, alteration, or repair of any public building or public work in the United States growing out of an appropriation heretofore made or hereafter to be made shall contain a provision that in the performance of the work the contractor, subcontractors, material men, or suppliers, shall use only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States except as provided in section 10g of this title: Provided, however, that if the head of the federal agency making the contract shall find in respect to some particular articles, materials, or supplies it is impracticable to make such requirement or that it would unreasonably increase the cost, an exception shall be noted in the specifications as to that particular article, material, or supply, and a public record made of the findings which justified the exception.

Id.

150. *See, e.g., Allis-Chalmers Corp. v. Friedkin*, 635 F.2d 248 (3d. Cir. 1980). In this case,

eign business surcharge might result in inefficient procurement or higher contract costs, the procuring agency's decision will be upheld as long as it is rational.¹⁵¹ The light burden of rationality applied to preference programs, as opposed to strict scrutiny applied to set-aside programs,¹⁵² further immunizes preference programs from court challenges.

IV. THE CASE FOR ECONOMIC DEMOCRACY

This country was founded on democratic principles, and its laws should reflect that foundation.¹⁵³ Minority firms' employees represent a significant portion of the nation's labor force.¹⁵⁴ These firms, through their employees, provide meaningful contributions to the production of goods and services in our economy.¹⁵⁵

a company subject to the Buy American Act was awarded a contract for the construction of a power plant because its bid was lower than Allis-Chalmers' even after a six percent surcharge was added. *Id.* at 249-50. Allis-Chalmers contended that the "entire" bid price was controlled by the Act, and the 12% surcharge was applicable since its firm was located in a labor surplus area. *Id.* at 243-54. The court adopted an administrative finding that Allis-Chalmers was located not in the city represented but, rather in a nearby township which did not have substantial unemployment, thereby making the imposition of a 12% surcharge inappropriate. *Id.* at 252-53. Further, the court found that Allis-Chalmers' construction of the Executive Order and implementing regulations governing bid price under the Act ignored clear mandates in the Act. *Id.* at 254. Specifically, the court noted that implementing regulations and the Executive Order require that surcharges be applied on a line-by-line basis, that post delivery expenses be excluded, and that foreign bids be separated into taxable and non-taxable categories. *Id.* at 254-55. Another court held that the Navy's failure to grant an American contractor a waiver of domestic buying requirements was an abuse of discretion, when the contractor could not obtain materials domestically at the price originally submitted in his bid. *John C. Grimberg Co. v. United States*, 869 F.2d 1475, 1478 (Fed. Cir. 1989).

151. *Allis-Chalmers Corp.*, 635 F.2d at 253; *Sea-Land Serv. v. Brown*, 600 F.2d 429, 435 (3d Cir. 1979).

152. *See supra* notes 37-60 and accompanying text.

153. Notwithstanding the shortsightedness of the framers who compromised the rights of blacks on political and economic grounds in order to reach middle ground with the representatives of slave states, W. JORDON, *WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO* 323-24 (1968), the preamble to the Constitution and many of its amendments suggest that the foundational base for affirmative action programs is strongly embedded in our laws. *See J. NOWAK, R. ROTUNDA, AND J. YOUNG, CONSTITUTIONAL LAW* 556-57 (3d ed. 1986); W. JORDAN, *supra*, at 322-25. The preamble of the Constitution provides:

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

U.S. CONST. preamble.

154. *See Hearing Before the Comm. on Governmental Affairs on S. 1235 to Amend the Civil Rights Act of 1964*, 101st Cong., 2d Sess. (1990) (statement of Senator Paul Simon) (transcript on file at Loyola of Los Angeles Law Review). Senator Simon stated that, for example, "[a]pproximately 7,200 to 10,800 new jobs were created from 1985 through 1988 through Chicago's minority business set-aside program." *Id.*

155. *See id.* In noting the findings of a study commissioned by Chicago's mayor, Richard

Under ideal circumstances, or in a race-neutral society,¹⁵⁶ private sector contracting would be a viable option. In our less than ideal society, however, this option is fraught with overwhelming difficulties. The Supreme Court opinions suggest, however, that the Court is not looking for a way to give its imprimatur to DBE programs, but rather it is convinced that such programs have run their course and are no longer needed.¹⁵⁷

