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THE WHITE HOUSE
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Austin

Grace Bush
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not where we should be

long way to go

until educ. econ.
& soc. justice
for all Amer.

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affirm. action
education
& in priv. sector
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Bus Amer. dream depends on
black comm. to lead the
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can lead the way. Yes educ.
can instill values

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THE WHITE HOUSE

WASHINGTON

July 25, 1989

MEMORANDUM FOR DAN MCGROARTY
STEPHANIE BLESSIE

FROM: HANNS KUTTNER *HK*
SUBJECT: Urban League Speech -- August 9

Overall

I would recommend that the speech seek a balance between defense of our position (urban problems can't be solved primarily through federal dollars) and the "work to be done" theme from the Inaugural Address.¹

Points to Hit

The field is rich with possibilities, in part because the themes involved haven't been touched on much in the President's speeches. I offer a menu of the topics that could be included.

Showing Awareness of Minority Concerns

In discussing the speech at our staff meeting, we concluded the typical listener would want to have the sense that the President is aware of minority concerns and issues. Emily Mead will be providing you with a National Research Council report on the current standing of blacks in American life. One key point is that ours is still a residentially segregated country. A strong push for fair housing will bring applause

Also, Secretary Sullivan has as one of his priorities lessening the health disparities between blacks and whites. I have a lot of statistics on this if you want to pursue it.

The Mess at HUD

Some of the revelations about what has happened in the administration of HUD's programs are an outrage. The President has full confidence in Secretary Kemp's effort to make things right. Secretary Kemp has kept the

¹"My friends, we have work to do. There are the homeless, lost and roaming, there are the children who have nothing -- no love and no normalcy -- there are those who cannot free themselves of enslavement to whatever addiction -- drugs, welfare, the demoralization that rules the slums."

President abreast of developments. The Justice Department is involved, and where crimes have been committed, there will be prosecutions. Also, OMB Director Darman is reviewing financial controls in other federal programs to assure there not problems elsewhere.

Michael Jackson from Cabinet Affairs should be sending you more on this.

Another point: this is another reason why housing vouchers for the poor are our approach to providing housing assistance to the poor. We want to promote choice all over, in education, in health care, and in housing, because we want to empower consumers rather than the bureaucrats who run housing authorities or the developers who seek to make profits from federal programs.

Urban Prosperity

The best program ever for urban America is economic prosperity. The investment and growth in income during the current economic recovery have frankly done more for the cities than any federal program by increasing municipal revenues. (There must be stats on growth of city budgets in real terms, since 1982 v previous five years.)

Ships that Don't Rise with the Rising Tide

We realize that a general upward trend will not raise all boats equally. Kemp is fond of playing with this metaphor, and there's probably a good "As Jack Kemp tells me" that has something to do with a rising tide swamping boats that are stuck on the bottom. That's why we hope for a kinder and gentler America, and support programs (like enterprise zones and help for the homeless) to help boats stuck on the bottom. (The metaphor works better with "boats with holes in their hulls" because it brings out the notion that we want to give people the tools needed to repair those holes.)

We also need to be wary of overpromising. (This was something on which Darman expressed concern at yesterday's DPC meeting on welfare strategy -- the phenomenal budget reduction target we face in the FY 91 budget.) I would suggest direct criticism of the overpromising of what the Great Society programs would bring. (see, e.g., LBJ's late-August 64 remarks at the signing ceremony for the Economic Opportunity Act saying that we will end poverty.) By contrast, we should have the humility to accept the Biblical injunction that the poor are always with us.

Enterprise Zones

The President today (July 25) sent up to the Hill a letter calling for action on enterprise zones. I'll provide whatever we have on this.

Homeless

In Building a Better America the President called for (1) full funding for programs in the Stewart B. McKinney Homeless Assistance Act and (2) a \$50 million initiative to figure out ways to better coordinate services to be

delivered to the homeless.

We need to clarify what we mean by leadership in this area. We don't mean nationalizing the problem, either with us taking over or pumping in cash because, frankly, we don't have the cash. Leadership means figuring out what works best in helping the different parts of the homeless population -- the chronically mentally ill, alcoholics, families in welfare hotels -- and creating the flexibility in federal programs so that people who make programs work at the local level can make them solve the problems of individual homeless people.

Also, we have an Interagency Council on the Homeless to work with service providers and coordinate federal programs. We have more than \$1 billion going into programs targeted at the homeless, spread through more than ten agencies.

✍ We don't need to be defensive here, and saying something like "We've failed these people" would win big points with the audience.

Welfare/Bush Anti-Poverty Agenda

✍ Line to leave them: We want to work with you to make our welfare programs lift people from dependency, not keep them there.

The Domestic Policy Council spent today's meeting talking about welfare reform and the Bush Administration. I'd think it would be fair to say that we believe:

- o The task of reform is not yet finished.
- o While some think of last year's Family Support Act (welfare reform) as a conclusion, we believe it is only a stepping stone to learning more about how to end dependency. That's why we want the States to continue initiating demonstrations of innovative approaches.
- ✍ o We have a Low-Income Opportunity Board to work with the states on shepherding through the federal approval process new ideas states want to demonstrate. We plan to show greater flexibility in approving demonstrations to increase state interest in demonstrations. (Unless this gets into the NGA speech, this counts as a policy announcement.)

Bush Anti-Poverty Principles

Choice "Give us the tools and we will do the job" (approximating Churchill) should apply to low-income people as well as international relations.

Example of this notion at work: proposal to encourage magnet schools, our child care proposal that would give money to parents so that they, not bureaucrats, can figure out what to do.

Flexibility We want programs to fit local situations. Thus the Low Income

Board as a means to allow federal programs to have the flexibility to meet local needs.

Opportunity We believe in an open society where those who are motivated and assume the responsibility can move themselves upward. We want to remove impediments to this, thus an emphasis on literacy and basic skills, not because it is Barbara Bush's pet project but because it is right for America. Also Pinkerton's anti-credentialism fits under this heading.

Kemp likes the word empowerment to combine the notions of choice and opportunity. He makes the point that the goal of poverty-related programs should be to empower people to help themselves out of poverty, not to pay them to stay where they are.

Task Force on Urban America

This is something we have been kicking around with Richard Nathan, Dean of the Rockefeller School at SUNY Albany. See attached background memo.

If things can be worked out, this Task Force can be announced as part of the speech.

Removing Barriers to Opportunity

I think you have Pinkerton's memo on this subject.

In this speech, the subject can be approached through the notion of the federal work force as a model for employers.

"Too many Americans lose out on job opportunities because while they can do the job, they don't have the formal credentials or because they do poorly on irrelevant tests. [Example of Missouri cosmetology laws; blacks pass practical at same rate as whites, but only 3% of blacks pass written tests.]"

In this speech, the President could:

1. Attack these barriers as doubly insidious, holding back minorities and suppressing the desire to get ahead in life.
2. Say that he wants the Commission on Civil Rights to be more active in identifying these barriers.

3. Announce that the federal government wants to be a model employer, and that he is commissioning the Director of OPM, Connie Newman, to study how barriers to federal employment can be reduced. Connie Newman's own story is an example of opportunity working -- she started as a GS3 typist at USDA. The President could praise her and say she's fit for most any job he can think of, but credentialism means the Federal government thinks she could never do many federal jobs.

Finally, this year is the 25th anniversary of LBJ's launching the Great Society, something that should at least be mentioned in the speech.

cc: Bill Roper
Jim Pinkerton
Emily Mead

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JOE CARPENTER, et al.,

Plaintiffs-Appellants

v.

SAMUEL K. SKINNER, Secretary of Transportation, et al.,

Defendants-Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

BRIEF FOR THE FEDERAL AND STATE APPELLEES

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-3578

JOE CARPENTER, et al.,

Plaintiffs-Appellants

v.

SAMUEL K. SKINNER, Secretary of Transportation, et al.,

Defendants-Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

BRIEF FOR THE FEDERAL AND STATE APPELLEES

QUESTIONS PRESENTED

1. Whether appellants lack standing in light of their failure to show redressable injury.
2. Whether, after Congress has lawfully established a program requiring that a proportion of the federal funds used in state highway projects be contracted with disadvantaged business enterprises (DBE), a state must make further findings sufficient to sustain a state sponsored set-aside before accepting federal highway funds.
3. Whether North Carolina's implementation of the DBE program is narrowly tailored.

STATEMENT

1. Procedural history.

Joe Carpenter, Executive Vice-President of Landmasters, Inc., a landscape contractor in Gaston County, North Carolina, filed this suit on April 3, 1985 (R. 1).¹ Carpenter and Landmasters (also a plaintiff) named as defendants various federal officials, including the Secretary of the United States Department of Transportation, and state officials responsible for administration of federally-assisted state highway construction projects in North Carolina (R. 1, pp. 3-4).

Plaintiffs challenged the constitutionality of Section 105(f) of the Surface Transportation Assistance Act (STAA) of 1982, which provides that no less than 10% of funds authorized under the Act should be expended on socially and economically disadvantaged businesses. Plaintiffs alleged that federal and state enforcement of Section 105(f) deprived nonminority landscaping contractors of a "meaningful opportunity" to bid on federally funded state highway projects solely because of their race (R. 1, p. 11), violating 42 U.S.C. 1981, 42 U.S.C. 1983, 42 U.S.C. 2000d, 42 U.S.C. 2000e, the Fifth and Fourteenth Amendments, and the Due Process and Equal Protection Clauses of the North Carolina Constitution (R. 1, pp. 15-17). Plaintiffs sought a declaration that Section 105(f), and the federal and state regulations enforcing that provision, are unconstitutional,

¹ A second plaintiff, Lanny Thornburg, another landscape contractor, was also a plaintiff. Thornburg was later dismissed from the case, and is no longer a party.

and an injunction restraining federal and state defendants from "discriminating on the basis of race in the administration of minority and disadvantaged business enterprise regulations of the Federal and State Departments of Transportation."²

All parties sought summary judgment in September of 1986 (R. 51 (state defendants' motion), R. 53 (federal defendants' motion for partial summary judgment), R. 56 (plaintiffs' motion for partial summary judgment)). On March 9, 1987, the district court found Section 105(f) and the federal regulations implementing it, to be facially constitutional (R. 70), and granted federal defendants' motion for partial summary judgment (*ibid.*).

Following that order, trial was held from November 4-6, 1987, to determine whether the program was discriminatorily applied. On June 16, 1988, the district court entered judgment for defendants and denied plaintiffs all relief (R. 93).

2. Facts.

As stated above, the trial focused only on the application of the federal disadvantaged business enterprise (DBE) program to federally financed state highway projects in North Carolina.

a. The Federal Program. In 1982, Congress enacted the Surface Transportation Assistance Act of 1982 (STAA), Pub. L. No. 95-28, 91 Stat. 116. This legislation authorized federal funds for interstate highway construction projects, and

² Plaintiffs subsequently moved to file an amended complaint and for certification of a plaintiff class (R. 28). The court denied the motion on July 11, 1986 (R. 46). Plaintiff has not appealed this decision.

established that "not less than 10 per centum of the amounts authorized to be appropriated under this Act shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals as defined by section 8(d) of the Small Business Act (15 U.S.C section 637(d)) * * * ." 3

The Department of Transportation promulgated regulations to implement Section 105(f). 49 C.F.R. Subpart D. The regulations defined "disadvantaged business" as a business at least 51% owned and managed by socially and economically disadvantaged individuals, id. at 23.62, and stated that members of several ethnic groups -- blacks, hispanics, Native-Americans, Asian-Pacific Americans -- or any other minorities or individuals found by the Small Business Administration to be disadvantaged shall be "presume[d]" to be "socially and economically disadvantaged individuals" for purposes of the DBE program.⁴ The regulations also stated that "recipients [of federal funds] may determine, on

³ In 1987 Congress enacted Section 106(c) of the Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURRA), Pub. L. No. 100-17, 101 Stat. 144. STURRA authorized federal funds for highway construction projects, and Section 106(c) stated that "Except to the extent that the Secretary determines otherwise, less than 10 percent of the amounts authorized * * * shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals." Section 106(c) changed the program which Section 105(f) of the 1982 Act established by adding "women" to the categories of those groups presumed to be socially and economically disadvantaged, see Sec. 106(c)(2)(B), and by establishing that no business may be certified as a small business for purposes of social and economic disadvantage if the business has had gross receipts over the preceding three years in excess of \$14,000,000. Sec. 106(c)(2)(A).

⁴ "Women" was added after the 1987 legislation. 52 Fed. Reg. 39320-39321 (October 21, 1987).

a case-by-case basis, that individuals who are not [members of one of the designated groups] are socially and economically disadvantaged." Ibid.

Federal regulations require each recipient of funds to have a federally approved minority business enterprise program, id. at 23.41, and to set annual goals for the use of disadvantaged businesses in federally assisted highway construction projects. Id. at 23.64. The regulations require that goals be based on the availability of minority or disadvantaged businesses to compete for a portion of the federally funded contract. Id. at 23.64(d), 23.45(g). Goals should be set both on an annual basis, and on a contract-by-contract basis, id. at 23.45(g)(2)(i), and the availability of DBEs must be calculated with respect to both types of goals. Id. at 23.45(g)(5)(i), 23.45(g)(7). The regulations also require the recipient to justify to DOT any proposed annual goals below the 10% figure of the STAA. Id. at 23.64(e). Federal officials may approve the lower goal if the recipient is making appropriate efforts to reach the 10% goal, and the lower goal represents a reasonable assessment of availability of disadvantaged businesses presently eligible to work on federally assisted projects. Id. at 23.66(b)(1), (2).

The regulations also require the recipient to establish a "challenge procedure," which permit a third party to challenge an individual's qualifications as "socially and economically disadvantaged." Id. at 23.69. Finally, the regulations state

that a recipient that fails to provide a proper program is subject to a withholding of federal funds. Id. at 23.68(e)(1).

b. The State Program. North Carolina officials testified that their DBE program was established to comply with the United States Department of Transportation's requirements for recipients of federal highway funds (Tr. 32). As explained in the state's "Program for Participation by Minority Business Enterprises in the North Carolina Department of Transportation's Federally Assisted Programs" (Pl. Ex. 62), the state's program "was developed to comply with the regulations (49 CFR Part 23) issued by the United States Department of Transportation * * *" (ibid.).

State officials testified that their program adopted the Department of Transportation's standards for "disadvantage" for purposes of determining which businesses should be certified as DBEs (Tr. 32, 181). As required by the federal regulations, firms which were 51% owned and operated by members of the minority groups set forth in the federal regulations were presumed to be "disadvantaged businesses" for certifying DBEs under the state program (Tr. 32). Also as required by federal regulations, the state program permitted individuals not members of the designated minority groups to attempt to qualify for certification as socially and economically disadvantaged; thus far, North Carolina had certified three businesses, all owned and operated by members of groups not presumed by the statute to be socially and economically disadvantaged, as DBEs (Tr. 77).

The state also permits third party challenges to the certification of a DBE firm, as required by federal regulations (Tr. 189, 236). As of the trial, however, there had been no such challenges (*ibid.*). The state also refused to qualify a firm as a DBE if it had average annual receipts of over \$14,000,000 over the preceding three year period, also as required by federal standards (Tr. 69, 184). The state investigated DBE firms to insure that those certified as DBEs based on the minority presumption were actually minority owned and controlled, and decertified nine firms between 1984 and 1986 (Pl. Ex. 26).

State officials testified that they set the state's annual goal after assessing the overall capability of DBEs in the state to perform portions of highway projects and estimating the amount of federal assistance for highway projects the state likely would receive that year (Tr. 34-35). State officials surveyed DBEs to determine approximate capabilities (see Tr. 199 (concerning 1985 survey); see also Pl. Ex. 87 (1987 survey)). State officials stated that there were only two DBE firms which were certified as prime contractors, so that the process of approximating goals assumed that the goals would be met through prime contractors subcontracting portions of projects to qualified DBEs (Tr. 52-53), but that there were DBEs certified in "just about every area associated with highway [construction]" (Tr. 208).

In 1985, state officials estimated that while the state would receive about \$400,000,000 in federal funds, DBEs were capable of performing only between \$18,000,000 and \$23,000,000

worth of work (Pl. Ex. 8, Tr. 203). As a result, North Carolina highway officials recommended to the Governor that they seek a waiver of the 10% goal mandated by the STAA, and seek approval of a 6.5% goal (Pl. Ex. 8). The Governor (for reasons not in the record) rejected the recommendation, and kept the state committed to a 10% goal (Tr. 45, 203). The federal funds the state received that fiscal year were not the expected \$400,000,000, but rather a little more than \$200,000,000 (Tr. 229); the DBEs' share over that fiscal year was about \$20,500,000 (Tr. 230), about 9.7% of the total federal assistance (Tr. 72). The United States Department of Transportation accepted the state's explanation for its inability for that year to achieve the 10% goal (Tr. 72). The state's 1987 DBE survey apparently concluded that the goal should remain at 10% (Pl. Ex. 87, 88).

James Murphy, North Carolina's Assistant State Highway Engineer for Construction and Materials, testified that when setting a goal for a particular contract, the state looks to the subcontracting opportunities in the particular type of project, along with the capabilities of DBEs in the area of the project to perform the sorts of subcontracting opportunities the project would include (Tr. 206-207). He stated (Tr. 209):

Some of the items which we look at when we set the goals are: clearing and grubbing, trucking or hauling; some grading work; storm drains; the term I call incidental concrete for lack of a better description, which would include drainage structures, paved ditch, curb and gutter, sidewalk, et cetera; guardrail, utility work, water and sewer type installations. We have a fair amount of that on projects; seeding and mulching and the associated items; reinforcing steel for structures; fencing, electrical; some pavement

marking, but usually that is not a very big factor. There are probably some other areas, but that is about all I can think of right now.

Murphy also stated that after the range of DBEs is assessed, the goal is set at a level that would allow the prime contractor flexibility in his use of DBEs: "we would feel like that we could set a goal so the contractor would have some options as to what he sublet. As a matter of practice, 15 percent is about as high a goal that we ever set on a project. And a lot of times the items that we consider in setting the goals might total 25, 30, 35 percent of the project" (Tr. 210).

Murphy testified regarding the state's assessment of an individual contractor's "good faith efforts" which may excuse a failure to meet a goal (Tr. 193-196; see Def. Ex. 6). The state imposes several requirements on contractors to insure efforts to locate and to solicit bids from minority subcontractors. The letters included in Def. Ex. 6 indicated that a prime contractor could be excused from meeting a specific goal when, after soliciting DBE participation in the manner required by the contract, the contractor had not received sufficient bids from available and qualified firms to meet the goal.

There was some testimony from state officials concerning the term "specialty" projects, as it relates to the types of subcontracting opportunities available on the state's federally assisted highway projects. Barry Jenkins, the state's Highway Engineer for Construction and Materials, testified that while drainage, pipe laying, and clearing and grubbing would not be

considered "specialty" items, seeding and mulching, guardrails, signs, and pavement marking would be. He defined specialty items as those that would not be performed by the prime contractor or require specialized equipment or labor force (Tr. 53-54).

Plaintiffs presented testimony by Henry Clegg, from the Carolinas Branch of Associated General Contractors of America, and a former employee of the North Carolina Department of Transportation (Tr. 84-86). Clegg testified, as had the state officials, that the DBE goals are met through subcontracting opportunities (Tr. 96), and stated that those subcontracting opportunities are usually "specialty" projects (Tr. 97).