A. Metro Broadcasting—*Too Little, Too Late*

*City of Richmond v. J.A. Croson Co.*¹⁵⁸ is the first case in which a majority of the Court held that "benign"¹⁵⁹ racial classifications are subject to the same demanding standard of review as "invidious" classifications.¹⁶⁰ *Croson* created disagreement in the courts of appeals as to whether non-remedial benign racial classifications are permissible.¹⁶¹ In

Daley, to study that city's set-aside goals, Senator Simon stated, "The Blue Ribbon Panel also found significant economic benefits to minority and women owned-businesses, to their communities, and to the City of Chicago itself." *Id.*

156. Even if the legacy of slavery and discrimination were disregarded and business opportunities for minorities were assessed in contemporary times, it would not be difficult to find a dearth of opportunities and the likelihood of failure would still be great. *See, e.g., Hearings, supra* note 4 (testimony of Mr. Parren Mitchell). Even firms with proven track records are unable to secure work in the private sector. *Id.* In fact, firms that successfully perform with majority firms on public sector work are almost never associated with in the future on non-affirmative action projects. *Id.* Even when minority participation is required, some firms will go to great lengths to secure a waiver of minority inclusion, notwithstanding the availability of competent firms. *Id.* Discriminatory banking and bonding practices of majority institutions only serve to aggravate an already pathetic situation. *See id.* (testimony of E. Mitchell, Sr., founder and former President of E. Mitchell Construction Co.).

157. *See, e.g., City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 1842 (1986).

158. 488 U.S. 469 (1989).

159. Benign racial classifications are classifications having legitimate, nondiscriminatory purposes. *Id.* at 470, 490-91; *see also Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 298 (1978).

160. Comment, *Affirmative Action After City of Richmond v. J.A. Croson Co.: A Response to the Scholars' Statement*, 99 YALE L.J. 155, 156 (1989). An invidious classification is one based on offensive, unfair discriminatory motives. *Croson*, 488 U.S. at 526-27.

161. *Shurberg Broadcasting v. FCC*, 876 F.2d 902 (D.C. Cir. 1989), *cert. granted sub nom., Astroline Communications Co. v. Shurberg Broadcasting*, 110 S. Ct. 715 (1990); *see Winter Park Communications v. FCC*, 873 F.2d 347 (D.C. Cir. 1989), *aff'd sub nom. Metro Broadcasting v. FCC*, 110 S. Ct. 2997 (1990). *Winter Park Communications* involved a challenge to the Federal Communications Commission's (FCC) use of "qualitative enhancement" criteria for minority ownership when awarding broadcasting licenses. 873 F.2d at 349-50. A majority station owner contended that these criteria violated the fifth amendment's equal protection mandate. *Id.* at 352. A panel of the D.C. Circuit concluded that non-remedial benign racial classifications were still permissible after *Croson*. *Id.* at 353. The Court reached a different result in *Shurberg Broadcasting*, which involved a challenge to an FCC distress sale program that favored minorities. 876 F.2d at 910. In that case, it was also contended that these pro-

addition, the *Croson* decision brought to focus, but left open, judicial analysis of programs that are funded by both federal and state monies. Justice O'Connor suggested that Congress could require or authorize federal minority programs which the states could not require or authorize by themselves.¹⁶² Because many local programs across the country receive federal assistance with the requirement that they establish racial preferences,¹⁶³ lower courts must resolve whether *Fullilove v. Klutznick*,¹⁶⁴ which involved a remedial federally funded program, or *Croson*, which involved a remedial state funded program, applies in determining the constitutionality of federally supported state programs.

In *Metro Broadcasting v. FCC*,¹⁶⁵ the Court only addressed the permissibility of non-remedial classifications.¹⁶⁶ After assessing two FCC policies which gave preference to racial minorities in awarding licenses to broadcasters,¹⁶⁷ the Court held that the standards outlined in *Croson* did not apply to benign racial classifications in federal laws.¹⁶⁸ The case focused not on minority entrepreneurship in broadcasting but, rather, on diversity in media programming, which is partly achieved through mi-

grams violated fifth amendment rights. *Id.* Another D.C. Circuit panel held that racial classifications can only be justified when used for remedial purposes or in an educational setting. *Id.* at 912.

162. *Croson*, 488 U.S. at 490-91. "We do not . . . find in § 5 of the Fourteenth Amendment some form of federal pre-emption in matters of race. We simply note what should be apparent to all—section 1 of the Fourteenth Amendment stemmed from distrust of state legislative enactments based on race" *Id.* at 491.

163. *See, e.g.*, 41 C.F.R. § 60-4.2 (1990) (contractor's compliance with executive order and the regulations in 41 C.F.R. pt. 60-4 (1990) shall be based on its implementation of equal opportunity clause, specific affirmative action obligations required by specifications set forth in 41 C.F.R. 60-4.3(a) and its efforts to meet goals); *id.* § 60-4.5(a) (a contractor participating, either individually or through an association, in approved Hometown Plan, including highway affirmative action plans, shall comply with its affirmative action obligations under Exec. Order No. 11,246, 3 C.F.R. 339 (1964-1965) by complying with its obligations under the plan); *id.* § 60-5.2(a) (under the equal opportunity clause contained in Exec. Order No. 11,246, 3 C.F.R. 339 (1964-1965), employers are prohibited from discriminating against employees or applicants for employment because of religion or national origin, and must take affirmative action to insure that applicants are employed, and that employees are treated during employment without regard to their religion or national origin).

164. 448 U.S. 448 (1980).

165. 110 S. Ct. 2997 (1990).

166. *See id.* at 3002.

167. *Id.* at 3004-05. Under its minority ownership policy, the FCC considered minority ownership and participation in management a positive factor when conducting comparative hearings to award licenses. *Id.* The second factor, generally referred to as the distress sale policy, allowed minorities to purchase licenses that are in jeopardy of revocation, at a reduced rate. *Id.* at 3005.

168. *Id.* at 3009-10. The Court specifically noted that the FCC policies were not designed to assist victims of discrimination, but to promote programming diversity. *Id.* at 3010.

nority ownership.¹⁶⁹ Writing for the Court, Justice Brennan noted that: benign race-conscious measures mandated by Congress—even if those measures are not “remedial” in the sense of being designed to compensate victims of past governmental or societal discrimination—are constitutionally permissible to the extent they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives.¹⁷⁰

Noting that the FCC policies were not entirely remedial, but rather geared towards promoting programming diversity, the Court concluded that diversity sufficed as an important governmental objective.¹⁷¹ Thereafter, the Court focused on whether the ownership policies were substantially related to the achievement of that objective.¹⁷²

Viewed in its most positive light, *Metro Broadcasting* represents a victory for minorities because it provides strong reaffirmation of *Fullilove* and Congress’ broad powers to institute race-conscious schemes. The *Metro Broadcasting* decision was not, however, a wholesale victory for minorities. It also reaffirmed some of the principles enunciated in *Croson*, that act as major impediments to minority contractors. *Metro Broadcasting* reiterated that states will be judged by less deferential standards than Congress in enacting benign discrimination legislation.¹⁷³ It also reaffirmed *Croson*’s holding that race-neutral alternatives must be considered prior to establishing or approving an affirmative action program,¹⁷⁴ that a program must be narrowly tailored in extent and duration,¹⁷⁵ and innocent victims cannot be unduly burdened by the program.¹⁷⁶ Therefore, after *Metro Broadcasting*, states and local governments still must satisfy the *Croson* standards that have eviscerated minority contracting.¹⁷⁷

169. *Id.* at 3012-13.

170. *Id.* at 3008-09.

171. *Id.* at 3010.

172. *Id.*

173. *Id.* at 3009. “With respect to this ‘complex’ empirical question . . . we are required to give ‘great weight to the decisions of Congress and the experience of the commission.’” *Id.* at 3011 (quoting *Columbia Broadcasting Sys. v. Democratic Nat’l Comm.*, 412 U.S. 94, 102 (1973)).

174. *Metro Broadcasting*, 110 S. Ct. at 3019; *Croson*, 488 U.S. at 506. In *Metro Broadcasting*, the Court found that three attempts at race-neutral alternatives had failed. 110 S. Ct. at 3022-23.

175. *Metro Broadcasting*, 110 S. Ct. at 3024 (tailoring was achieved through periodic review of policies, continual hearings, annual reports to Congress and judicial review); *Croson*, 488 U.S. at 509-10.

176. *Metro Broadcasting*, 110 S. Ct. at 3025-26; *Croson*, 488 U.S. at 509-10.