Clegg testified that he had reviewed state forms covering a period from July of 1986 to June of 1987 (Tr. 112), which report the amount of subcontracting by DBEs on each federally assisted project (Tr. 109-110). Clegg testified that he reviewed records of 80 projects, and found that 75 had DBE or WBE⁵ goals in them (Tr. 117). He testified that there were 71 projects with subcontracts in what he referred to as "specialty items" subcontracted to DBEs or WBES (Tr. 119-121).

Clegg stated that he had not determined whether there were subcontracts awarded to non-DBEs in any of these projects, as the forms he reviewed indicated only subcontracts to DBEs or WBES

⁵ WBE stands for "Women's Business Enterprise" which was, until enactment of the STURRA in 1987 (see n.3, supra), classified by North Carolina as a separate category of business to which the set-aside would apply. After 1987, women's businesses were included in the category of DBE's by federal statute.

(Tr. 122). Clegg stated that the forms did not indicate to what extent non-DBE firms were awarded some subcontracts, and did not reveal the pool of subcontractors that had offered bids on the subcontracts, so he could not determine whether any non-DBE firms had bid on the subcontracts (Tr. 124). In fact, Clegg stated that "there is a predominance of DBEs who are engaged in this particular area in North Carolina. There are not that many non-DBEs who are in this business at the present time in this particular specialty area that are actively seeking highway type work" (Tr. 124-125). Clegg also stated that, in addition to not knowing the amount of work subcontracted to non-DBE firms in those projects, he could not determine how much of the highway funds were allocated to specialty items (Tr. 154).

Clegg also stated that his definition of "specialty items" and North Carolina's definition may not be the same. He stated that he would not define clearing and grubbing, hauling, incidental concrete, masonry, drainage structures, or structural steel as traditional "specialty items" (Tr. 158).⁶

c. Plaintiff's Business. Plaintiff Carpenter stated that he is in the landscaping business (Landmasters is the name of his company), and that landscape planting and construction and

⁶ Pl. Ex. 74 was a quarterly report for the first quarter of 1987 which identified the DBE and WBE subcontracts awarded during the quarter. The document showed that 100 contracts or subcontracts had been awarded to DBEs or WBEs in the following categories: architectural services, grading and drainage, structures and buildings, materials, trucking, traffic control, and landscaping, as well as 15 labeled "other."

seeding and mulching are the types of jobs he would perform on state highway projects (Tr. 316). He stated that he did subcontracting, as well as a "good bit" of "second tier" work, which is work for which he is hired by a subcontractor but which is exempt from DBE requirements (Tr. 319).

Mr. Carpenter reviewed the extent of his income traceable to state highway projects over the last several years. He stated that in 1978, 15.8% of his income was from state highway projects; 40.6% in 1978-79; 49.5% in 1979-80; 60.4% in 1980-81; 37.5% in 1981-82; 68.7% in 1982-83; and 43.7% in 1983-84 (Tr. 325).⁷ He did not distinguish between highway projects that were totally state projects and those that were federally assisted.

The pretrial order stated that Mr. Carpenter was awarded subcontracts on federally assisted projects in the following totals: \$31,691 in 1981; none in 1982; \$38,906 in 1983; and \$8,735 in 1984. Mr. Carpenter also testified that from April 1985 to February 1987, he received \$308,989 in subcontracts for

⁷ He testified to the following income and percentages (Tr. 325-330; Def. Ex. 8):

<u>Fiscal year</u>	<u>Total income</u>	<u>% from state highway projects</u>	<u>Total from state highway projects</u>
1978-1979	\$ 395,901	40.6%	\$160,750
1979-1980	561,660	49.5%	227,854
1980-1981	1,125,985	60.0%	679,700
1981-1982	624,265	37.5%	234,092
1982-1983	526,740	68.7%	361,734
1983-1984	723,235	43.7%	316,378

work on federally assisted contracts (Tr. 330; see also pretrial order at 7). This evidence apparently did not include any second tier work Mr. Carpenter may have done during this period (Tr. 335). Mr. Carpenter stated that two projects he was awarded between 1985 and 1987, which were bid without goal requirements, totalled approximately \$221,102.55 (Tr. 333), leaving the amount of his other subcontracts in federally assisted projects over that period at about \$86,000. Regarding the two main projects, Mr. Carpenter stated, "Because of the set aside program, I had not quoted on certain jobs because I don't like to do an exercise in futility. But on those particular jobs, I was told that there was no [goal] requirement * * * " (Tr. 331). Mr. Carpenter testified that he thought the DBE program limited the opportunity to bid on certain types of jobs, and stated that "within the last couple of years * * * I have only went after the jobs I felt like I had any meaningful opportunity to get" (Tr. 337).

The pretrial stipulations stated that Mr. Carpenter's wife purchased a landscaping business in 1986, and bids on the same sort of highway projects on which he would bid (pretrial order at 6). Mrs. Carpenter's business is certified as a WBE. When Mrs. Carpenter bids on a state highway project, Mr. Carpenter does not bid; the pretrial stipulations also stated that Mrs. Carpenter's business has an agreement with Mr. Carpenter's business to rent equipment "needed to perform its operations" (*ibid.*).

Mr. Carpenter testified that he had been told by some prime contractors that they could not use his bid in order to meet a

DBE goal (Tr. 343), but he had no records, or other supporting documentation, of any such projects (ibid.). He also testified that he did not know whether a bid he offered which was rejected was a low bid, as the prime contractor has no obligation to inform a bidder of the reason the bid was not selected (Tr. 341).

3. Decisions of the District Court.

a. "Facial" challenge. The district court's first decision in this case, entered on March 9, 1987, granted the federal defendants' motion for partial summary judgment on the issue of the facial constitutionality of Section 105(f) of the STAA and the Department of Transportation regulations.

The court rejected plaintiff's allegation that Section 105(f) established an unconstitutional racial preference, holding that Section 105(f) satisfied the careful scrutiny which the Supreme Court held in Fullilove v. Klutznick, 448 U.S. 448 (1980), was required for set-aside programs with racial preferences (R. 70 at 17). Fullilove, the court stated, required analysis of the authority and findings of the body establishing the preferential program, and a limited use of racial classifications which extend no further than is necessary to remedy the effects of past discrimination (R. 70 at 17).

Under this analysis, the district court held Section 105(f) was a proper exercise of Congress's authority to remedy the effects of past discrimination. With regard to the existence of an adequate remedial predicate in this case, the district court pointed out that "the Supreme Court clearly affords Congress

greater deference as regards the necessity of compiling a 'record' to demonstrate the historical necessity of race-conscious remedial measures that it does to other 'legislative'[state] bodies." Id. at 27. Thus, the district court looked to the record Congress had before it when it enacted the 10% set aside in the Public Works Employment Act of 1977, which was upheld by the Supreme Court in Fullilove v. Klutznick, 448 U.S. 448 (1980) (R. 70 at 20-23). In enacting the STAA, the district court held, Congress was relying on evidence similar to that which supported the 10% set-aside upheld in Fullilove (id. at 24). The court also found that Section 105(f) is not over-inclusive because Congress had made findings, when enacting the Small Business Act, about discrimination against small businesses owned by minorities, and that Congress properly left to the agency the task of limiting participation in the STAA DBE program to legitimate disadvantaged businesses.

The court rejected plaintiff's argument that Congress had to make specific findings about discrimination in North Carolina before that state could adopt the federal program (id. at 25). "It is axiomatic that Congress legislates for the nation as a whole. A requirement that Congress must make specific findings regarding practices in discrete industries and individual states before it could pass legislation affecting the states would put an end to congressional lawmaking" (id. at 25-26).

The court held that the North Carolina Department of Transportation need not make independent findings of past

discrimination in that state before it could accept federal funds and implement the federal program (*id.* at 26). The court found that the Section 105(f) DBE program "is national in scope, and applies to all states through the operation of the supremacy clause of the Constitution. The federal findings supporting Section 105(f) are also national in scope. Plaintiffs do not explain why, absent a specific showing to the contrary, Congress was not entitled to presume that the incidence of past discrimination in North Carolina followed the pattern in the nation as a whole" (*id.* at 28).

The court found that the presumption of social and economic disadvantage contained in Section 105(f) does not create an impermissible racial preference. Indeed, the court concluded that "the language and legislative history of Section 105(f) do not indicate that Congress intended to enact legislation that would guarantee minority business owners who are not, in fact, socially and economically disadvantaged an unassailable status as socially and economically disadvantaged individuals." *Id.* at 33 (citation omitted). The court found that Section 105(f) attempts to identify "socially and economically disadvantaged individuals," and uses a rebuttable presumption that members of certain ethnic groups are socially and economically disadvantaged "in order to facilitate fund recipients identification of eligible participants" (*id.* at 34). The regulatory provisions which permit individuals to challenge the "disadvantaged" status of minority individuals who may not actually be socially and

economically disadvantaged, and the provisions that permit non-minority individuals who may be socially and economically disadvantaged to qualify for participation in the program (id. at 35), help further limit the program legitimately only to "disadvantaged" individuals. The court also noted that the goals used in this program are not inflexible, and that a failure to meet a goal despite good faith efforts to do so will not result in a loss of funding or other sanctions (id. at 37).

The court held that the greater flexibility that exists under this program than under the programs upheld in Fullilove is further support for the program's constitutionality. The court stated that the Fullilove program relied more on racial classifications than does this program, which uses the racial criterion as only one factor in the ultimate determination of "disadvantage" (id. at 39-41). The court also held that the flexible goals, and "good faith efforts" provisions, further support the conclusion that Section 105(f) does not create an inflexible racial preference.

Finally, the court held that Section 105(f) was narrowly tailored (id. at 43). The court first noted that plaintiffs failed to demonstrate an alternative to Congress's program (id. at 45); the court then pointed out that the appropriations under the STAA had been continually monitored by Congress, which had held hearings on the application of Section 105(f), "and continues to monitor its enforcement" (id. at 45); the court viewed this congressional oversight as insuring that Section

105(f) will not "require preferential treatment for DBEs after such treatment becomes unnecessary" (id. at 46).

The court held that the effect of the 10% goal in the STAA does not establish that it is facially unconstitutional because of its impact on non-DBE subcontractors. The court stated that the program's goals were much like hiring goals, and that the 10% goal left 90% or more of STAA funds available for non-DBE contractors (id. at 47). Plaintiffs' allegation that "specialty subcontractors" suffered a "greatly disproportionate adverse impact" under North Carolina's program (id. at 47), the court held, would have to await development of a record when the application of the program would be addressed.

b. "As applied" challenge. On June 16, 1988, the district court also rejected plaintiffs' "as applied" challenge to the DBE program. While rejecting at the outset plaintiffs' contention that "federal and state highway officers have a responsibility to second guess the regulatory scheme and make independent, individual determinations as to whether each would-be DBE in fact is socially or economically disadvantaged" (R. 93 at 3-14), the district court's decision rested on its holding that plaintiffs failed to prove that the DBE program had had any appreciable impact on them as specialty contractors (R. 93 at 14-20).

After briefly reviewing the state program, and its reliance on and compliance with the federal regulations, the court reviewed the evidence relating to the DBE program's effect on

Carpenter's and Landmaster's business. The court noted that Carpenter's business has four divisions, and "only [the] erosion control division sought regularly to work as a subcontractor on federally-assisted highway construction projects" (id. at 8). The court found that although Carpenter once bid aggressively on projects in South Carolina, he no longer does so, and had ceased regularly to bid on projects in North Carolina in 1983 (id. at 9). The court also found that Carpenter no longer bids regularly in part because his wife, who "owns a competing business" that qualifies as a DBE, bids on highway projects of the same kind as Carpenter's business performs. Carpenter's wife's business rents equipment from Carpenter, who, the court found, "benefits from profits generated by" his wife's firm (id. at 10).

The court also found that Carpenter did not know whether his quotes for subcontracting jobs were used by unsuccessful prime contractors, or whether his quotes were lower than accepted quotes, as prime contractors usually do not reveal quotations of proposed subcontractors. The court found that Carpenter was unable to identify any specific contracts that were denied him due to the DBE program, and that "from the implementation of the DBE program in 1982, until the end of fiscal year 1984, neither Carpenter nor Landmasters suffered any adverse economic effects which were attributed at trial by competent evidence to the DBE program" (id. at 11). The court concluded that plaintiff failed to put on any evidence demonstrating that he has suffered any economic loss caused by the DBE program (ibid.), and found that

plaintiffs had "prospered" since the program was implemented in 1982, and had failed to suggest what injury was suffered.

The court concluded that plaintiffs failed to put on competent evidence demonstrating the DBE program's effect on contracting opportunities of specialty contractors. The court noted that Henry Clegg, plaintiffs' primary witness, failed to consider the extent to which non-DBEs are awarded specialty subcontracts, the total amount of "highway dollars" awarded to specialty subcontracts, or the characteristics of the "pool" of specialty subcontractors, and that Clegg had admitted that there were not many non-DBEs seeking specialty subcontracts at the present time. The court concluded that "although there certainly appears to be the potential for a 'disproportionate impact type' claim by specialty subcontractors who wish to participate in federally-funded North Carolina highway construction projects, these plaintiffs have not proved theirs" (*id.* at 20).

SUMMARY OF ARGUMENT

In this appeal, plaintiffs mount a limited challenge to the district court's opinions upholding the constitutionality of Section 105(f) of the STAA and the federal regulations implementing that section, as well as to the implementation of the STAA program within North Carolina by state officials. Specifically, plaintiffs, relying primarily on the Supreme Court's recent decision in City of Richmond v. Croson, 109 S. Ct. 706 (1989), argue that North Carolina may implement the federal

DBE program only after making findings that would, under Croson, support a state-sponsored set-aside program.

First, appellants lack standing because they have not shown the requisite "injury in fact" and redressable harm necessary for judicial review. See, e.g., Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976). The district court made detailed and well-supported findings that the DBE program at issue here had no detrimental effect whatsoever on plaintiffs.

Second, the district court properly held the federal statute constitutional, finding that the record before Congress when it enacted Section 105(f) of the STAA was adequate to support the limited race-conscious remedy contained in that statute. As the district court recounted at some length, Congress made the necessary findings to establish a legitimate remedial predicate for the program. Those findings having been made on a national scale, it is not necessary for each state to duplicate them, any more than a county would have to duplicate a state's findings, or a city a county's. Such a requirement cannot be squared with Fullilove and is in no way required by Croson.

Thus, the critical question in this case is whether the implementation of the program has been narrowly tailored to Congress's demonstrated remedial purpose. It clearly has been. The most critical aspect of ensuring that a racial classification is narrowly tailored to its remedial purpose is, logically, that the classification not unnecessarily afford a remedy to those of a favored group who are not in fact suffering the effects of past

discrimination and, conversely, that it not bar relief to those of unfavored groups who are suffering those effects. This requirement is met in this case. The program has only a rebuttable presumption that certain minorities have been socially and economically disadvantaged; there is in place a flexible and workable opportunity for third parties to show that minority-owned DBEs are ineligible because the owners are not in fact socially and economically disadvantaged. Conversely, non-minority-owned DBEs can demonstrate eligibility by showing that they are socially and economically disadvantaged. The program's narrow tailoring is also supported by the flexibility of the goals set and their relationship to the available pool of eligible DBEs, and by the defendants' periodic review of those goals and the program as a whole.

ARGUMENT

I

PLAINTIFFS LACK STANDING

The government asserted before trial that plaintiffs lacked standing to assert that the DBE was unconstitutionally applied (R. 93 at 3), due to their inability to show that the program had caused them any harm. The district court stated that, due to plaintiffs' failure to show any injury traceable to the DBE program, there was presented a "very real question whether these plaintiffs even have standing to assert the constitutional challenge" (*id.* at 15), and the court ultimately concluded that "Plaintiffs Carpenter and Landmasters failed to prove that they

suffered a cognizable injury for which the relief they seek -- invalidation of the DBE program -- may provide redress * * * " (R. 93 at 21). See also id. at 13 (The court finds no merit to plaintiffs' position "that they have suffered economic injury as a result of the implementation in North Carolina of a DBE program"). We agree that plaintiffs' failure of proof demonstrates that they lack standing.

Plaintiffs here must demonstrate a redressable "injury in fact" in order to have standing to seek judicial review in federal court, and without such injury there is no justiciable controversy as required by Article III of the Constitution. Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26 (1976); Warth v. Seldin, 422 U.S. 490, 499 (1975); Linda R.S. v. Richard D., 410 U.S. 614, 617 (1973); Association of Data Processing Service Org. v. Camp, 397 U.S. 150 (1970); Barlow v. Collins, 397 U.S. 159 (1970). In this case, plaintiffs failed to show any such injury. The district court's findings⁸ made clear that the prejudicial program the complaint described did not exist, had no adverse impact on appellants, and that any change made in the administration of the program would redress no harm suffered by plaintiffs. See Warth, 422 U.S. at 515 ("to justify any relief [plaintiff] must show that it has suffered harm"); and Simon, 426 U.S. at 38 ("the relevant inquiry is whether * * * the

⁸ The district court appears to have used the evidence of lack of impact on plaintiffs to support both a finding of no standing and its finding of a narrowly tailored program (R. 93 at 15). We do likewise. See page 50, infra.

plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision"); Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 79 (1978) (standing requirements are generally to "demonstrate * * * injury in fact and a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury"); see also Webster v. Reproductive Health Services, No. 88-605 (July 3, 1989) ("this Court is not empowered to decide * * * abstract propositions, or to declare for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it" (citation omitted)). Plaintiffs were properly required to make allegations that were "true and capable of proof at trial" in order to demonstrate standing, and they failed to do so here. United States v. SCRAP, 412 U.S. 669, 689 (1973).

The district court found that plaintiffs' claim that the DBE program caused Carpenter, or specialty contractors generally, to lose contracts, simply was not proved. The district court found Carpenter stopped submitting quotes on North Carolina projects in 1983 or 1984 (R. 93 at 9). The court found that one reason Carpenter no longer bids on projects regularly is that his wife, who is certified as a WBE landscape business, does bid on those contracts. Carpenter benefits financially when she receives a contract; indeed, his wife's company leases equipment from him (id. at 9-10). The court also found Carpenter could not identify any contracts lost to him because of the DBE program (id. at 11),

and that he suffered no detrimental economic effects through 1984 (*ibid.*),⁹ and concluded that the evidence did not disclose that the DBE program has had any detrimental economic effect on him (*id.* at 11-12, 15). "[T]he competent evidence set forth at trial and the facts as found by the court, supra, fail to support any claim that plaintiffs have suffered economic injury. If anything, plaintiffs have prospered since implementation of the DBE program in 1982" (*ibid.*). These findings -- which are well documented by the district court's opinion and are discussed at length there -- are not clearly erroneous.¹⁰

With regard to specialty contracting generally, the court also noted that plaintiffs failed to put on evidence of the "overall construction contracting opportunities" available to specialty subcontractors, or those which have been withheld due to operation of the DBE program, "so that a calculation could be made of the percentage of the total annual expenditure for landscaping and erosion control projects -- public and private -- in North Carolina which was represented by the 10% DBE annual

⁹ The court rejected plaintiffs' evidence relating to economic effects after 1984 for failing to provide accurate responses to defendant's interrogatories (*id.* at 11-12). Appellants do not dispute this ruling in their brief.