177. See *supra* notes 75-100 and accompanying text for a general discussion of *Croson*.

For minority entrepreneurs, *Metro Broadcasting's* standards are not helpful. It technically assures that affirmative action is not dead, yet it simultaneously creates negligible opportunities for economic empowerment and impact.¹⁷⁸ In addition, the prospect that the decision will be narrowly interpreted and limited to the broadcast industry remains an open question.¹⁷⁹ Moreover, the increasingly conservative ideology represented on the Supreme Court will probably further limit *Metro Broadcasting*.¹⁸⁰ Despite the *Croson* Court's deference to federal initiatives,¹⁸¹ some federally funded programs are still being challenged.¹⁸² *Metro Broadcasting* did not address programs jointly funded by federal and state or local governments. As previously noted, in many instances, federal funds are tied to a requirement that race-based measures must be used to remedy the effects of discrimination.¹⁸³ Since *Croson* requires specific findings by states prior to implementing their programs,¹⁸⁴ states piggybacking on federal findings have been hauled into court on the basis of violating *Croson*. For example, in *Cone Corp. v. Florida Department of*

178. See *Metro Broadcasting*, 110 S. Ct. at 3025-26.

179. The Court specifically noted that it was not dealing with fixed quantity set-asides. *Metro Broadcasting*, 110 S. Ct. at 3027. In addition, future challengers to government minority business programs will be able to distinguish *Metro Broadcasting* because of its reliance on first amendment interests in diversity. *Id.* at 3010-11.

180. This is due to Justice Brennan's resignation and four other justices' deep-seated opposition to any affirmative action plans that are not remedial. See *id.* at 3028 (O'Connor, J., dissenting) (Rehnquist, C.J., Scalia, J., Kennedy, J., joined in dissent). Support from Justice White also seems limited to instances where programs are established or supported by Congress. See *Croson*, 488 U.S. at 476. Although Justice Souter is a self-portrayed supporter of broad affirmative action schemes, S. EXEC. REP. NO. 32, 101st Cong., 2d Sess. 23-25 (1990), state and local initiatives remain in jeopardy until his vote in a future case confirms his declaration of support.

181. *Croson*, 488 U.S. at 504.

182. See *H.K. Porter Co. v. Metropolitan Dade County*, 825 F.2d 334 (11th Cir. 1987), *vacated*, 489 U.S. 1062 (1989) (mem.) (remanded for reconsideration in light of *Croson*); *Tennessee Asphalt Co. v. Farris*, No. 3-85-1176, slip op. (M.D. Tenn. June 14, 1990); *Cone Corp. v. Florida Dep't of Transp.*, No. 88-40042, slip op. (N.D. Fla. Aug. 1, 1989).

183. See, e.g., 41 C.F.R. § 60-4.2 (1990) (contractor's compliance with executive order and regulations in 41 C.F.R. part 60-4 shall be based on its implementation of equal opportunity clause, specific affirmative action obligations required by specifications set forth in 41 C.F.R. 60-4.3(a) and its efforts to meet goals); *id.* § 60-4.5(a) (contractor participating, either individually or through association, in approved Hometown Plan, including highway affirmative action plans, shall comply with its affirmative action obligations under Exec. Order No. 11,246, 3 C.F.R. 339 (1964-1965) by complying with its obligations under plan); *id.* § 60-5.2(a) (under equal opportunity clause contained in Exec. Order No. 11,246, 3 C.F.R. 339 (1964-1965) as amended, employers are prohibited from discriminating against employees or applicants for employment because of religion or national origin, and must take affirmative action to insure that applicants are employed, and that employees are treated during employment without regard to their religion or national origin). See also *supra* note 163 and accompanying text.

184. *Croson*, 488 U.S. at 504.

Transportation,¹⁸⁵ a Florida district court granted summary judgment to majority contractors who attacked the state's ten percent Disadvantaged Business Enterprise goal for highway construction.¹⁸⁶ The court did not apply *Croson*, however, because the contracts involved federal funds.¹⁸⁷ Likewise, in *H.K. Porter Co. v. Metropolitan Dade County*,¹⁸⁸ the Court, in granting certiorari, vacated and remanded, in light of *Croson*, the Eleventh Circuit's determination that the county did not have to make additional findings of discrimination in order to participate in federal funding for highway construction.¹⁸⁹ Other federal courts have concluded that states need not go through the ritual of making specific findings but can rely on congressional determinations that remediation should occur when federal funding is involved. In *Tennessee Asphalt Co. v. Farris*,¹⁹⁰ a Tennessee district court ruled that:

A state which acts according to congressionally-determined specifications to administer a project induced by congressionally-approved funding is not acting independently in the sense that should raise constitutional implications Since it is apparent that a state would be shielded from constitutional attack if it simply enacted findings reiterating those of Congress word for word, why should the states not be allowed to rely on the congressional findings openly—as opposed to doing the same thing by going through an inane ritual?¹⁹¹

The *Tennessee Asphalt* court also cited with approval another case, *Milwaukee County Pavers Association v. Fiedler*,¹⁹² which held that *Fullilove* controlled jointly funded programs, and that a state need not make separate findings of fact to support its set-aside program.¹⁹³ In *Milwaukee County Pavers*, the court had reasoned that the state should be regarded as a subsidiary element of the federal initiative when it uses race-conscious measures in order to receive federal funding.¹⁹⁴

Until the Supreme Court hears such a case, lower court challenges

185. No. 88-40042, slip op. (N.D. Fla. Aug. 1, 1989).

186. *Id.*

187. *Id.*

188. 489 U.S. 1062 (1989) (mem.).

189. *H.K. Porter Co.*, 825 F.2d at 331. The Eleventh Circuit reached this conclusion based on the fact that the Surface Transportation Assistance Act of 1978 required that recipients of federal funds institute affirmative action plans. *Id.* at 325.

190. No. 3-85-1176, slip op. (M.D. Tenn. June 14, 1990).

191. *Id.* at 9.

192. 710 F. Supp. 1532 (W.D. Wis. 1989).

193. *Tennessee Asphalt Co.*, No. 3-85-1176, slip op. at 10 (citing *Milwaukee County Pavers Ass'n v. Fiedler*, 710 F. Supp. 1532, 1546 (W.D. Wis. 1989)).

194. *Milwaukee County Pavers*, 710 F. Supp. at 1545.

will continue to explore the distinction between federally mandated programs imposed on a state, and programs voluntarily created by a state to secure federal funds. *Metro Broadcasting* suggests that generalized observations by Congress will support a federal program.¹⁹⁵ The extent to which deference to congressional findings can serve as the predicate for state and local programs, however, remains to be seen.

V. CONGRESS AS A SOLUTION

In light of the Supreme Court's reluctance to authorize affirmative action programs, Congress is viewed as the proper alternate forum for addressing minority concerns. After all, it was congressional initiative that served as a catalyst for state and local minority set-aside programs in the first place.¹⁹⁶ Moreover, Congress has at times stepped in to prevent injustice when the Court has set legal or constitutional standards higher than minorities could hurdle to advance their cause in the courts.¹⁹⁷ During the *Lochner* era, Congress was instrumental in responding to judicial insensitivity to marketplace needs.¹⁹⁸ Congress, however, has been a curious ally. Although at times Congress has stepped in to prohibit discriminatory practices,¹⁹⁹ it has failed to intervene at other times when its assistance was badly needed.²⁰⁰ Nonetheless, the latest affirmative action decisions have so affected the disadvantaged that minorities have turned to Congress for refuge.²⁰¹ Given the unpopularity of set-aside pro-

195. *Metro Broadcasting*, 110 S. Ct. at 3027-28.

196. See, e.g., Public Works Employment Act of 1977, Pub. L. No. 95-28, 91 Stat. 116 (codified at 42 U.S.C. §§ 6701-6710 (1988)).

197. For example, in *City of Mobile v. Bolden*, the Court rejected a class action suit by negro citizens challenging the city's at-large electoral system as violative of the fifteenth amendment and the equal protection clause of the fourteenth amendment. 446 U.S. 55, 65, 74 (1980). For both amendments the Court stated that plaintiffs must prove purposeful discrimination and that a showing of disproportionate effects was not sufficient to establish a claim of unconstitutional vote dilution. *Id.* at 66, 70. In response, Congress amended the Voting Rights Act of 1982 to provide that "effects" were sufficient for proving such cases. Voting Rights Act of 1982, Pub. L. No. 97-205, § 2(b), 96 Stat. 131, 134 (codified as amended at 42 U.S.C. § 1973(b) (1988)); see SEN. REP. NO. 417, 97th Cong., 2d Sess. 15-17 (1982). This amendment was upheld by the Court in *Thornburg v. Gingles*, 478 U.S. 30 (1986).

198. See, e.g., Clayton Act, ch. 323, 38 Stat. 730 (1914) (current version at 15 U.S.C. §§ 12-27 (1988)); Norris-La Guardia Act, Pub. L. No. 72-68, 47 Stat. 70 (1932) (codified as amended at 29 U.S.C. §§ 101-115 (1988)); National Labor Relations Act, Pub. L. No. 74-198, 49 Stat. 449 (1935) (current version at 29 U.S.C. §§ 151-169 (1988)).