¹⁰ This Court may reverse a trial court's findings of fact only after determining that the findings are "clearly erroneous." Shrader v. White, 761 F.2d 975, 980 (4th Cir. 1985); W.F. Magann Corp. v. Diamond Mfg. Co., 775 F.2d 1202 (4th Cir. 1985). This in turn requires this Court to determine that the district court's findings and conclusions relating to the factual record are not "plausible." Anderson v. City of Bessemer City, 470 U.S. 564, 575 (1985). In our view, the district court's findings regarding appellants' failure of proof are well beyond "plausible," and indeed are compelled by the record.

participation goal" (id. at 17-18). The court rejected plaintiffs' primary evidence -- Henry Clegg's testimony -- relating to specialty subcontractors. The court found that Mr. Clegg's conclusion that the DBE program had a detrimental effect on specialty subcontractors was unsupported. The court noted that while Mr. Clegg reviewed documents that listed subcontracts to DBEs on state projects from July 1986 to June 1987, he had no information about the subcontracts awarded to non-DBEs, and no information about the pool of subcontractors who were bidding on the jobs which were awarded by subcontract. Thus, he could not determine whether non-DBE firms were continually losing projects to DBE firms. Id. at 18 n.10. The court found Mr. Clegg did not know the amount of money involved in subcontracts to specialty subcontractors (ibid.), and would not permit Mr. Clegg to express an opinion on the effect of the DBE program on specialty subcontractors "because plaintiffs failed to lay a proper foundation -- statistical or factual -- for such an opinion" (ibid.).¹¹ In fact, state officials testified that DBEs are certified in nearly every form of subcontracting work (see p. 7, supra), and the record also established that DBEs receive subcontractor opportunities other than those referred to as specialty items (see pp. 8-9, supra). In light of the lack of

¹¹ In fact, the district court noted that appellants' counsel, when asked whether he was going to offer a statistical proof of the effect of the DBE program on specialty subcontractors, responded, "We don't have the type of statistical analysis that one would seek to have in a disparate impact case" (R. 93 at 20).

evidence that specialty contracting in general was adversely affected by the DBE program, it is unsurprising that the district court also concluded that plaintiffs' specifically suffered no redressable harm.

Plaintiffs fail to argue here that the district court erred when making its findings of fact concerning their failure to prove that operation of the DBE had a detrimental effect on Carpenter specifically, or, more generally, on specialty contractors. In all events, the record fully supports the court's findings of fact. Accordingly, plaintiffs do not have standing.

II

ONCE CONGRESS HAS DETERMINED THAT A NATIONWIDE PROGRAM IS NECESSARY TO REMEDY THE EFFECTS OF PAST DISCRIMINATION IN A SPECIFIC AREA, AND ENACTS SUCH A PROGRAM BY STATUTE, A STATE NEED NOT MAKE ADDITIONAL AND INDEPENDENT FINDINGS

As the district court recognized, the constitutionality of Section 105(f) is determined by reference to the two inquiries set out by the Supreme Court's decision in Fullilove, which upheld the constitutionality of a similar federal, race-conscious, remedial program: first, whether Congress had before it sufficient evidence to support its determination that there was a problem of racial discrimination justifying national legislation and, second, whether the program Congress enacted is narrowly tailored to tie the remedy to the effects of discrimination. As shown below, the record Congress had before it is sufficient to sustain Section 105(f), and the federal and

state implementation of the statute is sufficiently narrowly tailored to satisfy Fullilove standards.¹²

A. Congress Had A Sufficient Remedial Predicate For The DBE Program It Enacted In 1982 And Re-Enacted In 1987.

1. Appellants argue (Br. 39-43) that in this case Congress did not make sufficient findings to support a race-conscious remedy either in 1982 when it enacted Section 105(f), nor in 1987 when it re-enacted the DBE program as Section 106(c) of the Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURRA), Pub. L. No. 100-17, 101 Stat. 144. ¹³ The

¹² Plaintiffs devote the initial portion of their argument to the proposition that strict scrutiny applies to racial classifications (see Br. 15-22). The United States does not dispute that the program challenged here contains, as the district court held, a racial classification: specifically, a presumption of eligibility for the program is afforded those who belong to particular racial groups. The Supreme Court in its recent decision in City of Richmond v. J.A. Croson Co. has held that such state-sponsored classifications must withstand "strict scrutiny," i.e., must be "narrowly tailored" to a "compelling governmental interest." Id. at 727, 728 (plurality opinion); id. at 735-739 (Scalia, J., concurring). The analysis in Croson, and in the Supreme Court's earlier decision in Fullilove v. Klutznick, 448 U.S. 448 (1980), also demonstrate, however, that in any consideration of the constitutionality of a race-conscious remedy, the Court must substantially defer to Congress's finding that a factual predicate -- establishing the "compelling government interest" in remedying discrimination -- exists, while a similar determination by a state or local government is due less deference. In this case, the district court correctly analyzed Congress's enactment of Section 105(f) with the appropriate deference to Congressional fact findings established in Fullilove. In our view, then, the district court's analysis was the correct one: it was in all essentials strict scrutiny, but with greater deference to Congress's determination of a remedial predicate.

¹³ Section 106(c) of STURRA added "women" to the list of minority group members presumed to be economically and socially disadvantaged, and limited "small business concerns" to those with gross receipts under \$14,000,000 for the preceding three years.

district court rejected this argument, holding that Congress was familiar with the problem of discrimination against minority businesses through enactment in 1977 of the PWEA, and that subsequent evidence relating to minority firms justified Congress's decision to continue, through the STAA and later the STURRA, the kind of program begun in the PWEA (R. 70 at 28-32). We believe that the district court correctly concluded that Congress had a sufficient record to establish a remedial predicate for the DBE program challenged here.

In Fullilove, Chief Justice Burger stated that, in 1977, "Congress had abundant evidence from which it could conclude that minority businesses have been denied effective participation in public contracting opportunities by procurement practices that perpetuated the effects of prior discrimination. * * * [T]here was direct evidence before the Congress that this pattern of disadvantage and discrimination existed with respect to state and local construction contracting as well." 448 U.S. at 478; see also id. at 461-467, summarizing the evidence before Congress. The Court noted that although Congress did not, and need not, make the kind of "findings" which would be required of an adjudicatory body, "we are satisfied that Congress had abundant historical basis from which it could conclude that traditional procurement practices, when applied to minority businesses, could perpetuate the effects of prior discrimination." Id. at 478. Chief Justice Burger also noted that the PWEA was a temporary "pilot project," id. at 489, subject to "reassessment

and reevaluation" by the Congress prior to any extension or re-enactment. Ibid.

Thus, when Congress enacted Section 105(f) of the STAA in 1982, it was quite familiar with the problems of discrimination against minority businesses in public contracting, and had several times examined and re-examined those problems. In 1980, the Senate Select Committee on Small Business held hearings on legislation to amend the Small Business Act regarding the Section 8(a) program, which also benefits disadvantaged businesses.¹⁴ Evidence was presented there regarding the tiny percentage of construction dollars (\$3 billion of \$200 billion) which was going to minority-owned firms. Hearing at 16-17. The hearing also described the continuing effects of discrimination faced by minority firms in getting subcontracts, even on Section 8(a) projects. Id. at 19-23. In 1981, the House Committee on Small Business held hearings on the Small Business Administration's 8(a) program, where witnesses further documented the problem, discussing the difficulties minority businesses had in achieving a competitive foothold.¹⁵ The House Committee on Small Business also held hearings in 1981 and 1982 on Small and Minority

¹⁴ See Hearings on H.R. 5612, To Amend the Small Business Act To Extend The Current SBA 8(a) Pilot Program before the Senate Select Committee on Small Business, 96th Cong. (August 4, 1980).

¹⁵ Hearings on the Small Business Administration 8(a) Program, before the Subcommittee on SBA and SBIC Authority, Minority Enterprise and General Small Business Problems of the Committee on Small Business, House of Representatives, 97th Cong., 1st Sess. (May 21, June 4, and June 10, 1981).

Business in the Decade of the 1980's," 97th Cong., 1st Sess. In those hearings, the House heard evidence concerning disadvantage caused by larger firms refusing to contract with newer minority businesses (id. at 26); difficulties minority firms had breaking into the "old boy" network that controlled much contracting (id. at 34, 260); the lengthy process of raising minority businesses into competitive positions (id. at 239); and the lack of access of minority firms to capital (id. at 209-211). Similar difficulties were described in the 1982 "Hearings on Minority Business and its Contributions to the U.S. Economy, held by the Senate Committee on Small Business," (97th Cong., 2d Sess. (June 23, 1982). See id. at 45 (difficulty breaking into the "old boy contracting network, at 80 (difficulties on minority access to capital).

Rep. Parren Mitchell, in sponsoring the legislation which became Section 105(f), referred Congress both to the history of the enactment of the PWEA, and the need to continue the success of that program. See 128 Cong. Rec. H8954 (Dec. 6, 1982).

After 1982, additional hearings were held recounting the continuing difficulties minority firms had in gaining a competitive contracting position. Congress held oversight hearings on the effects of Section 105(f). See, e.g., Hearings before the Subcommittee on SBA and SBIC Authority, Minority Business Enterprise and General Small Business Problems of the House Committee on Small Business, 99th Cong., 1st Sess. (April 17, June 5, and October 22, 1985). Those hearings provided

extensive information concerning the operation of Section 105(f), and convinced Congress that its extension was justified. See, e.g., Oct. 22, 1985 hearings at 2-3, 85-86 (discussing conditions in North Carolina); 121-125 (in Pennsylvania); 194 (in Wisconsin); 215 (in Indiana). Other hearings similarly evidenced the continuing difficulty of establishing minority-firm opportunities after years of discrimination.¹⁶

In 1987, before Congress enacted Section 106(c) of STURRA, the Senate Committee on Environment and Public Works issued its Report on the Federal-Aid Highway Act of 1987. That Report discussed the implementation of Section 105(f), and stated that the Committee had "considered extensive testimony" and had concluded that a DBE provision "is necessary to remedy the discrimination faced by socially and economically disadvantaged persons attempting to compete in the highway and mass transit construction industry." The Committee referred to Section 105(f)

¹⁶ See, e.g., Hearings on Federal Contracting Opportunities for Minority and Women-Owned Businesses: An Examination of the 8(d) Subcontracting Program before the Committee on Small Business, United States Senate, 98th Cong., 1st Sess. (Dec. 19-23, 1983); Hearings on Minority Enterprise and General Small Business Problems before the Subcommittee on SBA and SBIC Authority, Minority Enterprise and General Small Business Problems of the Committee on Small Business, House of Representatives, 99th Cong., 2d Sess. (Sept. 8, 1986); Hearings on the State of Hispanic Small Business in America before the Subcommittee on SBA and SBIC Authority, Minority Enterprise and General Small Business Problems of the Committee on Small Business, House of Representatives, 99th Cong., 1st Sess. (Sept. 17, 1985); Hearings of Women Entrepreneurs: Their Success and Problems before the Committee on Small Business, United States Senate, 98th Cong., 2d Sess. (May 30, 1984). The factors enumerated at these hearings are quite similar to the evidence before Congress which Chief Justice Burger enumerated in his opinion in Fullilove. See 448 U.S. at 456-472.

of the STAA, and concluded that while the statutory DBE program had helped reduce barriers to the effects of discrimination, continued use of a program in this area of contracting was necessary. Id. at 11.

In sum, Congress has over a long period of time carefully scrutinized conditions in public contracting to determine whether continued use of programs for minority and disadvantaged businesses is necessary. In so doing, it established, as in Fullilove, 448 U.S. at 478, an "abundant historical basis from which is could conclude" that remedial action was necessary (see also Croson, 109 S. Ct. at 724, requiring a "'strong basis in evidence for [Richmond's] conclusion that remedial actions was necessary'" (quoting Wygant v. Jackson Board of Educ., 476 U.S. 267 (1986)), and demonstrated a more than sufficient factual predicate for enacting the Section 105(f) program in 1982 and the Section 106(c) program in 1987.

2. We would also contend that greater deference is due the findings made by Congress than by state or local legislative bodies.¹⁷ Thus, assuming arguendo, that the evidence here might have been insufficient to sustain a state or local program, it is more than adequate to sustain a congressional program.

The breadth of Congress's remedial power was critical in Fullilove, of course, and strongly reaffirmed in Croson. Indeed,

¹⁷ In this case, there is no doubt that Congress itself, by the express terms of the statute, authorized the racial preferences at issue. Compare Hampton v. Mow Sung Wong, 426 U.S. 88, 114-116 (1976); Central Alabama Paving, Inc. v. James, 499 F. Supp. 629, 634-639 (M.D. Ala. 1980).

Justice O'Connor in Croson, 109 S. Ct. at 718, quotes Chief Justice Burger's opinion in Fullilove, 448 U.S. at 483, that "in no organ of government state or federal, does there repose a more comprehensive remedial power than in Congress." See also Croson at 719 ("Justice Powell [in Fullilove] made it clear that other governmental entities might have to show more than Congress before undertaking race-conscious measures"); id. at 719-720; Fullilove, 448 U.S. at 472, 473, 483 (opinion of Burger, C.J.) (stressing deference due Congress in light of this "comprehensive remedial power"); id. at 515-516 & n.14 (Powell, J., concurring) (stressing Congress's "unique" role, and stating, "Nor do I conclude * * * that the selection of a set-aside by any other governmental body would be constitutional").¹⁸

Justice O'Connor's opinion in Croson (in part II, where she was joined by Chief Justice Rehnquist and Justice White) also endorses greater deference to Congress's findings ability. Justice O'Connor wrote that "Congress may identify and redress the effects of society-wide discrimination" (109 S. Ct. at 719), and quoted favorably from Associated General Contractors of Cal.

¹⁸ Chief Justice Burger's opinion in Fullilove indicates that Congress may pass a law broadly requiring states to use set-asides as necessary to undo the remaining effects of past discrimination, so long as in its implementation the statute is neither overbroad nor underinclusive. In concluding that the statute in Fullilove withstood a "facial" attack, the Chief Justice indicated that Congress had authority to define in rather broad terms the predicate for its action, and reviewed in some detail the facts Congress had before it, but stated that implementation of the program in a concrete factual setting, particularly with regard to whether it was narrowly tailored, was still open to review. This approach also appears to be the one taken by Justice Powell in his concurrence in Fullilove.

v. City & Cty. of San Francisco, 813 F.2d 922, 929 (9th Cir. 1987): "The city is not just like the federal government with regard to the findings it must make to justify race-conscious remedial action" (ibid., emphasis added). Similarly, in Shurberg Broadcasting of Hartford v. FCC, No. 84-1600 (D.C. Cir. March 30, 1989, slip op. 20-21), Judge Silberman differentiated between Fullilove and Croson by stating that the cases established that:

The nature of the evidence required to establish the existence of prior discrimination varies with the authority of the governmental body imposing the remedial preference. See Fullilove, 448 U.S. at 515 n.14 (Powell, J., concurring). Congress is clearly the institution with the most latitude to make findings of discrimination and authorize remedies on the basis of the evidence before it. See Croson, 57 U.S.L.W. at 4137-38; Fullilove, 448 U.S. at 472, 483; id. at 499-502 (Powell, J., concurring). A state or local government must have stronger evidence of discrimination before it can employ racial classifications, Croson, 57 U.S.L.W. at 4138, and that evidence must approach a prima facie case of a constitutional or statutory violation.

Conversely, the court of appeals cases appellant cites (Br. 37) all involve state or local programs,¹⁹ none involve a federal program of the type in this case.

B. Once Congress Acts With A Sufficient Evidentiary Predicate For A Nationwide Race-Conscious Remedy, A State Need Not Make Additional Findings Before Implementing The Federal Program.

Plaintiffs suggest that North Carolina may implement the federal program only if it first makes findings -- beyond those made by Congress -- which the Supreme Court in Croson recently

¹⁹ South Florida Chapter of Assoc. Contractors v. Metropolitan Dade County, 723 F.2d 846 (11th Cir.), cert. denied, 469 U.S. 871 (1984); Michigan Real Builders v. Milliken, 834 F.2d 583 (6th Cir. 1987); J. Edinger v. Louisville, 802 F.2d 213 (6th Cir. 1986).

held were necessary to support state-sponsored race-conscious legislation. As the district court held (R. 70 at 27), there is simply no support, and plaintiffs effectively cite none here, for that argument.

1. In Fullilove, the Supreme Court upheld the 10% minority set-aside Congress enacted in the Public Works Employment Act (PWEA) of 1977, Pub. L. No. 95-28, 91 Stat. 116. The PWEA program worked in a manner almost identical to the STAA program at issue in this case; Congress appropriated money for construction projects, which would be distributed to state and local grantees. Those grantees, who would then approve projects and award contracts paid for in whole or in part with the federal assistance, id. at 453, would require of its contractors that 10% of each grant should be spent on minority business enterprises.

In upholding the PWEA set-aside, the Fullilove Court relied in part on Congress's authority under Section 5 of the Fourteenth Amendment to enforce the Equal Protection Clause, and its determination that there was a problem of nationwide scope requiring a nationwide remedy. "[T]here was direct evidence before the Congress that this pattern of disadvantage and discrimination existed with respect to state and local construction contracting as well. In relation to the MBE provisions, Congress acted within its competence to determine that the problem was national in scope." Id. at 478. Once Congress concluded that existing public contracting practices would be "perpetuating the prevailing impaired access by minority

businesses to public contracting opportunities," the Court found that Congress had the authority to establish a nationwide remedy. Id. at 475.

In upholding the PWEA in Fullilove, therefore, the Supreme Court clearly understood that Congress's decision to require all states and localities accepting PWEA funds to require a 10% set-aside did not depend on findings by a particular state or local grantee.²⁰

2. The Supreme Court has rejected the limitation on Congress's power suggested by plaintiffs in no uncertain terms, holding that once Congress had constitutionally exercised its authority to determine that nationwide legislation is necessary,²¹ no further findings by any locality is necessary. In Katzenbach v. Morgan, 384 U.S. 641 (1966), Congress had enacted legislation prohibiting states from denying the right to vote to any individual because of the individual's inability to read English if the individual had finished the sixth grade in an "American flag" school. 42 U.S.C. 1973b(e). The State of New

²⁰ See also Milwaukee County Pavers v. Fiedler, No. 89-C-0177-C (W.D. Wis. Apr. 7, 1989), slip op. 30 (district court holds that a local entity implementing the STAA program need not make independent findings, but rather may rely on Congress's findings). This is not to state, however, that local conditions are entirely irrelevant to implementation of the set-aside. As explained below, at 47, infra, local conditions may be relevant when determining whether implementation of the required set-aside is narrowly tailored.

²¹ We do not suggest, of course, that Congress could authorize an unconstitutional racial classification in any area of the country. As we have seen, the DBE program is clearly constitutional.

York sued the federal government, alleging that Congress, exercising its authority under Section 5 of the Fourteenth Amendment to enforce the Equal Protection Clause, could require a state to alter its laws only to the extent that application of those laws would violate the Equal Protection Clause. The Court rejected such a limiting construction of Congress's power (Katzbach v. Morgan, 384 U.S. at 648-649). Congress's authority in this area was further delineated in Oregon v. Mitchell, 400 U.S. 112 (1970). In that case, Congress had, inter alia, barred the use of literacy tests nationwide for five years. The State of Arizona argued that application of the ban to its state was improper, since the racial discrimination Congress was prohibiting was caused "by governmental bodies elsewhere in the country." 400 U.S. at 233 (opinion of Brennan, White, Marshall J.J.). The Court unanimously refused to require findings that circumstances in a particular state met with Congress's assessment of a national problem before the law could be applied to that state (id. at 284):

Nationwide application may be reasonably thought appropriate when Congress acts against an evil such as racial discrimination which in varying degrees manifests itself in every part of the country. A remedy for racial discrimination which applies in all the States underlines an awareness that the problem is a national one and reflects a national commitment to its solution.

Because the justification for extending the ban on literacy tests to the entire Nation need not turn on whether literacy tests unfairly discriminate against Negroes in every State in the Union, Congress was not required to make state-by-state findings concerning either the equality of educational opportunity or actual impact of

literacy requirements on the Negro citizens' access to the ballot box. In the interests of uniformity, Congress may paint with a much broader brush than may this Court, which must confine itself to the judicial function of deciding individual cases and controversies upon individual records.

Thus, the Supreme Court has made clear that when Congress determines that a particular problem has national ramifications and requires a nationwide remedy, additional findings are not required by any entity -- Congress or, a fortiori, anyone else. Appellants' argument that North Carolina was required to make findings sufficient to justify application of a set-aside within the state before it could enforce the set-aside Congress established in the STAA is meritless.

3. In addition, plaintiffs' argument that a state should be required to make additional, localized findings notwithstanding Congress's nationwide findings has no logical stopping point. It would require a county, next, to make county-wide findings if a state has made adequate statewide findings, and a city then to make citywide findings, and so on. Plaintiffs appear to recognize the absurdity of this argument when they at one point concede that there is only "a requirement that the compelling state interest required for the use of race be firmly established at some level" (Br. 42, emphasis added).

In addition, the principal purpose of the first prong of strict scrutiny is to ensure that the racial classification is rooted in legitimate remedial aims. See Croson, 109 S. Ct. at 727 (majority opinion), quoting Fullilove, 448 U.S. at 533-535

(Stevens, J., dissenting); see also appellants' Br. 34-35. Congress's findings establish this. It is nowhere alleged that the state's motives for participating in the program are discriminatory. On the contrary, they are clearly monetary. For these reasons, too, additional filings and the state level are unnecessary here.²²

4. Finally, plaintiffs assert that the Supreme Court's recent Croson decision establishes that North Carolina needed to make findings of local discrimination before adopting the federal program. There is nothing in Croson, however, to support this. Justice O'Connor's opinion made clear numerous times that it was addressing a program established by a state or local government, and not by Congress. The Court specifically rejected Richmond's reliance on the PWEA set-aside upheld in Fullilove, for its own program, stating, "What [Richmond] ignores is that Congress, unlike any State or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment. The power to 'enforce' may at times also include the power to define situations which Congress determines threaten principles of equality and to adopt prophylactic rules to deal

²² Appellants refer (Br. 38-39) to the Justice Department's amicus brief, written before Croson and submitted to the Supreme Court when the Court was considering the petition for a writ of certiorari in H.K. Porter Co. v. Metropolitan Dade County, No. 87-1001, as support for its position that local findings are necessary in this case. That reliance is unavailing. The issue presented in Porter, see 825 F.2d 324 (11th Cir. 1987), did not involve a statute specifically mandating a set-aside program. Here, Congress clearly has made a nationwide determination, and that determination controls in this case.

with those situations." 109 S. Ct. at 719 (emphasis in original). Thus, not only did Croson not address the situation where Congress had already made the necessary findings, Justice O'Connor's discussion of Congress's authority indicates that, once Congress has made such findings and enacted a program, additional state findings are unnecessary.

III

NORTH CAROLINA HAS PROPERLY IMPLEMENTED THE
FEDERAL REGULATORY REQUIREMENTS FOR OPERATION
OF A DBE PROGRAM, THEREBY INSURING THAT THE
PROGRAM IS NARROWLY TAILORED AND DOES NOT UNFAIRLY
AFFECT ANY ONE TYPE OF CONSTRUCTION OR CONTRACTOR

Plaintiffs argue here that evidence presented below shows that North Carolina's implementation of the program violated the Supreme Court's standards for narrow tailoring (Br. 45-57). To the contrary, the evidence showed that North Carolina's implementation of the program is precisely what the regulations require, and what Fullilove and Croson approved as narrow tailoring. As the district court found, appellants put on virtually no convincing evidence demonstrating their claim that the plan, as administered by North Carolina, was not narrowly tailored or had a disparate effect on specialty subcontractors or Mr. Carpenter.²³

²³ Fullilove itself cited several factors to consider in determining whether a program is narrowly tailored. First, the Court noted that the PWEA program contained an "administrative mechanism, including a complaint procedure, to ensure that only bona fide MBE's are encompassed by the remedial program, and to prevent unjust participation in the program by those minority firms whose access to public contracting opportunities is not impaired by the effects of prior discrimination." 448 U.S. at (continued...)

1. The most critical aspect of ensuring that a racial classification is "narrowly tailored" to its remedial purpose is, logically, that the classification not unnecessarily afford a remedy to those of a favored group who are not in fact suffering the effects of past discrimination and, conversely, that it not bar relief to those of unfavored groups who in fact are suffering those effects.

Thus, Chief Justice Burger's opinion in Fullilove stressed that "the MBE provision cannot past muster unless * * * it provides a reasonable assurance that application of racial or ethnic criteria will be limited to accomplishing the remedial objectives of Congress and that misapplication of the program will be promptly and adequately remedied administratively" (448

23 (...continued)

482. The Court also noted that the PWEA program assumed that the grantee who sought available, bona fide minority MBEs would achieve the 10% level of minority participation, and that the grantee who failed to reach the required 10% goal has available an "administrative waiver" of the goal should the grantee demonstrate that it cannot reach that level of minority participation "without departing from the objectives of the program" by using firms which are charging unreasonable prices or are otherwise attempting improperly to benefit from a program designed to remedy disadvantages stemming from racial discrimination. Id. at 481-482. The Court further noted that the administrative mechanism permits the elimination of spurious minority front firms to prevent abuses of the program. Id. at 488. The Court also relied on the fact that the federal program would be "subject to reassessment and reevaluation by Congress prior to any extension or re-enactment." Id. at 489. Finally, the Court determined that the actual effects of the program on the contracting expectations of "nonminority firms is relatively light in this connection when we consider the scope of this public works program as compared with overall construction contracting opportunities." Id. at 484; see also id. at 514-515 (Powell, J.). As is discussed in the text below, each of these elements of narrow tailoring is met in this case.

U.S. at 487). The Chief Justice then explained that the program's racial presumption "may be rebutted" (ibid.), that there was available a "complaint procedure * * * for reporting 'unjust participation by an enterprise or individuals in the MBE program'" and that no MBE may "exploit the remedial aspects of the program by charging an unreasonable price, i.e., a price not attributable to the present effects of past discrimination" (id. at 488).

Justice O'Connor's opinion in Croson similarly stressed this aspect of the program in Fullilove, noting that "[t]he Chief Justice indicated that without this fine tuning to remedial purpose, the statute would not have 'pass[ed] muster'" (109 S. Ct. at 718) (plurality), and that in the Richmond program "there is no inquiry into whether or not the particular MBE seeking a racial preference has suffered from the effects of past discrimination by the city or prime contractors" (id. at 729) (opinion for the Court). Justices Stevens, Kennedy, and Scalia also acknowledged in their concurring opinions the necessity of this fine tuning to a remedial purpose. Id. at 730, n.1 (Stevens, J.) ("Unless the legislature can identify both the particular victims, and the particular perpetrators of past discrimination, * * * a remedial justification for race-based legislation will almost certainly sweep too broadly") (emphasis in original); id. at 734 (Kennedy, J.) ("the rule suggested in [Justice Scalia's] opinion, which would strike down all preferences which are not necessary remedies, to victims of

unlawful discrimination, would serve important structural goals"); id. at 735-739 (Scalia, J.). See also Shurberg Broadcasting Co. of Hartford, Inc. v. FCC, No. 84-1600 (D.C. Cir. Mar. 31, 1989), slip op. 18, 20, 21 (opinion of Silberman, J.); id. at 9-11 (opinion of MacKinnon, J.).

The federal program at issue in the present case is entirely consistent with this fundamental remedial principle. Plaintiffs concede that the district court made essentially this very determination (Br. 22), and those findings are not clearly erroneous. North Carolina certifies disadvantaged business enterprises in a manner consistent with the federal regulations, and in a manner more attuned to disadvantage than the strict racial classification which Fullilove upheld. As Congress required in Section 105(f), minority status serves only as a "presumption" of entitlement to status as a "socially and economically disadvantaged business." As required by federal regulations (49 C.F.R. 23.69), North Carolina has procedures which permit individuals to challenge the designation of certain minority firms as disadvantaged (see p. 7, supra) to help limit certification to those firms owned and operated by individuals who legitimately are economically and socially disadvantaged.

Thus, there is ample opportunity for examination of these facts that underpin social and economic disadvantage if questions arise either through a self-initiated investigation or by a third party challenge. As to the former, Roger Lewis, Assistant FHWA Division Administrator, testified that should information be

received that calls into question the social or economic disadvantage of a member of the presumed groups, then NCDOT would have an obligation to conduct an appropriate investigation. In determining whether such individuals are in fact socially and economically disadvantaged, NCDOT would apply the criteria set forth in 49 C.F.R. Part 23, Subpart D (Tr. 299-300). To date NCDOT has had no reason to question the validity of the presumption of social and economic disadvantage as applied to any participant in the DBE program (Tr. 234). And there is not the slightest hint in the record before the Court that businesses owned by minorities who are not in fact socially and economically disadvantaged participate in the DBE program in North Carolina. Thus, plaintiffs' argument that the DBE program as applied in North Carolina is "overinclusive" is pure speculation.

As to the third party challenge process, competing DBE and non-DBE firms have ample incentive to challenge the bona fides of any firm whose certification they have reason to question. The fact that no challenge has been filed by plaintiff Carpenter or anybody else does not render the program unconstitutional and is not evidence that the procedure is illusory or that the presumption is conclusive. On the contrary, the absence of third party challenges, combined with the absence of any suggestion that nondisadvantaged firms are participating in the NCDOT program, is evidence that there is an effective mechanism for ensuring that participants in the program are truly disadvantaged. Thus, the procedures in place in North Carolina

are consistent with DOT's regulations and Congressional intent. Indeed, ensuring that only bona fide businesses participate in the DBE program is of utmost importance to maintaining the integrity of the program. To maintain this level of integrity, NCDOT created a task force to investigate previously certified DBEs that had been identified as not in fact eligible for certification. Furthermore, NCDOT monitors the bona fides of all firms annually as part of the recertification process (Tr. 226).

Conversely, the state also allows people who do not qualify for the minority presumption to demonstrate that they share attributes of disadvantage sufficient to be certified as DBEs, and has certified as DBEs three firms owned by handicapped individuals (see p. 6, supra). See also 49 C.F.R. Pt. 23, Subpart D, App. A (Sec. 23.62). Thus, this record shows that there is in place a workable and flexible procedure to decertify minorities who should not be certified as DBEs, and to permit nonminorities who should be certified as DBEs to be granted such status.²⁴

²⁴ When accepting applications from individual firms seeking certification as DBEs, the state considered membership of the firm's owner and manager in one of the minority groups set forth in the federal regulation, 49 C.F.R. 23.62, to establish a "rebuttable presumption" that the individual was economically and socially disadvantaged, and therefore eligible for certification. Appellant criticizes this approach, suggesting that the state is improperly using race as a "conclusive" presumption of disadvantaged status (Br. 22), and that the program permits certification of individuals belonging to minority groups not located in North Carolina (Br. 28 n.5).

Appellants failed to prove, however, that the state's processes have actually resulted in unfair certifications.

(continued...)

2. There is abundant other evidence of narrow tailoring as well.

To begin with, federal regulations require that a grantee set goals based on the availability of existing DBEs to do the required project work required by the project, 49 C.F.R. 23.64, 23.45, and the record shows that North Carolina did exactly that; it calculated its annual goal based on the probable workload capability of DBEs within the state, and probable level of federal funding (pp. 7-8, supra). In addition, state officials testified that goals for individual contracts were based on the availability of existing and qualified DBEs to do the kind of subcontracting work the project would permit, and were set in such a way that the prime contractor would have flexibility to choose among several types of subcontracting projects for which there were qualified DBEs (p. 9, supra). This effectively insures that the goal is less of a "set-aside" than a requirement that the prime contractor insure that available DBEs become aware of contracting opportunities and participate in the contracting process. In addition, by setting a goal at a level below the availability of DBEs in a particular area, and by insuring that

24 (...continued)

Appellants failed to put on any evidence that individuals have been certified for DBE status who should not have been. State officials testified that, again as required by federal regulations, the state permits a third party, like Mr. Carpenter, to challenge the certification of any individual, minority or not. Federal regulations suggest just such an approach. See App. C to 49 C.F.R. Pt. 23. There have been no such challenges filed to date. Accordingly, there is simply no evidence in this record that the state has been certifying individual firms for DBE status which should not have been certified.

DBEs are available in many areas of subcontracting opportunities (see pp. 8-9, supra), the state permits a prime contractor to determine competitively which area of the contract he will subcontract to an available and qualified DBE; the goal will not require a contractor to reserve one particular area of the contract only for a minority firm.

In addition, the record shows that North Carolina had a method of determining whether a prime contractor unable to meet a goal should be excused from compliance. Specifically, the contractor may show that a good faith effort to meet the goal would fail due to unavailability of sufficient DBEs seeking to participate in the project (see p. 9, supra). Similarly, North Carolina officials testified that they investigate DBE firms to insure that those which state that they are 51% owned and operated by minorities are actually so controlled, and have decertified at least nine firms after discovering that the firms were actually not controlled by minorities (see p. 7, supra).

Accordingly, North Carolina's method of setting goals, and of evaluating good faith efforts to achieve a goal, are precisely what the federal regulations require, and are more flexible, waivable, and less onerous than the program approved in Fullilove.

Appellants suggest North Carolina misapplied its authority to set goals when in 1985 the Governor rejected a suggestion from state highway officials to seek a 6.5% goal. The state officials' suggestion was based on an assumption of receipt of

over \$400,000,000 in federal assistance and potential use of DBEs of \$20,000,000 worth of work. As it turned out, the level of federal assistance was lower than \$400,000,000, so that the actual use of DBEs was 9.7% of that year's federal assistance. The state's explanation that its failure to meet the 10% goal was based upon a lack of sufficient DBEs was accepted by the federal officials. Accordingly, contrary to appellants' suggestion that the annual goal was "not tied to the relevant labor market," it was precisely so assessed. Despite the governor's rejection of a lower percentage goal, the actual DBE use was the same as the level of projected DBE use in the state officials' initial recommendation. The percentage goal fluctuated based on the amount of federal assistance North Carolina received. The result was that the state handled calculation of the annual goal perfectly well, did not use DBEs in a manner beyond what the state officials determined was their overall capability, and was excused from its inability to meet the goal.

The district court correctly pointed out that appropriations under the STAA have been continually monitored by Congress, which has held hearings on the application of Section 105(f), and which "continues to monitor its enforcement" (R. 70 at 45); this oversight is evidence that the DBE program will not "require preferential treatment for DBEs after such treatment becomes unnecessary" (*id.* at 46). Without such continuous Congressional re-examination, the remedial predicate can, of course, at some point become stale, but that is not the case here.

Finally, the fact that the program had no appreciable impact on specialty contractors generally or on plaintiffs in particular (see part I, pages 22-26, supra), also demonstrates the program's minimal impact on innocent third parties and, therefore, its narrow tailoring. See, e.g., Wygant v. Jackson Board of Educ., 476 U.S. 267 (1986).

CONCLUSION

For the reasons stated herein, the district court's judgment denying relief in this case should be affirmed.

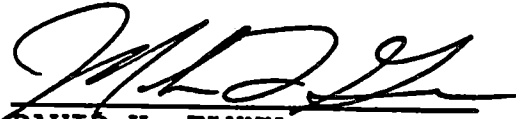
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This 12th day of July 1989


MARK L. GROSS
Attorney

10 ^{pm}
7/28

Chriss:

May be able to build a news element
into Urban League regarding President's

Enterprise Zones Program (Letter of Transmittal
to Congress July 25). Proposal includes
~~not just~~ details of how zones would
work - not just another "we support
E. Zones" statement....

Catch: Kemp speaks to Urban
League day before Pres. Bush. Can we
make some Pres. has option to "announce"??

Dan McG.

Ben Chriss:

Do not release

WK

OFFICE OF THE VICE PRESIDENT

Embargoed until delivery -- approx. 10:30 AM, July 12, 1989

TEXT OF REMARKS BY THE VICE PRESIDENT

80TH ANNUAL CONVENTION OF THE NAACP
COBO HALL, DETROIT, MICHIGAN
JULY 12, 1989 - 10:30 A.M.

It is an honor for me to be here today as you commemorate the 80th anniversary of the NAACP. The President regrets that he could not be here, as he is traveling in Europe. He asked me to extend his highest personal regards to you, Dr. Hooks, Dr. Gibson, Mrs. Mcmillen, the NAACP Executive Board, and the NAACP membership.

I'd like to begin by echoing the remarks of President Bush at your 79th annual convention last year. The President promised that this Administration would have "a positive civil rights agenda." He also promised that he would be "personally involved in protecting the civil rights of all Americans."

The NAACP can be proud of the fact that, over the last eight decades, it has made an immeasurable contribution to the betterment of our society. In 1909, when the NAACP was organized, America was a segregated society. Black citizens could not work as public servants in some states, could not use public accommodations, could

not attend many of the nation's finest colleges and universities. Blacks were forced to attend segregated public schools and had to drink from "colored" water fountains.

You could pay your taxes, but you could not use the public restrooms in some city halls. You could fight in the Army during periods of war, but you could not buy a home outside of the black community, or use public hospitals to treat black soldiers' wounds. You could cook the food in the kitchen, but you could not eat the food that you cooked at a table in a restaurant in which you worked. Largely because of the work of the NAACP over the past 80 years, these and many other racial barriers have been struck down.

But as your theme says: "the struggle continues." Our society today is less steeped in intolerance, but there is still intolerance in the land. Our society is less racist today, but there is still racism. Our society is less bigoted today, but there is still bigotry and there are still bigots. And so long as this is so in America, there will be a need for the NAACP.

I mentioned earlier the Civil Rights Act of 1964. Two weeks ago, we held a White House ceremony marking the 25th anniversary of its passage. Dr. Hooks was there, as were other civil rights leaders. I think the President's

remarks at that ceremony bear repeating before this audience. He asked that we, as a nation, "rededicate ourselves to that most American of dreams: a society in which individuals are judged not 'by the color of their skin, but by the content of their character.'" The President also went on to say that "we must move beyond the protection of rights to the creation of opportunity."

The current situation for black Americans is a mixture of progress and continuing struggle.

- o I understand that the black middle class has grown by a third in the 1980s. This according to black sociologist Bart Landry of the Joint Center for Political Studies.
- o I understand that average black family income is at the highest level in history.
- o I understand that the black employment rate -- the number of working-age black Americans holding jobs -- is at the highest level in history.
- o I understand that the number of black professionals has increased by nearly one-half.
- o I understand that the black business sector has almost doubled in size over the course of the decade.

But, then, I also understand that nearly a third of black Americans have family incomes that place them below

the poverty line.

- o I understand that the black infant mortality rate is twice that of whites.
- o I understand that homicide is the leading cause of death for young black males.
- o And I understand that the high school drop out rate in many of our black inner cities is as high as 50% in some places.

These are not just black problems. They are America's problems. They are problems that we -- as a nation -- must work together to solve.

Of course, these problems are very complex and very painful. They have no easy answers. But I think that the NAACP was on to something when it co-sponsored the Black Family Summit in 1984 at Fisk University in Nashville. I think most of us realize that strong families -- be they black, white, yellow or brown -- produce progress. Parents instill values in their kids. They emphasize the importance of education. They preach the work ethic. They encourage personal responsibility.

Broken families, as we know, often have to work hard every day just to survive. With all the pressures such families face in their daily lives, is it any wonder that family members might sink into despair? When we talk about drug abuse, when we talk about teen-age pregnancy, when we

talk about joblessness, when we talk about crime, when we talk about high school drop-outs, we are not simply talking about statistics.