199. See, e.g., Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000e - 2003-17 (1988)) (prohibiting discrimination through use of commerce power).

200. For example, Congress never legislated to outlaw or regulate slavery. Instead slavery was outlawed by constitutional amendment. U.S. CONST. amend XIII.

201. One of the strategies employed by the Lawyers Committee For Civil Rights Under

grams in many quarters,²⁰² reliance on Congress for relief remains a questionable proposition. Timing sometimes becomes crucial in gaining support and assistance from Congress.²⁰³ In any event, substantial data exist which demonstrate that internally the country is at a critical stage with respect to opportunities for minorities and immediate remedial re-

Law, to respond to recent decisions, is political lobbying. *See, e.g.*, Memorandum from Barbara R. Arnwine, Executive Director Lawyers' Committee for Civil Rights Under Law to Supporters of the 1990 Civil Rights Act (Nov. 5, 1990) (discussing past efforts of group to pass 1990 Civil Rights Act and future efforts necessary to pass 1991 Civil Rights Act). That organization promoted a legislative lobbying network intended to pressure delegates, congresspersons and senators into taking action by voting to support legislation which would establish laws that will restore the vitality of civil rights legislation. *See id.* On February 8, 1990, a bipartisan group of legislators introduced a bill titled "Civil Rights Act of 1990," which sought to remedy or overturn the latest decisions that have eviscerated job discrimination laws. *See* H.R. 4000, 101st Cong., 2d Sess. (1990). The intent of the Bill was to shift the burden of proof back to employers and to curtail lawsuits challenging court approved consent decrees. *Id.* at 3. The bill focuses on decisions such as *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) (holding that the Civil Rights Law of 1866 covers racial harassment in hiring but not on the job); *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642 (1989) (holding that the employee has the burden of showing the impact of each employment practice and how it caused discrimination, while the employer's only burden is to produce *subjective* hiring and promotion criteria justifying its decision); and *Martin v. Wilks*, 490 U.S. 755 (1989) (allowing white firefighters to challenge consent decree between city and group of black firefighters). The bill, however, did not directly address the legality of affirmative action programs and was attacked by the Bush administration as being too broad, and as establishing quotas. *See, e.g.*, Memorandum from Barbara R. Arnwine, *supra*, at 1. *See also* Moore, *After the Marching*, NATIONAL JOURNAL, June 23, 1990, at 1525. Although the bill was approved in both Houses of Congress, it was vetoed by the President. 136 CONG. REC. S16562-02 (daily ed. Oct. 24, 1990). The Lawyers' Committee for Civil Rights Under Law has resolved to reintroduce the bill at the beginning of Congress' next term. Memorandum from Barbara R. Arnwine, *supra*, at 1. As planned, a new bill was introduced on January 3, 1991, titled the Civil Rights Act of 1991. H.R. 1, 102d Cong., 2d Sess., 137 CONG. REC. H53-01 (daily ed. Jan. 3, 1991).

On May 8, 1990, a series of hearings began to respond to the Supreme Court decision in *City of Richmond v. Croson*, 488 U.S. 469 (1989). *See Hearings, supra* note 4.

202. In addition to *Croson*, district courts in several jurisdictions have struck down set-aside plans favoring minority business enterprises. *See, e.g.*, *Milwaukee County Pavers Ass'n v. Fiedler*, 707 F. Supp. 1016 (W.D. Wis. 1989) (held contractors were likely to succeed on claim that statute was unconstitutional in absence of evidence of prior discrimination); *Contractors Ass'n of E. Pa., Inc. v. Philadelphia*, 735 F. Supp. 1274 (E.D. Pa. 1990) (city's reservation of certain contracts for bidding only by disadvantaged businesses held violative of equal protection).