We are talking about human beings, whose lives are important to their families, to their communities and to this society. Because when a person succumbs to these and other problems it not only represents a personal tragedy, but a loss to family, to community, and to society. It means missed opportunity. It means unrealized potential. And it means that a national resource -- human in this case -- has been under-utilized. With the world growing increasingly competitive, America cannot afford such losses in human capital.

This Administration has set out to pursue initiatives that are meant to offer hope and opportunity to the disadvantaged.

- o You heard Monday from Jack Kemp, our Secretary of Housing and Urban Development. He is putting forward some very innovative ideas to improve the lives of residents of the Nation's public housing communities.
- o Tomorrow you will hear from Louis Sullivan, our Secretary for Health and Human Services, who intends to bring to bear the resources of his department to deal with the health problems of black Americans.

o Our Labor Department, under Secretary Elizabeth Dole, will continue to offer help to those who are unemployed and lacking job skills through the Job Training Partnership Act Program. I am particularly proud of this program, since I helped to create it when I was in the Senate. Earlier this morning, I toured a JTPA site at Wayne State University. This site happens to be one of the best in the country. Overall, 68% of those who go through JTPA are placed in jobs. Those are results that no other job training program has equaled. And we are working to make the program even better. Most important, by improving our targeting of jobless people from the most disadvantaged backgrounds.

o On the education front, this Administration, under George Bush -- who has stated on numerous occasions that he intends to be the "Education President" -- intends to push forward with our reform agenda, with the object being to provide a genuine quality education for our school children.

This Administration has laid out four key principles on education:

- 1) Excellence and success in education should be recognized and rewarded.
- 2) Federal funding should be targeted to those who need

it most.

- 3) Choice and flexibility -- for educators, parents, and students -- are important to educational reform and to achieving excellence.
- 4) Greater accountability is needed in the education system to assure that students are actually receiving the highest quality education. Success should be rewarded; programs which do not work should be changed.

We intend to recognize merit schools, whose students make significant educational progress over time, with special emphasis on schools that enroll substantial numbers of disadvantaged students.

We are going to assist in the creation and development of magnet schools, which offer students and parents wider educational choices. Many of these magnet schools, as you may know, are being created in black neighborhoods. And we are creating a special fund of \$60 million -- over four years -- to help build the endowments of historically black colleges and universities. As you know, President Bush is strongly committed to black colleges. And I stand with him in that commitment.

This past may, I had the honor of delivering the commencement message at Fisk University -- the same campus on which the NAACP held its Family Summit five years ago.

The point was brought home to me that if Fisk did not exist, many of the students that graduated that day might not ever have received a college diploma. And I'm sure the same could be said of the other black colleges and universities as well.

We must stress education because -- as we all know -- it is the key to upward mobility. Now a good education does not guarantee that you will have a full and prosperous life. But a poor education almost certainly guarantees that you won't.

And quality education can happen anywhere. Even in a decaying neighborhood infested with drugs and overrun by crime and violence. I visited a school in such a neighborhood last February. Charles Drew Elementary School in the Liberty City section of Miami. This black public school was exemplary in practically every way. Attendance was nearly perfect. The students were well behaved. The teachers were enthusiastic.

As a result, test scores had improved dramatically over the past few years. And the school and its Principal, Frederick Morley, have been cited for numerous awards. This is the kind of progress that can be achieved when families, when communities come together for a good purpose. It is the self-help ethic in full bloom.

When I think of self-help, I am reminded of a famous figure in black history who spent a considerable part of her life in my home state of Indiana -- Madame C. J. Walker. Madame Walker -- as most of you probably know -- founded a multimillion dollar business employing several thousand workers at the turn of the century. She was a philanthropist. She gave freely to the old and the needy. And she contributed generously to this organization -- the naacp -- because she believed strongly in its mission.

It is because of what Madame C. J. Walker represented -- enterprise and philanthropy -- that I, along with Senator Richard Lugar, helped to make funds available for the creation of the Madame Walker Urban Life Center in Indianapolis.

The Center stands today as a symbol of black achievement. It is a place where cultural and educational activities are carried out for the benefit of the entire Indianapolis Community. And it is also a place that offers job training and employment opportunities for those from disadvantaged backgrounds.

This, it seems to me, is a model that deserves to be replicated, much like the various, important self-help programs that the NAACP sponsors. I commend you on your act-so program, which motivates black high schoolers to excel in academic, scientific and cultural endeavors, your

back-to-school/stay-in-school program, and your program addressing the problem of teenage pregnancy. These are the kinds of illuminating programs that the President was thinking about, when he spoke of the need for 1,000 points of light.

If we have learned anything over the last quarter-century, it is that government can do a lot to improve the lives of the disadvantaged but it can not do it all, and it cannot do it alone. We must have a partnership between the government and organizations like the naacp to deal with the social problems that confront this Nation.

I'd like to see other private organizations -- non-profits, philanthropies, corporations, churches, academic institutions -- join together in a new spirit of volunteerism. If we as a Nation come together, with a sense of purpose, there is no problem -- drugs, crime, poverty --that we cannot overcome.

I'd like to speak personally for a moment if I may. I want you to know that I am committed, just as the President is committed, to fostering good relations with the civil rights community. In his remarks earlier in the convention, Dr. Hooks noted "a fresh spirit of openness and reason" in the White House. He said that while the NAACP differs with the Administration on a number of issues, "we can differ and still maintain an open line of

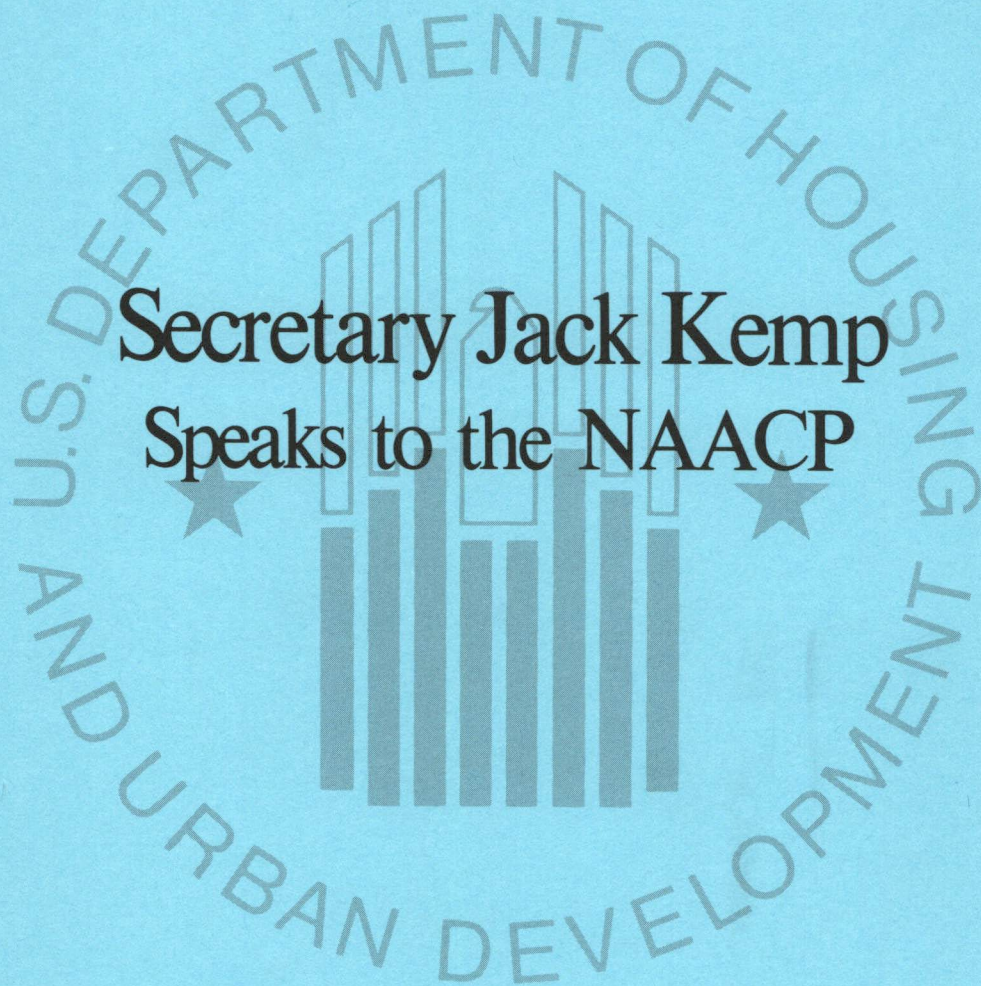
communications free of bitterness and rancor."

Dr. Hooks went on to say that the word to describe this new relationship is "civility." And I heartily concur. I want to say to you today, Dr. Hooks, that my door is always open to you whenever you have something on your mind. We may differ as to the course that this Nation must travel, but we do not differ on the goal of one america where opportunity is not an elusive goal, but a concrete reality. We should work together. Not only for the good of black Americans, but for the good of the Nation.

While we are speaking of civility, let me also say that I would like to see better relations between black Americans and the Republican Party. We have had our differences in the past. But now is the time to put them aside. I invite you all here to give us a fresh look, to join us, to help shape our agenda. The new Republican Party stands for hope and opportunity. I think you will find that you are welcome in the party of Lincoln.

In closing, let me thank you for the welcome you have given me here. I feel confident that we can work together to build an America that we all envision. And, finally, I hope that you will see fit to invite me back some time in the future.

Thank you very much.



Secretary Jack Kemp Speaks to the NAACP

Remarks at the
NAACP Annual Convention
Detroit, Michigan

July 10, 1989



*"I want to help every man, woman, and child
share the American Dream."*

Jack Kemp
July 10, 1989

Ladies and gentleman, I'm honored and thrilled to be here with you at the annual NAACP convention. On this eightieth birthday of your founding, I'm proud to share the dais with your fellow warriors in the continuing battle for civil rights. I'm proud to share this moment with you and with Mrs. Aminda Wilkins, with your Chairman of the Board, Dr. William Gibson; with Nathaniel Colley, who chairs your Special Contributions Fund; with Mrs. Enolia McMillan, President of the National Board; with your Vice Chairman, Rev. Edward Hailes, with Mrs. Myrlie Evers, who is presiding; with Hazel Dukes of the New York State NAACP and Dan Acker of the Buffalo NAACP; with Althea Simmons, Director of the NAACP's Washington Bureau, and of course, with your Executive Director, Dr. Benjamin L. Hooks.

I want to thank Ben Hooks for that warm and generous introduction. I want to thank him, too, for the unstinting leadership he has delivered to your organization...and our country...in the march for liberty and justice.

Thirty-two years ago this month, I came to Detroit as the 17th round draft choice. It's good to be back.

And frankly, folks, if it weren't for Ben Hooks...without his early support...Ben, I might not be Secretary of HUD. When people were wondering what kind of a Secretary I might be, he said I was a liberal with a big 'L' on relations between the races.

And, Ben, I won't let you down!

A few days ago, Ben came by my office to talk about a national campaign styled somewhat after the "clean-up, paint-up, fix-up" programs common to many local communities. He mentioned that the Detroit Baptist Council has such a program, that the Baltimore Afro-American newspaper has such a program, and that in Charlotte, North Carolina, there is a massive clean-up program with hundreds of citizens clearing the shoulders of the expressway -- a major campaign for cleanliness.

Well, I agreed that we should start working with Ben Hooks and the NAACP to make this a national project, and right now, I am announcing that the planning for this program will start immediately. Through this and similar efforts, religious groups, civic groups, labor unions, old, young, teenagers, and all kinds of community organizations can be involved in a massive effort to make our neighborhoods more liveable. I want HUD to work with them and with you to do it. Let's start with those 15,000 abandoned houses in Detroit; and let's get GM, Ford, Chrysler, and Labor to work with us.

On the day President Bush nominated me, I was proud to choose as my motto the beautiful words Martin Luther King expressed upon receiving the Nobel Peace Prize. He said he had "...an abiding faith in America and an audacious faith in the

future of mankind." I, too, have that audacious faith in the future of mankind.

What a thrill it was the other day to sit next to Ben Hooks at the White House, as President Bush and distinguished civil rights leaders and Members of Congress celebrated the 25th anniversary of the Civil Rights Act of 1964, a milestone on the road to freedom and justice. You helped lay that milestone. Vernon Jordan, John Jacob, John Lewis, Joseph Lowery, Jesse Jackson, Floyd McKissick, and Martin Luther King III were there, too; and what an honor it was to meet the great lady of inspiration, Rosa Parks, in the East Room ceremony.

I couldn't help thinking that the modern civil rights movement really started in earnest nine years before the '64 Act. It started on Cleveland Avenue in Montgomery, Alabama, on December 1, 1955 when a local official of the NAACP, Rosa Parks, said she just wasn't about to move to the back of that bus. That was a profoundly courageous thing she did, and it helped inspire sweeping changes in the South and throughout America.

Ben, I've always admired the wisdom of your thought, the eloquent clarity of your ideas -- as so well expressed in the words I read in last month's issue of Crisis. You wrote: "America can only be great if she extends to all of her citizens a chance to make a difference, an opportunity to make a significant contribution to the collective good..."

Those words crystallize our challenge! A chance to make a difference. An opportunity to contribute to the collective good.

This is the American quest. In one simple, yet profound, statement, Ben Hooks has captured its meaning. He has defined our quest...our common objective.

That objective has been ennobled by the lives of patriots and martyrs, by students and workers, by black and white. It has been bought dearly by the sacrifices of those who came before us.

Martin Luther King, writing from the Birmingham jail, personified those sacrifices. He said the civil rights protesters "were in reality standing up for what is best in the Judaeo-Christian heritage, thereby bringing our nation back to those great wells of democracy which were dug deep by the founding fathers in their formulation of the Constitution and the Declaration of Independence."

Ladies and gentlemen, they sacrificed so we might succeed. The road we travel to basic human rights, to dignity and justice, has been carved through the wilderness of ignorance and bigotry, of racism and prejudice. Our way was cleared by the sweat and blood of our ancestors. And by so many people in this room. The

road we follow was laid out by Thomas Jefferson and Crispus Attucks, by Abraham Lincoln and Frederick Douglass, by Hubert Humphrey and Martin Luther King. It was paved and advanced by DuBois and White and Wilkins.

We're following that same road today...Ben, you, me. Men and women of good will everywhere. It's never an easy journey, but we'll keep on going until we reach our destination...until we reach that blessed America so many have struggled, fought, and died for.

We're going to keep on that road. We dare not leave it. For the road to freedom and justice is not yet complete. Our job is to complete it...not just for ourselves...but for those who come after us -- for your children and mine.

Finishing that job...traveling and advancing that road...that is our greatest challenge. For this is the Glory Road...the road that leads to a truly great America in which none are left out...no one is left behind...and all have a chance to contribute. We're going to meet that challenge....we're going to complete this Glory Road...by shaping an America that offers each of us...every man, woman, and child...the freedom to reach the outermost limits of our capabilities.

This is a momentous time in our Nation's history. It's our chance to take what our forefathers knew America could become...to take that idea, that dream, that promise...and transform the promise into reality for all.

We can do it. We must do it. We must extend that road into every ghetto and barrio, into every impoverished corner in urban and rural America. We can open that road to those left out or left behind. We can clear the way so they, too, may follow that road to hope and dreams, to self-determination, to opportunity, homeownership, and economic independence.

Ladies and gentlemen, I'm a believer. I believe we can build that Glory Road. I believe that, working together, we will build it.

We can build it because we know the way. It's clearly laid out for us. America's Glory Road has been well-marked by the signposts of history.

Just think. Two hundred and thirteen years ago last week, Thomas Jefferson wrote the immortal words: "We hold these truths to be self-evident: that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness..."

Some people thought those words were written for white folks. But they were written for all folks. Some thought they were written just for Americans. But they were written for all people. Some thought they were written for one moment in history. But they were written for all time.

Those words inspired not only the students in Selma, but the students in Beijing. Not only factory workers in America, but factory workers in Poland. They inspired not only the struggle for civil rights for blacks in America, but the fight for democracy and human rights for blacks in South Africa.

Those words have guided our country throughout the course of its history. We accept them not simply as an ideal, but as a worthy and realistic goal; recognizing, all the same, that it is a goal we have yet to achieve in full for all our people.

More than a century and a quarter ago, Abraham Lincoln engaged in a magnificent debate with the "Little Giant," Senator Stephen Douglas. In what became known as the "Peoria speech," Lincoln said:

"I cannot but hate slavery. I hate it because of the monstrous injustice of slavery itself. I hate it because it deprives our American example of its just influence in the world; enables the enemies of free institutions, with plausibility, to taunt us as hypocrites; causes the real friends of freedom to doubt our sincerity; and especially because it forces so many good men among ourselves into an open war with the very fundamental principles of civil liberty, criticizing the Declaration of Independence, and insisting that there is no right principle of action but self-interest...I object to it because it assumes that there can be moral right in the enslaving of one man by another...we began by declaring that all men are created equal; but now, from that beginning, we have run down to the other declaration, that for some men to enslave others is a 'sacred right of self-government.' These principles cannot stand together. They are as opposite as God and Mammon."

Lincoln's eloquence...his thorough understanding of the fundamental moral imperative underlying the issue...was formidable. And, do you know what Douglas did? He capitulated. He begged for a truce, saying: "Lincoln, you understand this question of prohibiting slavery...better than all the opposition in the Senate of the United States. I cannot make anything by debating it with you."

Freedom. An inalienable right. An idea so powerful that the "Little Giant" was forced to concede the issue and begged for a truce.

In the nineteenth century, a house divided against itself,

half free and half slave, could not stand. And today we cannot allow our nation to stand divided between prosperity and poverty. How can we tell the world that democracy and freedom work, if we can't make them work for those left out and left behind in America?

Freedom and justice are never easily won.

That's why we needed the NAACP eighty years ago. And that's why we need the NAACP today: to make America live up to itself. Through your efforts, our country has made great strides in basic human rights.

You helped pass the Voting Rights Act, the Civil Rights Act. You helped abolish municipal housing segregation ordinances. And you brought an end to school segregation.

The NAACP successfully pushed for the Open Housing Act and other fair housing laws, including the one passed last year. I want to thank Ben Hooks and Althea Simmons, the Director of the NAACP's Washington bureau, who worked so hard to get it passed. I have the duty and the privilege of administering those laws and, only a few days ago, I brought the first charge of racial discrimination under the Fair Housing Amendments Act of 1988.

I want you to know that President Bush will not tolerate housing discrimination. And neither will I.

The boycotts, the sit-ins, the marches, the legal challenges...all punctuated a message of moral outrage -- a message that became a testament of fierce commitment to freedom and justice. You were there then and you are here now, continuing the struggle.

I wasn't there, but I wish I had been.

The 1950's and 60's were an awesome period of expanding civil and human rights in American history -- a time of powerful and necessary changes in the law. It was the dramatic high point of Chapter One in the struggle for civil rights.

Chapter One was written by those who led the fight for basic human rights, for legal rights, voting rights. It was written by Rosa Parks, Martin Luther King, Jr., and Whitney Young. It was written by Andy Young, Morris Abram, Ella Baker, and John Lewis. It was written by Fred Shuttlesworth and Ralph Abernathy, by Thurgood Marshall and Roy Wilkins. By Vernon Jordan, John Jacob, Dr. Leon Sullivan, Ben Hooks...and so many of you here.