203. Many of the efforts to promote and protect small businesses were triggered by wartime conditions. For example, the Smaller War Plants Corporation was created to effectively incorporate small businesses into the war material production process for World War II. *See* Act of June 11, 1942, Pub. L. No. 77-603, ch. 404, § 4(f)(4), 56 Stat. 351, 354 (1942) (expired 1946). Again in 1951, the Small Defense Plants Administration was created as a result of the Korean War. *See* Act of July 31, 1951, Pub. L. No. 82-96, ch. 275, § 714 (b)(1) (B), (C), 65 Stat. 131, 140 (1951) (repealed 1966). This agency attempted to assist small businesses in obtaining prime contracts which they typically had been unable to obtain due to circumstances such as lack of a track record, capital, bonding, etc. *Id.*

sponses are necessary.²⁰⁴

The constitutional and economic magnitude of the Court's decision in *City of Richmond v. J.A. Croson Co.*²⁰⁵ is tremendous. Although only a small window of opportunity for minorities remains at the federal level, the weight of authority suggests that the federal government alone cannot ensure equal opportunity for minorities.²⁰⁶ We need a substantial national commitment to democratic ideals supported by both Congress and the Court.²⁰⁷ To say that Congress has greater discretion than states to remedy the effects of past discrimination is to engage in legal calisthen-

204. See 1988 Comm. on the Cities, "The Kerner Report Twenty Years Later" (Mar. 1, 1988) (unpublished report available at Loyola of Los Angeles Law Review office). A summary provided in this report stated:

Poverty is worse now than it was twenty years ago Overall unemployment in America is twice what it was twenty years ago. And unemployment for blacks is now twice what it is for whites There is a large and growing urban underclass in America . . . principally blacks and Hispanics in the central cities. They are more economically isolated, more socially alienated, than ever before There are "quiet riots" in all of America's central cities: unemployment, poverty, social disorganization, segregation, family disintegration, housing and school deterioration, and crime are worse now

Id.

205. 488 U.S. 469 (1989).

206. In *Croson*, Justice O'Connor noted that greater deference will be afforded the federal government in providing race conscious relief. *Croson*, 488 U.S. at 490-91 (citing *Bohrer, Bakke, Weber and Fullilove: Benign Discrimination and Congressional Power to Enforce the Fourteenth Amendment*, 56 IND. L.J. 473, 512-13 (1981)). O'Connor went on to suggest that states would get similar deference if their programs were either authorized or required by the federal government. *Croson*, 488 U.S. at 491. This limited approach is one of convenience for the Court since it was probably not ready to take on Congress, and fully recognized that the federal government funds many local programs and requires the establishment of racial preferences as a condition of such funding. See, e.g., *supra* note 163. Even if the Court was willing to respond by deferring to all federal programs and state programs authorized or required by the federal government, this would be an insufficient response. The *Report of the National Advisory Commission on Civil Disorders* noted and emphasized the need for a national response which includes commitment at both public and private levels. See NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 230 (1968). The Commission noted that "the need is not so much for the Government to design new programs as it is for unions, the churches, the foundations, the universities—all our urban institutions—must deepen their involvement." *Id.* Moreover, the *Commission's Advisory Panel On Private Enterprise* noted:

We conclude that maximum utilization of the tremendous capability of the American free enterprise system is a crucial element in any program for improving conditions in both our urban centers and rural poverty areas, which have brought us to the present crisis. . . . [T]he private sector is the mainspring of the national economy and consequently of the economic well-being of our citizens. Free enterprise, with its system of incentives and rewards for hard work, ability, ingenuity and creativity, has made this nation strong and produced the highest standard of living the world has ever known.

Id. at 313 (emphasis in original).

207. Recent interpretations of Civil Rights Laws have been appropriately characterized as "cramped," *Croson*, 488 U.S. at 560 (Marshall, J., dissenting), and "pinched, . . . [thereby]

ics. Whether the legislative actor is federal, state, or local, legislatures enacting affirmative action programs are attempting to aid Americans who have suffered discrimination for hundreds of years. There is no valid basis for precluding all actors from relying on the same data as the Supreme Court did in *Croson*.²⁰⁸ Minority political empowerment with its concomitant expansion of economic opportunity for minorities²⁰⁹ should not overwhelm us with thoughts of racial politics.²¹⁰ The fact that whites in power have discriminated against blacks or other minorities in favor of whites, should not lead to the inevitable conclusion that if blacks were politically empowered they would similarly discriminate against whites in favor of blacks or other minorities.²¹¹ Such reasoning is clearly misplaced. It is doubtful that the majoritarian power structure would tolerate an allocation of benefits that excluded it, much less allow such schemes to endure. This has been demonstrated even in instances where the favorable allocation has been made by whites for the benefit of minorities.²¹²

VI. CONCLUSION

The multiplicity of state and local set-aside programs plus congressional initiatives should have sensitized the Supreme Court to the need

ignoring powerful historical evidence about the Reconstruction Congress' concerns." *Patterson*, 109 S. Ct. at 2379.