Chapter One is a proud part of our country's history...a chapter of commitment and sacrifice, of determination to achieve justice and equality for all our people. But, Chapter One would

not have been possible without the work begun 80 years ago by the NAACP. The relentless drive for freedom and justice has lived within us for as long as history can recall; but this chapter was largely written by those who joined forces in 1909 to forge an alliance against racism...and by all of you who followed in their footsteps.

Chapter One was about freedom and justice, about removing legal barriers, about full rights for each and every one of us as American citizens.

And, I must give credit to some great leaders of the Democratic Party who were marching at the head of the civil rights revolution in the '60s when many in the party of Lincoln were nowhere to be found. But I'd be remiss not to say that the Republican Party's roots were not dug by Herbert Hoover. The Republican Party began as a great civil rights movement in the 1850s that included breakaway Democrats, anti-slavery Whigs, abolitionists and Free-soilers. Abe Lincoln called it the Republican Party to remind folks that it was an extension of Thomas Jefferson's old Democratic/Republican Party. As Tony Brown's Journal has recalled, the radical Republicans were the best friends blacks had during Reconstruction, and I hope a modern-day radical Republican Party competes effectively for the minority vote.

President Bush and I look forward to the day when both major political parties compete for the votes of African-Americans. We must remind people that the entire civil rights revolution is the continuing saga of the first American Revolution.

And now, at the dawn of a new millennium, we are engaged in a new chapter of this ongoing revolution, for as you in the NAACP have said so well, "The Struggle Continues."

Let us dedicate this chapter to realizing the dream of homeownership...of opportunity...of prosperity...for everyone. That's what HOPE spells.

This chapter is about economic prosperity, about jobs for everyone, and growth, and a bigger pie and more seats at the table.

And this chapter is about more than that. Not only about a chance to drive a truck, but a chance to own the truck...not just a chance to have a job, but a chance to own the company...not only a chance to live in decent and drug-free public housing but a chance to homestead and manage, and, ultimately, own the housing.

And, as we move into Chapter Two, we need to know how far we have come so we may appreciate how far we have yet to go.

It's a good sign that some 40 percent of black American households are considered middle income, a category that has grown by more than 25 percent during the recent economic expansion. The receipts of black American businesses have been growing at an average rate of eight percent every year since 1982. Over 2.5 million new jobs have been filled by black Americans in the last five to six years.

Yet, clearly, this is not enough. It only serves to remind us how far we have to go. Over half a century ago, Franklin D. Roosevelt saw one-third of a nation ill-clad, ill-housed, and ill-fed. By 1987, the GNP had increased eightfold; and still -- 56 years after FDR's statement -- one-third of black Americans remained below the official poverty line...ill-clad, ill-housed, ill-fed.

According to the Good Shepherd (Matt. 25:40) those who "inherit the kingdom" are those who feed, clothe, and house "the least of these my brothers."

Well, our American economic growth has not yet reached the least of our brothers and sisters. We must reach the least, the lost, and the last...that's what we must do in Chapter Two. As my Chief of Staff, Wendell Gunn, says, "We've got the ticket. After 200 years we can finally get on the train. Now let's get the train moving."

That's what President Bush wants to do and wants me to do at HUD. We want to get the train of growth in jobs and opportunity for decent and affordable housing moving through Watts and Boyle Heights, through Newark and Bed-Stuy, through Liberty City and Vine City, through Overtown and Motown...through every place where the least, the lost, and the last need to get on that train.

That's why I'm proud to be in the President's Cabinet, because he wants to create an "opportunity society...an economy," he said, "that's thriving and creating jobs; cities that are filled with enterprise and offer residents a good life and a good living; neighborhoods that are vibrant and safe, with affordable houses going up; old ones being restored."

President Bush said, "it means giving people -- working people, poor people, all our citizens -- control over their own lives. And it means a commitment to civil rights and economic opportunity for every American."

I'm proud to accept that mission because those are exactly my goals, as well. And I want you to know that even though the President is in Poland today...he is here because I'm here to say it for him.

And I promise you what I promised him. We are going to reform HUD from top to bottom. We are going to make our programs work for the people in need, not those motivated by greed.

Saturday night, I had the honor to speak to the League of United Latin American Citizens, LULAC. I shared a story with them that I'd like to share with you. This is a lesson I learned from Luis Munoz Marin, the great governor of Puerto Rico, the leader of the Popular Democratic Party, and the originator of Operation Bootstrap. When his political party was out of power, he used to talk about the need to redistribute wealth among the people, to slice the loaf so everyone gets a piece in the name of social justice. But, when he became Governor of Puerto Rico, he soon realized that if all he had to distribute was the same loaf of bread, the slices would get pretty thin before too long. He realized what he needed weren't just better ways to slice that one loaf, what was really needed was to create new bakeries.

That's what we must do -- create more bakeries in the ghettos and barrios all over America.

We can start by passing enterprise zones now, so we can begin the process of "green-lining" the inner city areas for entrepreneurship and jobs...areas that have been "red-lined" for despair. Enterprise zones can help unleash the creative energies of minority entrepreneurs in the urban areas of America to create opportunity for those who have been left behind. I will work closely with the Congress to ensure its passage so we can replace pockets of poverty with jobs and opportunity.

In 1929, on the eve of the Great Depression, blacks owned 65,000 businesses nationwide. I am struck by the number -- 65,000 black owned businesses -- because, as John Jacob tells us in The State of Black America 1989, there were just 301,000 black-owned businesses in 1982.

As I told Coretta and Dexter King at Paschal's Restaurant in Atlanta -- on the day after my swearing-in -- we must commit America to doubling or tripling that number by the middle of the next decade.

Enterprise zones will be of little help in doing that if there is no capital available to invest in new businesses in the zones. The people who cannot afford high capital gains taxes are not the rich, ladies and gentlemen. Capital gains taxes have their most important effect on people's power to find "seed corn" to start up new businesses.

Publisher John Johnson, a true entrepreneur, just wrote a deeply inspiring book called Succeeding Against the Odds. The seed capital he needed to begin publishing in 1942 amounted to just \$500 -- so near, yet so far. Unable to get a loan from Chicago's biggest bank, his only solution came from his mom who

put up her new furniture as collateral for a \$500 loan from a small thrift. So risky was that venture that Mrs. Johnson prayed and cried for days before she felt she could take the chance on losing every piece of furniture she had.

Not every potential entrepreneur is lucky enough to have a mom with even \$500 worth of furniture to put up. But somebody has to invest the seed corn when an idea-rich but money-poor man or woman in a ghetto or barrio wants to imitate the John Johnsons and Mr. Paschals by putting their dreams to work. And that somebody should not be stopped because the capital gains tax is too high to make the risk worth taking.

In his book John Johnson says of success in business, "Can it be done again? "Yes," he says, "it can be done again. I could do it again. So could you. So could any man or woman who comes up with an idea that provides a service no one else is meeting and who is willing to subordinate everything to the idea and the dream."

If we are ever going to turn the page -- if we are ever going to begin Chapter Two in earnest -- if we are serious about unlocking the door to opportunity -- we have to unlock the seed capital for black and hispanic and minority and women's enterprises. We must convince Congress to cut the capital gains tax to fifteen percent nationwide and to eliminate it in our rural and urban enterprise zones.

We can also help entrepreneurs with another incentive. I strongly support Congressman Charlie Rangel's proposal to give investors an upfront tax deduction for the first \$100,000 they put into enterprise zone businesses.

There is more we can do. We need to increase the earned income tax credit to hold down the enormous effective marginal tax rates on the poor just struggling to get on the first rung of that ladder of opportunity. The supplemental earned income tax credit would give eligible families a credit to supplement their earnings. There should be no tax on workers' wages up to 160 or 170 percent of the poverty level.

As you can see, I favor using the tax code to achieve socially desirable goals...and what's more socially desirable than jobs and adequate, decent, and affordable housing for low-income Americans? I think the low-income housing tax credit fits that "desirable" criterion. It expires this year; but I'm pleased that it has bipartisan support, and I'm working with Congressman Rangel and Senator Mitchell to extend it and make it work better for low-income people and low-income communities.

And, there's another extremely valuable tool available right now, the Community Reinvestment Act. In March, 1978, the

Comptroller's office approved the first non-profit Community Development Corporation, dedicated to the "revitalization of inner-city residential neighborhoods." Today, more than 130 banks are investing in communities sponsoring low- and moderate-income housing.

This month, the Comptroller will make public all information on all lending decisions which involve CRA-related conditional approvals, denials and CRA protests. This will enable the public -- you -- to help the Comptroller's office scrutinize bank practices to insure that the Community Reinvestment Act is being complied with. I strongly support this Act and all efforts to end, once and for all, the disgrace of red-lining in America. We must encourage the flow of seed capital and lending to develop our low-income communities and to produce low-income housing. We want to encourage investment by banks and thrifts and pension plans -- profit and non-profit -- with Federal, State and local support.

These are some of the ideas we're working on at HUD and within the Administration to extend jobs, opportunity and hope to every American. But those are not the only ideas. I've had a look at your plan for the year 2000 and beyond, and it calls for:

- * developing and implementing programs to increase black homeownership and home retention among blacks;
- * increasing black family wealth from its presently disproportionate low level;
- * increasing black self-employment;
- * ensuring that substantial numbers of blacks are employed in growth industries and occupations;
...and there are other proposals.

I have one problem with this plan. Why wait for the year 2000? I want to start now.

I want to help the NAACP integrate the economy. I want to help every man, woman, and child share the American Dream.

Ladies and gentlemen, I have to tell you something.

I wasn't there when Rosa Parks integrated the buses. I wasn't there when the students integrated the lunch counters. I wasn't there when the schools were integrated. I wasn't there at the Lincoln Memorial, when Dr. King spoke of "the dream."

But, I'm here now.

Let's get started!

Withdrawal/Redaction Sheet

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02. Memo	Hans Kuttner to Dan McGroarty and Stephanie Blessie, re: Urban League Speech -- August 9. (5 pp.)	07/25/89	~~P-5~~	

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July 26, 1989

THE WHITE HOUSE

WASHINGTON

July 25, 1989

MEMORANDUM FOR DAN MCGROARTY
STEPHANIE BLESSIE

FROM: HANNS KUTTNER *HK*
SUBJECT: Urban League Speech -- August 9

Overall

I would recommend that the speech seek a balance between defense of our position (urban problems can't be solved primarily through federal dollars) and the "work to be done" theme from the Inaugural Address.¹

Points to Hit

The field is rich with possibilities, in part because the themes involved haven't been touched on much in the President's speeches. I offer a menu of the topics that could be included.

Showing Awareness of Minority Concerns

In discussing the speech at our staff meeting, we concluded the typical listener would want to have the sense that the President is aware of minority concerns and issues. Emily Mead will be providing you with a National Research Council report on the current standing of blacks in American life. One key point is that ours is still a residentially segregated country. A strong push for fair housing will bring applause

Also, Secretary Sullivan has as one of his priorities lessening the health disparities between blacks and whites. I have a lot of statistics on this if you want to pursue it.

The Mess at HUD

Some of the revelations about what has happened in the administration of HUD's programs are an outrage. The President has full confidence in Secretary Kemp's effort to make things right. Secretary Kemp has kept the

¹"My friends, we have work to do. There are the homeless, lost and roaming, there are the children who have nothing -- no love and no normalcy -- there are those who cannot free themselves of enslavement to whatever addiction -- drugs, welfare, the demoralization that rules the slums."

President abreast of developments. The Justice Department is involved, and where crimes have been committed, there will be prosecutions. Also, OMB Director Darman is reviewing financial controls in other federal programs to assure there not problems elsewhere.

Michael Jackson from Cabinet Affairs should be sending you more on this.

Another point: this is another reason why housing vouchers for the poor are our approach to providing housing assistance to the poor. We want to promote choice all over, in education, in health care, and in housing, because we want to empower consumers rather than the bureaucrats who run housing authorities or the developers who seek to make profits from federal programs.

Urban Prosperity

The best program ever for urban America is economic prosperity. The investment and growth in income during the current economic recovery have frankly done more for the cities than any federal program by increasing municipal revenues. (There must be stats on growth of city budgets in real terms, since 1982 v previous five years.)

Ships that Don't Rise with the Rising Tide

We realize that a general upward trend will not raise all boats equally. Kemp is fond of playing with this metaphor, and there's probably a good "As Jack Kemp tells me" that has something to do with a rising tide swamping boats that are stuck on the bottom. That's why we hope for a kinder and gentler America, and support programs (like enterprise zones and help for the homeless) to help boats stuck on the bottom. (The metaphor works better with "boats with holes in their hulls" because it brings out the notion that we want to give people the tools needed to repair those holes.)

We also need to be wary of overpromising. (This was something on which Darman expressed concern at yesterday's DPC meeting on welfare strategy -- the phenomenal budget reduction target we face in the FY 91 budget.) I would suggest direct criticism of the overpromising of what the Great Society programs would bring. (see, e.g., LBJ's late-August 64 remarks at the signing ceremony for the Economic Opportunity Act saying that we will end poverty.) By contrast, we should have the humility to accept the Biblical injunction that the poor are always with us.

Enterprise Zones

The President today (July 25) sent up to the Hill a letter calling for action on enterprise zones. I'll provide whatever we have on this.

Homeless

In Building a Better America the President called for (1) full funding for programs in the Stewart B. McKinney Homeless Assistance Act and (2) a \$50 million initiative to figure out ways to better coordinate services to be

delivered to the homeless.

We need to clarify what we mean by leadership in this area. We don't mean nationalizing the problem, either with us taking over or pumping in cash because, frankly, we don't have the cash. Leadership means figuring out what works best in helping the different parts of the homeless population -- the chronically mentally ill, alcoholics, families in welfare hotels -- and creating the flexibility in federal programs so that people who make programs work at the local level can make them solve the problems of individual homeless people.

Also, we have an Interagency Council on the Homeless to work with service providers and coordinate federal programs. We have more than \$1 billion going into programs targeted at the homeless, spread through more than ten agencies.

We don't need to be defensive here, and saying something like "We've failed these people" would win big points with the audience.

Welfare/Bush Anti-Poverty Agenda

Line to leave them: We want to work with you to make our welfare programs lift people from dependency, not keep them there.

The Domestic Policy Council spent today's meeting talking about welfare reform and the Bush Administration. I'd think it would be fair to say that we believe:

- o The task of reform is not yet finished.
- o While some think of last year's Family Support Act (welfare reform) as a conclusion, we believe it is only a stepping stone to learning more about how to end dependency. That's why we want the States to continue initiating demonstrations of innovative approaches.
- o We have a Low-Income Opportunity Board to work with the states on shepherding through the federal approval process new ideas states want to demonstrate. We plan to show greater flexibility in approving demonstrations to increase state interest in demonstrations. (Unless this gets into the NGA speech, this counts as a policy announcement.)

Bush Anti-Poverty Principles

Choice "Give us the tools and we will do the job" (approximating Churchill) should apply to low-income people as well as international relations.

Example of this notion at work: proposal to encourage magnet schools, our child care proposal that would give money to parents so that they, not bureaucrats, can figure out what to do.

Flexibility We want programs to fit local situations. Thus the Low Income

Board as a means to allow federal programs to have the flexibility to meet local needs.

Opportunity We believe in an open society where those who are motivated and assume the responsibility can move themselves upward. We want to remove impediments to this, thus an emphasis on literacy and basic skills, not because it is Barbara Bush's pet project but because it is right for America. Also Pinkerton's anti-credentialism fits under this heading. *Chicago*

Kemp likes the word empowerment to combine the notions of choice and opportunity. He makes the point that the goal of poverty-related programs should be to empower people to help themselves out of poverty, not to pay them to stay where they are.

Task Force on Urban America

This is something we have been kicking around with Richard Nathan, Dean of the Rockefeller School at SUNY Albany. See attached background memo.

If things can be worked out, this Task Force can be announced as part of the speech.

Removing Barriers to Opportunity

I think you have Pinkerton's memo on this subject.

In this speech, the subject can be approached through the notion of the federal work force as a model for employers.

"Too many Americans lose out on job opportunities because while they can do the job, they don't have the formal credentials or because they do poorly on irrelevant tests. [Example of Missouri cosmetology laws; blacks pass practical at same rate as whites, but only 3% of blacks pass written tests.]"

In this speech, the President could:

1. Attack these barriers as doubly insidious, holding back minorities and suppressing the desire to get ahead in life.
2. Say that he wants the Commission on Civil Rights to be more active in identifying these barriers.
3. Announce that the federal government wants to be a model employer, and that he is commissioning the Director of OPM, Connie Newman, to study how barriers to federal employment can be reduced. Connie Newman's own story is an example of opportunity working -- she started as a GS3 typist at USDA. The President could praise her and say she's fit for most any job he can think of, but credentialism means the Federal government thinks she could never do many federal jobs.

Finally, this year is the 25th anniversary of LBJ's launching the Great Society, something that should at least be mentioned in the speech.

cc: Bill Roper
Jim Pinkerton
Emily Mead

Curbs on Anti-Bias Cases

High court rulings on racial hiring practices likely to open floodgate of lawsuits claiming affirmative action discriminates against whites

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By Marshall Ingwersen

Staff writer of The Christian Science Monitor

WASHINGTON

THE United States Supreme Court has virtually assured a new political confrontation over affirmative action.

In the past two weeks, the justices have attacked two of the most controversial aspects of a program that is designed to bring relief to women and racial minorities who have been victims of job discrimination. These are: standards on which bias is determined and the ability of white workers to challenge rulings that give preferences to minorities in the workplace.

In both instances, the court — by a 5-to-4 margin — opted to place a greater burden on workers to prove discrimination than on employers to show the lack of it. It further gave legal standing to white employees who say they have been innocent victims of plans that detail racial quotas.

Two results are likely: The dropping of many lawsuits by workers whose claims of bias cannot be substantiated; and a new wave of cases charging that affirmative action discriminates against nonminorities.

To some, including civil-liberties groups, the high court has taken a major step backward in this area of civil rights — one they trace directly to the conservative stances of Reagan appointees to the bench. To others, this action is a midcourse correction to what they see as abuses in affirmative-action litigation, which has unfairly burdened employers and nonminority workers.

The upshot is that the battle is returning to Congress. Legislators are watching for another key court decision that may come down before the session ends. That case, *Patterson v. McClean Credit Union*, involves a Civil War-era law

forbidding discrimination in contracts. The case is expected to further define the high court's views.

Lawmakers are already planning to counter the two recent decisions with legislation.

Local governments with affirmative-action plans in place are already concerned that political passions over once-settled issues will reignite. Most communities had largely moved past inflammatory, contentious confrontations over racial quotas, says National League of Cities spokesman Randy Arndt. "The courts are straining that tremendously."

THE Supreme Court appears to be so deeply divided philosophically on the affirmative-action issue that it is difficult to draw patterns, say scholars of the court and civil rights law.

But a majority of justices "now seem to be very close to a color-blind standard," says Alex Aleinikoff of the University of Michigan.

Among the justices, Associate Justice Antonin Scalia most clearly opposes the principle of racial preferences and favors racially color-blind programs, judging from his court opinions and earlier writings. The most recently appointed associate justice, Anthony Kennedy, has also expressed seri-

ous doubts about the principles underlying quotas.

"I don't think they [Scalia and Kennedy] have five votes yet" in support of a completely color-blind standard, says University of Virginia law professor George Rutherglen.

The principle that remedies for past discrimination can apply to people who were not themselves

'I don't think they [Scalia and Kennedy] have five votes yet' in support of a completely color-blind standard.

— George Rutherglen,
The University of
Virginia

directly discriminated against still stands, Dr. Aleinikoff says, but on very narrow legal ground.

The latest case was a reverse discrimination case against Birmingham, Ala., brought by white firefighters. The court decision on Monday was procedural: It did not rule on the standards or substance of the case. But it did allow the white firefighters to challenge an affirmative-action program on the grounds that they were not a party to the legal agreement that led to it.

In practice, government agencies all over the country that either settled or avoided politically charged discrimination suits by creating court-sanctioned affirmative action plans now fear that white employees can challenge them, even years later.

In a decision a week earlier, the court shifted some of the burden of proof onto the plaintiffs in discrimination suits. Employees can still sue their employers, showing "disparate impact" — that jobs or promotions are not going proportionately to minorities or women.

But for the past 18 years, the court precedent was that the employer had to prove the disparate impact was the result of business necessity, not discriminatory practice.

The June 5 decision concerning an Alaskan cannery shifted the burden of proving discriminatory practice onto the employee.

Neither of these decisions approaches the scope, however, of the late-January decision that struck down a Richmond, Va., requirement that 30 percent of the city's contracts go to black-owned companies, either as contractors or subcontractors.

That decision demanded much stricter standards for justifying such programs. Scholars and local governments struggling to forge legal affirmative-action programs are still debating exactly what the court required.

Rights Groups Plan Hill Counterattack

Supreme Court No Longer Seen as Ally in Fighting Discrimination

By Al Kamen
Washington Post Staff Writer

Civil rights groups plan to launch a legislative counterattack after stinging defeats at the Supreme Court that they see as marking a historic shift in the court's role in discrimination cases.

They said, however, that any effort to reverse recent rulings must be waged on a radically different political and legal battleground and could be overruled by the high court on constitutional grounds.

For the last four decades, the civil rights community generally has been able to count on the court as an ally, willing to fill in gaps when necessary where Congress neglected—or couldn't muster the votes—to fully define the scope of civil rights laws.

But the court, with a cohesive conservative majority now in control, has served notice that it will no longer tilt in favor of civil rights groups.

"The party is over for liberal activists," said Daniel J. Popeo, general counsel for the conservative Washington Legal Foundation. Liberals "have had radical legislating at the Supreme Court for years. Now they can't look to the Supreme Court as a vehicle for political and social change."

Conservative court expert Bruce Fein agreed. "For 34 years, since *Brown v. Board of Education*, the court's approach to civil rights laws bent the ordinary rules of [interpreting laws] so that almost invariably minorities would win. Now what has happened is for the first time" the court is saying "no longer are we going to give an advantage, a golf handicap We are going to treat the civil rights laws like other laws, no special favors for anyone."

Conservatives say the court's recent rulings involving minority business set-asides and the use of statistical evidence to prove discrimination and its decision Thursday scaling back on the reach of a key Reconstruction-era law all were necessary correctives to earlier liberal rulings.

To civil rights lawyers, the decisions, most on 5 to 4 votes, constitute the conservative judicial activism of a court dominated by four Reagan appointees.

"This court is a radical court that is going out of its way to undermine well-established civil rights statutes," said Ralph Neas, executive director of the Leadership Conference on Civil Rights. "It is important to understand that we have had a conservative court for two decades, but in the last 11 days the court has run amok and totally ignored judicial restraint."

Popeo, however, said it is "foolish to suggest that now that we have a court that leans away from liberal activism that it is tilted toward a conservative path."

Civil rights lawyers say future legislative battles will be different from past fights. During the Reagan years, with the court as an ally, civil rights groups successfully fended off efforts to reverse previous liberal victories, and managed to keep one conservative nominee, Robert H. Bork, off the high court. Bork's replacement, Anthony M. Kennedy, has added a solid and pivotal vote against them, and shifted the court's balance.

Neas said that during the 1980s the Reagan administration, led by then-Attorney General Edwin Meese III and his aide, William Bradford Reynolds, "forced the civil rights community and Congress to refight the civil rights battles that were won in the 1960s and '70s."

Prior civil rights victories on voting rights, affirmative action, housing and in other areas "all were threatened by the Reagan Department of Justice," he said, "but there was a reaffirmation of civil rights by Congress and the Supreme Court and a bipartisan repudiation of the extremism of the Reagan-Meese agenda."

"What the court has done recently, Neas said, "is forcing the civil rights community to fight those same battles for a third time," but this time without the court as an ally.

Given the court's actions, any proposed legislation "must be crystal clear," said Kerry Scanlon, an attorney with the Washington Lawyers Committee for Civil Rights Under Law.

That clarity is needed, he said, because "this court seems to be willing to restrict the coverage of civil rights laws whenever and wherever possible."

An added complication to new legislation, one attorney said, is

that it may be difficult to resolve some of the anti-discrimination questions without dealing with affirmative action, a political minefield Congress has avoided for years.

"They [civil rights groups] are in a box," said Fein. "What they have got to do now is go out and argue why race preferences are good things."

Several civil rights lawyers said some court rulings, such as one last week making it harder to use statistical evidence to prove discrimination, may be easier to correct than others. The decision in January that struck down a Richmond minority business set-aside program may be more difficult to handle, those lawyers said, because it was based on the Constitution rather than on a federal law.

With the new conservative court, anything Congress does rests on shakier ground.

For example, the court, looking at the federal rules of civil procedures, decided Monday that white men adversely affected by affirmative action consent decrees must have the right to challenge those decrees in court.

Congress could pass a bill changing the federal rules, Scanlon said, but that in turn could be overruled if the court decides the right to sue is also protected by the Constitution.

"We're hopeful that Congress will react quickly," Scanlon said, "but there is a possibility that it will not. We're going to need a legislative package and it is something that may take a while."

Neas, pointing to past legislative successes, said the battles in the 1980s have been won by 70 percent bipartisan majorities in both houses of Congress. "We're confident that those battles will be won again—but they should not have to be fought."

Court narrows thrust of civil rights laws

By Aaron Epstein
Regular Washington Bureau

WASHINGTON — For more than three decades, the Supreme Court championed the cause of racial minorities confronted by discrimination, protecting them with generous interpretations of civil rights laws and the Constitution's promise of equality.

No longer.

In a series of rulings through Thursday, the court's newly entrenched conservative majority has narrowed the scope of civil rights protections and come to the rescue of employers and whites who believed that court-approved remedies for discrimination treated them unfairly.

The court made it tougher for minorities and women to prove discrimination in the workplace, easier for white males to challenge job preferences for minorities and women, and riskier for state and local governments to set aside contracts for minority-owned enterprises.

And while the court conservatives have refused to throw out established precedents in discrimination cases and insist that they are not "signaling one inch of retreat," they are making it clear that civil rights laws will be read narrowly rather than broadly.

Now lawyers, legal scholars and women's groups wonder whether, in the next two weeks, the court will follow a similar pattern in a long-awaited ruling on the validity of *Roe v. Wade*, the 1973 landmark that gave women a constitutional right to choose abortion.

The betting is that it will — by declining to overrule *Roe* but limiting how it can be applied.

The recent civil rights rulings are likely to lead to fewer successful discrimination suits by minorities and women — and an outburst of litigation by whites and males challenging affirmative action programs that prevented them from being hired or promoted.

President Ronald Reagan's appointments of Justices Sandra Day O'Connor, Antonin Scalia and Anthony M. Kennedy made the new conservative majority possible. But what is the rationale underlying the recent spate of civil rights rulings?

Harvard law Professor Laurence Tribe believes that the new court majority simply does not consider civil rights to be the urgent matter it once was.

Tribe, an authority on constitutional law, said the Supreme Court seems to be saying that it no longer will put flesh on the bones of civil rights statutes. From now on, if Congress wants stronger protections for minorities and women, it must write them into the lawbooks.

And if Congress doesn't do that, Tribe said, "the courts will take a narrow and technical

view of the law — as if there's nothing special about civil rights."

Claudia Withers, a lawyer for the Women's Legal Defense Fund, perceives "an unwillingness to acknowledge that there is still racism and sexism in our society."

But conservative William Bradford Reynolds, head of the Justice Department's civil rights division during the Reagan administration, said that the new court majority is "looking at a civil rights landscape that is different from what it was 20 years ago. Twenty years ago, we had a black-white problem, and we did a lot of good things to remove the barriers for blacks."

"But now the court is looking at favored treatment for certain discrete groups that was put in without thinking of what it does to other groups, and this new court majority is making sure that the law works in an evenhanded way so no group has an advantage."

"In the past, there was a tendency of the court to stretch laws to fit new situations. This court is saying that's not the job of the judiciary."

With the Supreme Court no longer in their corner, civil rights leaders are turning to Congress for relief. House and Senate staffs are drafting legislation.

Already, Rep. Tom Campbell (R., Calif.), has introduced legislation to undo a court ruling that makes it more difficult for minorities and women to win job discrimination cases.

"The reality is that discrimination in the workplace exists and that it hurts. ... Unless we give plaintiffs [minorities and women] a reasonable chance in the courtroom, we're not going to be able to put an end to it," Campbell said.

Employers are caught in a dilemma. They must correct past discrimination by taking steps to hire and promote minorities and women. Yet, if they go too far toward those aims, they expose themselves to lawsuits filed by whites and men claiming to be victims of the remedies.

Businesses are expected to re-examine questionable plans but are being advised not to abandon carefully drawn programs that are designed to help minorities and women without resorting to quotas.

"The business community worked long and hard to come up with these plans, and now the Supreme Court says they can be opened up again to new challenges — with no end in sight," said Robin S. Conrad, director of litigation for the U.S. Chamber of Commerce.

The major cases decided this term

Associated Press

Here are major civil rights rulings by the Supreme Court this term:

• **Richmond v. Croson:** The court, by a 6-3 vote Jan. 23, struck down a Richmond, Va., program requiring contractors on city building projects to set aside at least 30 percent of the value of the project for firms at least half minority owned. The court said the quota is reverse discrimination.

• **Price Waterhouse v. Hopkins:** The court, by a 6-3 vote May 1, ruled that employers have the burden of disproving bias when there is evidence it played a part in personnel decisions. The court ruled for a woman who said she was denied promotion to partnership because she acted too much like a man.

• **Wards Cove Packing v. Atonio:** The court, by a 5-4 vote on June 5, erected significant new barriers for workers who try to prove with statistical evidence they are victims of racial bias.

• **Martin v. Wilks:** The court, by a 5-4 vote Monday, allowed white men to challenge court-approved affirmative action programs even years after they take effect.

• **Patterson v. McLean Credit Union:** The court Thursday unanimously upheld the Civil Rights Act of 1866 to bar discrimination in hiring but ruled, 5-4, that it could not be used to fight racial harassment on the job.

Emerging majority on court reverses rights ruling trends

By Ted Gest

122/127

When Edwin Meese told an audience at Pennsylvania's Dickinson College in 1985 that affirmative action "in the form of racially preferential quotas, goals and set-asides" was a "legal, moral and constitutional tragedy," the conservative attorney general's views appeared to be in the minority. Civil rights groups had been prevailing consistently in courts and legislatures on racial bias questions despite the Reagan administration campaign to end what Mr. Meese called discrimination in favor of minorities under a "new version of the separate but equal doctrine."

A mere four years later, the theories of Mr. Meese and other Reaganites are far closer to holding the decisive edge. The shift is due largely to personnel changes on the Supreme Court and the lower federal courts, where Mr. Reagan was able to appoint half the judges during his eight-year term. Three decisions last week by the Supreme Court completed a quintet of disastrous rulings for civil rights advocates in only six months. "This is the worst Supreme Court term we can recall in 25 years," says Penda Hair of the NAACP Legal Defense and Educational Fund.

Within a few minutes last Monday morning, bare majorities of justices struck two blows. Voting 5-4, the court allowed white firefighters in Birmingham, Ala., to challenge an anti-bias plan they said amounted to reverse discrimination. In the second 5-4 ruling Monday, the court said female workers at AT&T Technologies Inc. waited too long to contest a new seniority system they charged was biased against women.

Then on Thursday, another 5-4 majority held that a Civil War-era federal law could not be used to recover damages in suits charging private employers with racial harassment. It did not go as far as critics had feared, however; it did not reverse an earlier finding that the century-old law bars discrimination in private contracts.

A week earlier, the court made it easier for employers to rebut job bias charges, and just five months earlier it had restricted government-contract "set-asides" for minorities.

The court has been split 5-4 on many civil rights issues for years. But what seems to have tipped the balance for conservatives is the arrival of Anthony M. Kennedy, the California judge who replaced the retired Lewis F. Powell Jr. last year, after President Reagan's nomination of Robert H. Bork was defeated.

Justice Kennedy has proved to be a reliable ally of Chief Justice William H. Rehnquist, Reagan appointees Sandra Day O'Connor and Antonin Scalia, and John F. Kennedy appointee Byron R. White, who has joined the court's conservative wing on many issues. Justice Powell staked more of a middle-ground position, voting in the 1978 Bakke case, for example, against fixed racial quotas but in favor of the use of race as a factor in university admissions decisions.

The new wave of civil rights rulings already is having an impact. Since the January decision against set-asides that guarantee a percentage of government contracts to minority firms, courts have struck down such plans in a half-dozen places, while nine other jurisdictions have voluntarily suspended their programs, according to the Washington-based Minority Business Enterprise Legal Defense and Educational Fund. Advocates insist that many set-aside arrangements will survive, but only after proof is compiled that the remedy was justified by specific acts of discrimination.

Class-action lawsuits that can benefit large employee groups are likely to suffer as a result of the high court's June 5 decision shifting the burden of proof in discrimination cases. The number of such suits already had fallen from 1,174 in 1976 to fewer than 50 last year. It is not that such cases are unwinnable. In fact, Charles Shanor, general counsel of the U.S. Equal Employment Opportunity Commission, promises that his agency "won't throw in the towel" and drop class actions. But civil rights lawyers say the odds have shifted so markedly against them that they are less likely to have the resources necessary to sustain complex cases. Mr. Shanor says the EEOC may seek a budget increase to handle the load.

Among privately filed cases that will be affected is one brought this year by the Mexican American Legal Defense and Educational Fund alleging bias at the U.S. Customs Service, which the group charged has unlawfully allowed its ranks of senior Hispanic managers to shrink from nine to three. In the past, the agency would have been required to prove that its employment practices were a "business necessity." Under the new ruling, the Customs Service will be able to defend itself by asserting that its procedures are reasonable, an argument that the Hispanics can overcome only if they can afford to employ experts to conduct studies and convince a court that the agency violated the Civil Rights Act.

Business interests had argued that the old rules, which stemmed from a well-known 1971 Supreme Court case called *Griggs vs. Duke Power Co.*, made it too easy for plaintiffs to win job bias remedies "by the numbers" — asserting that a lack of minorities on a firm's payroll was compelling evidence of discrimination. "Now it won't be enough just to say that the numbers seem out of whack," said Alan Slobodin of the Washington Legal Foundation, a conservative legal group.

Civil rights forces are also taking their licks in the lower federal courts, which are packed with Reagan conservatives. A study by Kansas political scientist C. K. Rowland found that 3 in 5 people who file bias suits received favorable rulings from judges named by Jimmy Carter, compared with only 1 in 8 from Reagan judges.

Plaintiffs who lose these days risk stiffer sanctions in a crackdown on lawsuits that judges deem frivolous. When minorities charged employment bias at Fort Bragg, N.C., a judge dismissed the case and ordered a prominent civil rights lawyer to pay the government's

\$80,000 legal fees. A study of court rulings in Pennsylvania, Delaware and New Jersey concluded that such penalties are five times as common in civil rights cases as in other lawsuits.

Little change seems in the offing from the Bush administration. Although the new president seems on better terms with black leaders than was Mr. Reagan, civil rights groups are disappointed with his early personnel moves. Many have registered opposition to former Michigan Sheriff William Lucas, the Bush choice to head the Justice Department's civil rights division. And the White House seems set to nominate Clarence Thomas, EEOC chairman and staunch opponent of quotas, to a seat on the influential federal appeals court based in Washington.

"We have seen no positive sign that there will be any departure from the Reagan civil rights policies," said Nan Aron of the Alliance for Justice, a Washington coalition of liberal interest groups.

In the face of such setbacks, minority advocates are taking a different course. Perhaps their safest tactic is sticking to cases with direct evidence of bias. The NAACP Legal Defense and Educational Fund, for example, is pressing a suit against the Nashville-based Shoney restaurant chain, where one manager asserts he was ordered "to get rid of the black employees and . . . to hire white instead." But such dramatic and direct evidence is difficult to turn up. More typical nowadays are squabbles over subjective hiring and promotion decisions that are difficult to contest under the new Supreme Court standards.

Conservatives, meanwhile, are testing approaches that they contend will promote "economic liberties" of minorities without the use of quotas. A suit filed by the Washington-based Landmark Center for Civil Rights led to a ruling that voided a District of Columbia law prohibiting street-corner shoeshine stands. The group also has filed suit against a Houston ban on "jitney" taxi services that often are operated by minorities.

"Quotas have been a superficial solution" in bias cases, declared the center's director, Clint Bolick, who contended that the new Supreme Court rulings will "give us impetus to look at the real reasons blacks fail, primarily a shortage of human capital development." That theory may get a wider hearing as the federal courts continue their march to the right.

A Changed Court Revises Rules on Civil Rights

By LINDA GREENHOUSE 12/12/89

WASHINGTON — WITH a recent burst of discrimination rulings, the Supreme Court did something more than provide newly confining definitions to widely used civil rights laws. The Court all but guaranteed that civil rights would leap to the forefront of domestic politics.

Three decisions this month, each by the same 5-to-4 conservative majority that now dominates the Court on civil rights issues, rewrote long-settled ground rules of proof and procedure in employment discrimination cases. The decisions, plus a fourth that set strict time limits on challenges to discriminatory seniority systems, make discrimination suits harder to bring, harder to win and more vulnerable to attack if successfully concluded.

The decisions left no doubt that Ronald Reagan, out of office five months, finally succeeded in a goal that had appeared to elude him for much of his eight years in the White House: to shift the Supreme Court's direction on civil rights. The new majority consists of his three appointees, Justices Sandra Day O'Connor, Antonin Scalia and Anthony M. Kennedy; Chief Justice William H. Rehnquist, whom he elevated to that position; and Justice Byron R. White, who started taking conservative positions on civil rights years ago.

Civil rights leaders, reeling from the string of defeats, turned immediately to Congress, where liberals vowed to restore what had been lost. That worked earlier in the decade, when Congress overturned a Supreme Court ruling on voting rights and another concerning discrimination by institutions that receive Federal funds.

But such efforts rarely prove as straightforward or cost-free as they might appear at the start. For example, it took four years for

Congress to overturn the 1984 decision on Federal funds. The Congressional effort to overturn that decision, *Grove City College v. Bell*, became mired in a debate over its possible impact on abortion rights, opening painful fissures in the civil rights coalition before the Civil Rights Restoration Act finally became law over President Reagan's veto in 1988.

A brief filed on behalf of 66 Senators and 145 Representatives in one of the cases decided last week, *Patterson v. McLean Credit Union*, noted, in asking the Court not to tamper with the precedent, that "any congressional effort to change a decision of this Court could prove divisive" and could "confront grave difficulties in addressing the nuances that have arisen from case-by-case elaboration of the statute."

The point is telling because it was the superstructure of judicial interpretation, not the statutory foundations, that the majority knocked loose in the recent decisions.

Filling in the Law

For example, Title VII of the Civil Rights Act of 1964 forbids, in rather spare language, discrimination in employment on the basis of race, sex and some other categories. It was the Court that gave life and force to the statute's words. In a 1971 case called *Griggs v. Duke Power*, the Court ruled unanimously that Title VII prohibited not just purposeful discrimination but also job requirements and practices that had the effect of discriminating. In those kinds of cases, the *Griggs* opinion said, employers had the burden of justifying the necessity for such practices.