208. *Croson*, 488 U.S. at 488-89. To analyze discrimination on the basis of broad federal, versus narrow state remedial, power is to duck the issue. There can be no basis for differentiating the kind of data on which the program sponsor can rely in order to remedy discrimination. Such differentiation suggests a lack of seriousness about providing a remedy. As Justice Marshall's dissent noted, "No principle of federalism or of federal power, however, forbids a state or local government from drawing upon a nationally relevant historical record prepared by the Federal Government." *Id.* at 547 (Marshall, J., dissenting).

209. Bates, *Black Political Empowerment and Economic Advancement*, FOCUS, May 1989, at 5 (periodical published by the Joint Center for Political Studies in Washington, D.C.). Upon studying black businesses in cities with black mayors, Bates found that more procurement activities are targeted to such businesses and they tend to flourish in comparison to cities that do not have black mayors. *Id.* at 5, 6. Black firms also tended to be larger, have more employees and lower business failure rates in such cities with presiding black mayors. *Id.* at 6.

210. *Croson*, 488 U.S. at 493.

211. See Bates, *supra* note 209. This belief was probably triggered by the fact that many cities that have mayors from a minority group, or city councils comprised predominantly of minorities, have established affirmative action programs. *Id.* at 5. It is curious that these heightened standards of behavior are only coming into fruition at a time when minorities are beginning to make modest political gains. The logical consequence of this reasoning is the elimination of civil rights laws. This category of rights will be no different than any other in American jurisprudence, since a remedy will only be afforded after a current specific wrong is proved.

212. See, e.g., *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (preferential policy for minority teachers abandoned when white professors were faced with layoff if implemented).

for racial equality through affirmative action programs. The Court should calibrate its value system to give a democratic and accountable response to racial discrimination and its resultant lack of opportunity for minorities. If it does not, the Court will continue to face political²¹³ and legislative²¹⁴ challenges as minorities search for economic democracy. As far as minority entrepreneurs are concerned, the Court still represents a superlegislature with respect to economic policy, causing minorities to play a perpetual game of catch-up in Congress.²¹⁵ Many of the imponderables confronting minority small businesspersons, also confront white small businesspersons. In each case, our system of democracy has deceived, deprived and exploited the weak.

There has always been a great gap between the realities of life in America and this nation's ideal of democracy for all. This gap should be highlighted so that a consolidated national response can be garnered. As the Court and Congress respond to majoritarian pleas for a level playing field with foreign competitors, their sensitivity to the dilemma of minority entrepreneurs will hopefully be heightened, thereby leading to more democratic responses.

213. The defeated nomination to the Supreme Court of Robert Bork was due partly to democratic and minority efforts triggered by the concern that he would interpret the Constitution in a manner harmful to their interests and that of American society generally. See Rudenstine, *Foreward*, 9 CARDOZO L. REV. 5, 6 (1987) (forward in symposium issue observed that Bork nomination "sparked" concern by nation that Bork's constitutional interpretation was too radically conservative). In opposition to Bork's confirmation, the Democratic Party noted that he opposed virtually every legislative and judicial initiative that advanced civil rights and the condition of American workers. 133 CONG. REC. 7599-7624 (daily ed. Sept. 17, 1987). Bork's rejection is reminiscent of the rejection of Judge Parker in 1930 for his Lochnerist intervention into labor disputes as typified by his opinion in *United Mine Workers v. Red Jacket Consol. Coal & Coke Co.*, 18 F.2d 839, 844, 850 (4th Cir. 1927). See *Confirmation of Honorable John Johnston Parker to be an Associate Justice of the Supreme Court of the United States, Hearings before the Subcommittee of the Senate Committee on the Judiciary*, 71st Cong., 2d Sess. 66 (1930).

214. See Civil Rights Act of 1990, H.R. 4000, 101st Cong., 2d Sess. 440 (1990); see also Memorandum from Barbara R. Arnwine, *supra* note 201 (discussing preparation for introduction of Civil Rights Act of 1991).

215. See, e.g., *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (local "grandfather provision" prohibiting pushcart food sales found not violative of equal protection clause); *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 425 (1952) (Missouri statute which allowed employees to miss work in order to vote not found to violate due process or equal protection clauses).