In its June 5 opinion in *Wards Cove Packing v. Atonio*, written by Justice White, the Court shifted that burden to employees, who must now prove that the challenged practices are in fact not necessary. The shift might appear to be a technical matter, but the outcome of lawsuits is often determined by standards and burdens of proof.

Critics of the latest rulings hope Congress will provide relief.

Lawyers representing blacks and women in job discrimination suits said the *Wards Cove* decision gave plaintiffs an onerous burden, while employer groups greeted the result as overdue relief from a set of rules that they viewed as stacked against them. Charles Fried, the Solicitor General during the last four years of the Reagan Administration, called the decision a welcome development that would help end the "sinister pressure" for quotas.

Wards Cove may be the most difficult of the decisions for Congress to overrule, because any debate over the structure of Title VII almost inevitably invites messy debate about affirmative action.

Congress is much more comfortable painting with a broad brush — "discrimination is forbidden" — than in filling in the details. The Court's approach this month was essentially the opposite: to rearrange the details while leaving the broad image, at least at first glance, untouched.

In the *Patterson* case, decided on Thursday, the Court unanimously did what the 211 Senators and Representatives who filed the brief had asked it to do: retained its decision in a 1976 case, *Runyon v. McCrary*, that interpreted a Reconstruction-era civil rights law to bar private as well as officially sponsored acts of racial discrimination.

But then a 5-to-4 majority revisited the old

law, known as Section 1981, giving it a new interpretation that civil rights leaders said would severely weaken it as a tool against job discrimination. Justice Kennedy's majority opinion said that Section 1981 covered discrimination in the initial hiring process but not discriminatory treatment on the job. The Congressional brief, aimed at preserving the law, did not focus on its particular application, but that must now be the focus of any Congressional debate to overturn the ruling.

Of all the decisions, the ruling last Monday in *Martin v. Wilks* may be the most unsettling for civil rights leaders. The Court ruled that white firefighters in Birmingham, Ala., could sue to reopen an affirmative-action settlement, approved by the Federal District Court there eight years ago to remedy discrimination that had kept blacks out of all senior positions in the department. Because Chief Justice Rehnquist's majority opinion was based not on a particular statute but on an interpretation of the procedural rules that govern the Federal courts, it may have the effect of reopening many cases long believed closed.

The timing of the decisions in a two-week period, while perhaps coincidental, gave an added sense of drama to the Court's shift. "The second Reconstruction period has ended," Richard Cohen, a Washington Post columnist, wrote on Friday, dating the period from the Court's 1954 school desegregation ruling until this month.

The new majority appeared to be aware of a firestorm of criticism. "Neither our words nor our decisions should be interpreted as signaling one inch of retreat from Congress' policy to forbid discrimination," Justice Kennedy wrote at the end of his opinion in the *Patterson* case. From one perspective it was a statement of the obvious. Others, hearing a defensive tone in Justice Kennedy's words, prepared to do uncertain battle to hold Congress, if not the Court, to their promise.

It's Up to Congress Now 122/127

The Supreme Court has handed Congress its civil rights agenda for the 1990s. In three out of four decisions just handed down, the court weakened the rights of minorities and women. It is now up to Congress to reaffirm the nation's commitment to stamp out discrimination based on race or sex.

In the 1960s and 1970s Congress and the federal courts moved largely in the same direction on discrimination cases. Congress was disposed to act against bias in elections, employment, education and the economy, and the courts did not oppose those actions. Judges and justices seemed to understand the spirit and intent of the legislation. That has now changed.

First, in *Wards Cove vs. Atonio*, the Supreme Court reversed a unanimous ruling that had allowed aggrieved employees to sue when statistics indicated a pattern of discrimination, even if an individual could not point to specific signs of prejudice.

This week the court said employees—usually white males—who felt their rights had been limited by affirmative action court settlements in favor of women or minorities could sue to throw out those agreements. That decision, *Martin vs. Wilks*, threatens to invalidate dozens of settlements involving police, firefighters and other public employees. California was among 32 states that had asked the court not to tamper with the body of law as it stood. Los Angeles is one of the cities with agreements that could be affected.

Finally, in *Patterson vs. McLean Credit Union*, the court held that an 1866 civil rights law did not cover racial harassment. The only bright spot in the picture is the court's unanimous decision in the same case not to overturn *Runyon vs. McCrary*, a decision that permits lawsuits against private individuals who discriminate against minorities.

At a minimum, Congress should sweep aside all three 5-4 decisions. It could, for example, specifically address use of statistics to determine patterns of job discrimination. It could set limits on intervention in affirmative action agreements. And

it could attempt to define racial harassment so it too is covered by civil rights laws, as clearly it should be. Congress may see a need to act more broadly as well. The civil rights community had been reluctant to open Title VII of the 1964 Civil Rights Act to any restructuring, fearing that its manifold protections might be weakened. As the Supreme Court now has done just that, according to one attorney, "Everything is on the table."

Rewriting the law to accommodate both women and minorities as well as white men who inevitably will feel that they have lost while others have gained will not be easy. But Congress has no choice but to find the words to express its overarching concern that civil rights laws be interpreted to take the side of those who are trying to eradicate race and sex discrimination.

The record of the past few years says that Congress is up to the task. Through the Reagan years, the lawmakers repeatedly reinforced voting rights, fair housing laws and affirmative action requirements for federal contractors. It rejected key Reagan appointees like William Bradford Reynolds of the Justice Department because they opposed civil rights protections. Congress also overturned the Supreme Court *Grove City* decision that weakened sanctions against discrimination on campuses that receive federal money. Congress acted as it did not only to provide protections guaranteed by the Constitution but also because growing numbers of voters are minorities and because women remain vocal about their rights.

During the debate, Congress must use the opportunity to remind Americans of the importance of civil rights laws, especially Americans too young to remember the civil rights and women's movements of the 1960s and early 1970s.

The United States has not yet achieved either a color-blind society or one free of gender bias. Reaching that goal requires the support of the courts enforcing the law as Congress intended it be interpreted. Congress must now spell out its intent to shield all citizens from bias.

Justices Reaffirm 1866 Law on Bias but Reduce Scope

By DAVID G. SAVAGE, Times Staff Writer 12/12/89

WASHINGTON—The Supreme Court, acting in the most closely watched civil rights case of the year, Thursday cut back the reach of the nation's oldest law barring racial discrimination, but stopped short of overturning it entirely.

On a 5-4 vote, the conservative majority said a black person who is harassed on the job because of his race cannot sue his employer for damages under the Civil Rights Act of 1866.

However, in a unanimous finding, the justices did not follow through on a prospect raised last year to rule that the bedrock civil rights law cannot be used at all against racial discrimination in private schools and businesses.

Draws Angry Reaction

Civil rights lawyers nevertheless reacted angrily, citing the ruling as the fifth high court setback so far this year for minority protections against discrimination.

"It is another underhanded way to erode a settled civil rights law," said Penda Hair, an attorney for the NAACP Legal Defense Fund, who represented a black bank teller involved in the case. "They haven't explicitly overruled [the post-Civil War doctrine], but we're left with a shell of a law."

Writing for the court, Justice Anthony M. Kennedy asserted that the decision to reject the case of Brenda Patterson, who claimed longstanding mistreatment by her employer, should not be "interpreted as signaling one inch of retreat" against racism.

"Discrimination based on the color of one's skin is a profound wrong of tragic dimension," Kennedy wrote.

However, he said the scope of the 1866 law as written was limited. In forbidding that race be used as a factor in "making private contracts" or denying them, he said, the law bars employers or schools from denying jobs, promotions or enrollment to blacks, Latinos or others because of their race. But it does not cover general discrimination or abusive treatment once they are on the job or in school, he added.

In narrowing the interpretation of the 1866 law, the court did not totally eliminate Patterson's chances of pursuing her case. If she can convince a jury she was denied a promotion because of her race, she can still win damages, Kennedy said.

But civil rights experts said the narrowing was crucial because the 1866 law has been considered the broadest prohibition against various forms of racial discrimination across the span of American life.

Newer civil rights laws specifically cover bias in employment, housing and public education, but leave gaps in such areas as private school enrollment, admission to nightclubs and treatment of customers by businesses.

Awards Limited

Also, the newer laws generally limit awards that can be collected to actual damages, such as back pay.

Under the 1866 law, plaintiffs sued for almost any type of racial discrimination, and could seek large punitive damage awards as well as "pain and suffering" compensation. For the past 20 years, courts have tended to allow such expansive use of the law.

With Thursday's ruling, civil rights experts said, more plaintiffs may see their complaints fall through the cracks between anti-discrimination laws or find their options for awards more limited.

The high court's liberals disagreed sharply with the new interpretation.

Said Justice William J. Brennan Jr. for the four dissenters, "What the court declines to snatch away with one hand, it takes with the other."

Calling the majority's view "heedlessly cramped," he said an employer, in imposing unfair terms on blacks on the job, "has not allowed blacks to make a contract on an equal basis."

While the ruling outraged civil rights lawyers, it did not surprise them.

So far this year, the court, with its new conservative majority, has ruled that cities may not set aside a fixed percentage of public contracts for minorities; that civil rights plaintiffs may not use statistics on job segregation to prove illegal discrimination; that white males may file reverse discrimination challenges against court-approved affirmative action programs, and that minorities or women may not challenge an unfair seniority policy after it has been in force for 300 days.

"It's bothersome that this comes at a time when we are seeing ugly aspects of racism reappearing in this country," said Washington civil rights attorney John Payton.

The law at issue took shape in the months after the Civil War ended in 1865. Alarmed by reports that newly freed slaves were being harassed, beaten and intimidated by their former masters, the Reconstruction-era Congress passed a law saying that "citizens of every race and color . . . shall have the same rights" as whites to buy and sell property and "to make and enforce contracts." Victims were

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For more than 100 years, the Civil Rights Act of 1866 went largely unused. But in 1962, the Supreme Court revived it by upholding a black person's lawsuit against a white housing developer who refused to sell to blacks. The clear language of the law, the court said then, bars racial discrimination across the board.

Thursday's case centered on a suit filed in 1962 by Patterson, a black bank teller from North Carolina, who alleged that for more than 10 years she had been insulted by her supervisor, given mental notices, and told that "blacks are known to work slower."

The bank denied that she was racially harassed and contended the law did not apply to her complaint.

A federal judge in North Carolina ruled that her case could not go before a jury because the 1866 law did not cover harassment. But when Patterson appealed to the Supreme Court, attorneys for the Ronald Reagan Administration sided with her. Such "racially mo-

tivated" mistreatment, if true, violates the 1866 law, the Justice Department said.

However, two months after hearing Patterson's appeal last year, the Supreme Court issued a stunning announcement. The five conservatives said they wanted to reconsider the entire landmark 1968 interpretation covering virtually all forms of racial discrimination.

The announcement set off a storm of protest in Congress and among civil rights groups. Two-thirds of the U.S. Senate, 47 of the 50 state attorneys general and dozens of civil rights organizations filed briefs urging the justices to leave the law as it was.

Hiring, Promotions

In one sense, the court did just that Thursday. "We now reaffirm that [the 1866 law] prohibits racial discrimination in the making and enforcement of private contracts," Kennedy said. To the relief of the civil rights community, the majority did not restrict it to literally only contracts and granted that it applied to hiring and promotions by private businesses and admission by private schools.

But it drew the line there. Nothing that can be construed as the making of a contract exists in conditions at the job or school after that point, the majority said.

Kennedy's opinion in Patterson vs. McLean Credit Union, 87-107, was joined by Chief Justice William H. Rehnquist and Justices Byron R. White, Antonin Scalia and Sandra Day O'Connor.

Thursday's ruling supplied new impetus to civil rights advocates and liberal members of Congress hoping to pass new laws to counter the effects of the court's recent race-related rulings.

Sen. Edward M. Kennedy (D-Mass.) said Thursday's ruling was the "fourth straight decision in 11 days" that deals "a significant setback to civil rights laws. Congress must not let these decisions stand."

Excerpts From Opinions on Scope of Rights Act

WASHINGTON, June 15 — Following are excerpts from the majority and dissenting opinions in *Patterson v. McLean Credit Union*, in which the Supreme Court today interpreted the scope of the Civil Rights Act of 1964. Justice Anthony M. Kennedy wrote the majority opinion. Opinions dissenting in part were filed by Justice William J. Brennan Jr. and John Paul Stevens.

FROM THE OPINION

By Justice Kennedy

In this case, we consider important issues respecting the meaning and coverage of one of our oldest civil rights statutes, 42 U.S.C. Sec. 1981.

Our decision in *Runyon* has not been undermined by subsequent changes or development in the law.

We granted certiorari to decide whether petitioner's claim of racial harassment in her employment is actionable under Sec. 1981, and whether the jury instruction given by the District Court on petitioner's Sec. 1981 promotion claim was error. After oral argument on these issues, we requested the parties to brief and argue an additional question:

"Whether or not the interpretation of 42 U.S.C. Sec. 1981 adopted by this Court in *Runyon v. McCrary*, 427 U.S. 160 (1976), should be reconsidered."

Precedents 'Not Sacrosanct'

We now decline to overrule our decision in *Runyon v. McCrary*. We hold further that racial harassment relating to the conditions of employment is not actionable under Sec. 1981 because that provision does not apply to conduct which occurs after the formation of a contract and which does not interfere with the right to enforce established contract obligations. Finally, we hold that the District Court erred in instructing the jury regarding petitioner's burden in proving her discriminatory promotion claim.

Our precedents are not sacrosanct, for we have overruled prior decisions where the necessity and propriety of doing so has been established.... Nonetheless, we have held that "any departure from the doctrine of stare decisis demands special justification." We have said also that the burden borne by the party advocating the abandonment of an established precedent is greater where the Court is asked to overrule a point of statutory construction. Considerations of stare decisis have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done....

We conclude, upon direct consideration of the issue, that no special justification has been shown for overruling *Runyon*. In cases where statutory precedents have been overruled, the primary reason for the Court's shift in position has been the intervening development of the law, through either the growth of judicial doctrine or further action taken by Congress....

... Whether *Runyon's* interpretation of Sec. 1981 as prohibiting racial discrimination in the making and enforcement of private contracts is right or wrong as an original matter, it is certain that it is not inconsistent with the prevailing sense of justice in this country. To the contrary, *Runyon* is entirely consistent with our society's deep commitment to the eradication of discrimination based on a person's race or the color of his or her skin....

Section 1981 reads as follows:

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

Bias in Contracts

The most obvious feature of the provision is the restriction of its scope to forbidding discrimination in the "making and enforcement" of contracts alone. Where an alleged act of discrimination does not involve the impairment of one of these specific rights, Sec. 1981 provides no relief. Section 1981 cannot be construed as a general proscription of racial discrimination in all aspects of contract relations, for it expressly prohibits discrimination only in the making and enforcement of contracts....

... The statute prohibits, when based on race, the refusal to enter into a contract with someone, as well as the offer to make a contract only on discriminatory terms. But the right to make contracts does not extend, as a matter of either logic or semantics, to conduct by the employer after the contract relation has been established, including breach of the terms of the contract or imposition of discriminatory working conditions. Such postformation conduct does not involve the right to make a contract, but rather implicates the performance of established contract obligations and the conditions of continuing employment; matters more naturally governed by state contract law and Title VII.

FROM DISSENTING OPINIONS

By Justice Brennan

What the Court declines to snatch away with one hand, it takes with the other. Though the Court today reaffirms Sec. 1981's applicability to private conduct, it simultaneously gives this landmark civil rights statute a needlessly cramped interpretation. The Court has to strain hard to justify this choice to confine Sec. 1981 within the narrowest possible scope, selecting the most pinched reading of the phrase "same right to make a contract," ignoring powerful historical evidence about the Reconstruction Congress's concerns, and bolstering its parsimonious rendering by reference to a statute enacted nearly a century after Sec. 1981, and plainly not intended to affect its reach. When it comes to deciding whether a civil rights statute should be construed to further our nation's commitment to the eradication of racial discrimination, the Court adopts a formalistic method of interpretation antithetical to Congress's vision of a society in which contractual opportunities are equal. I dissent from the Court's holding that Sec. 1981 does not encompass Patterson's racial harassment claim.

... In the past, this Court has overruled decisions antagonistic to our nation's commitment to the ideal of a society in which a person's opportunities do not depend on her race, e.g., *Brown v. Board of Education* (1954) (overruling *Plessy v. Ferguson* (1896)), and I find it disturbing that the Court has in this case chosen to reconsider, without any request from the parties, a statutory construction so in harmony with that ideal.

Having decided, however, to reconsider *Runyon*, and now to reaffirm it by appeal to *stare decisis*, the Court glosses over what are in my view two very obvious reasons for refusing to overrule this interpretation of Sec. 1981: that *Runyon* was correctly decided, and that in any event Congress has ratified our construction of the statute.

Even were there doubts as to the correctness of *Runyon*, Congress has in effect ratified our interpretation of Sec. 1981, a fact to which the Court pays no attention. We have justified our practice of according special weight to statutory precedents by reference to Congress's ability to correct our interpretations when we have erred.

There is no cause, though, to consider the precise weight to attach to the fact that Congress has not overturned or otherwise undermined *Runyon*. For in this case we have more positive signs of Congress's views. Congress has considered and rejected an amendment that would have rendered Sec. 1981 unavailable in most cases as a remedy for private employment discrimination, which is evidence of Congressional acquiescence that is "something other than mere Congressional silence and passivity." In addition, Congress has built upon our interpretation of Sec. 1981 in enacting a statute that pro-

vides for the recovery of attorney's fees in Sec. 1981 actions.

The Court holds that Sec. 1981, insofar as it gives an equal right to make a contract, "covers only conduct at the initial formation of the contract." This narrow interpretation is not, as the Court would have us believe, the inevitable result of the statutory grant of an equal right to make contracts. On the contrary, the language of Sec. 1981 is quite naturally read as extending to cover postformation conduct that demonstrates that the contract was not really made on equal terms at all. ... In my view, harassment is properly actionable under the language of Sec. 1981 mandating that all persons "shall have the same right ... to make ... contracts ... as is enjoyed by white citizens" if it demonstrates that the employer has in fact imposed discriminatory terms and hence has not allowed blacks to make a contract on an equal basis.

The question in a case in which an employee makes a Sec. 1981 claim alleging racial harassment should be whether the acts constituting harassment were sufficiently severe or pervasive as effectively to belie any claim that the contract was entered into in a racially neutral manner. Where a black employee demonstrates that she has worked in conditions substantially different from those enjoyed by similarly situated white employees, and can show the necessary racial animus, a jury may infer that the black employee has not been afforded the same right to make an employment contract as white employees.

By Justice Stevens

In *Runyon* we held that Sec. 1981 prohibits a private school from excluding qualified children because they are not white citizens. Just as a qualified nonwhite child has a statutory right to equal access to a private school, so does a nonwhite applicant for employment have a statutory right to enter into a personal service contract with a private employer on the same terms as a white citizen. If an employer should place special obstacles in the path of a black job applicant — perhaps by requiring her to confront an openly biased and hostile interviewer — the interference with the statutory right to make contracts to the same extent "as is enjoyed by white citizens" would be plain.

It is also difficult to discern why an employer who does not decide to treat black employees less favorably than white employees until after the contract of employment is first conceived is any less guilty of discriminating in the "making" of a contract. A contract is not just a piece of paper. Just as a single word is the skin of a living thought, so is a contract evidence of a vital, ongoing relationship between human beings.