should be approved to be U.S. Ambassador to Luxembourg. She was a prominent lawyer. There was no question about her qualifications. Indeed, during the course of her career, she went on to be Secretary of HUD and of HEW. But, in 1965, Patricia Harris represented the first African American woman to become an American ambassador. The Senate then was left with a challenge of meeting what Thomas Jefferson considered our highest calling. That is, in his words, whether this would be a nation of ''equal opportunity for all and special privilege for none.''

I cite the judgment of the Senate in confronting the nomination of Patricia Harris for Ambassador to Luxembourg because the Senate now faces a similar choice. President Clinton has sent before the Senate the name of Mr. James Hormel to become Ambassador to Luxembourg. Mr. Hormel was a member of the U.S. delegation to the U.N. Human Rights Commission. Last May, the Senate approved the nomination for him to serve as an alternate representative to the 51st session of the U.N. General Assembly. Last October, the Foreign Relations Committee recommended Mr. Hormel as our envoy to Luxembourg. But for a few of my colleagues, that is not enough. Just as Patricia Harris met opposition to her nomination as Ambassador to Luxembourg, Mr. Hormel is now being prejudged by some because of his sexual orientation.

Mr. President, I rise today not simply to advance the nomination of Mr. Hormel, but I rise against those who would prejudge his qualifications based simply on the prejudice because of his personal lifestyle and his sexual orientation. I believe that fairness and decency require that Mr. Hormel be afforded his God-given right to serve his country in a position for which he is clearly qualified.

No one can argue with his professional experience, his academic achievement, or the qualifications that led this Senate previously to send his name to be a member of our representation to the United Nations or that led the Foreign Relations Committee to recommend his service as an ambassador.

Mr. Hormel received a doctorate degree from the University of Chicago Law School. He served there as a dean of students. He is a member of the Board of Managers of Swarthmore College, from which he graduated.

Mr. Hormel is a committed philanthropist and public servant. He serves as chairman of the Equidex Corporation and has donated millions of dollars to some of the most important charities in America. They include the Virginia Institute on Autism, the Catholic Youth Organization, the American Indian College Fund, United Negro College Fund, and the Jewish and Children's Family Services. In recognition, he has received numerous awards and was named Outstanding Philanthropist by the National Society of Fundraising Executives.

He is a member of the board of directors of the San Francisco Symphony, the San Francisco Chamber of Commerce, the Human Rights Campaign, and the American Foundation for AIDS Research. He is founding director of the City Club of San Francisco, a club created to bring together community leaders of diverse backgrounds.

Mr. President, as the Secretary of State, Secretary Albright, said, ''. . . Mr. Hormel has demonstrated outstanding diplomatic and leadership skills. He will be an excellent United States Ambassador to Luxembourg.''

Mr. President, what else could this Senate ask of a nominee to be an American Ambassador, with leadership in corporate fields, in civic pursuits, a philanthropist, a leader of great American universities? What other American Ambassadors have better backgrounds, proven community service, or come with higher praise? This isn't about Mr. Hormel's qualifications. It isn't about his ability to serve as an Ambassador. This has become a referendum on Mr. Hormel's lifestyle, the most private intimate matters of his sexual orientation.

It is said by some colleagues in this institution who stand in opposition to his nomination that his lifestyle is inappropriate and that he is representing a country that is overwhelmingly Catholic. They failed to note, indeed, that the country of Luxembourg itself has spoken favorably of Mr. Hormel's potential service as our Ambassador.

My colleagues know that Mr. Hormel has spoken candidly about his potential service in Luxembourg and has made clear that he will not use his position to advocate his own views or his own private agenda. Indeed, my colleagues know that American Ambassadors are appointed and confirmed to serve solely the interests of the U.S. Government. Whether it is their political views, their religious views, or their sexual orientation, the advance of any of those opinions would be inappropriate by an American Ambassador. They serve in this position for one purpose and one purpose only: to advance the views of the U.S. Government.

Yet, Mr. Hormel, like Patricia Harris before him, stands in a historic position, potentially being confirmed by the U.S. Senate, and has made pledges which should be unnecessary—indeed, are unprecedented—and made several pledges to this institution:

First, to limit his charitable giving to 501(c)(3) organizations and to only donate through private foundations that do not bear his name. He doesn't have to do so, but he has.

He has pledged to prohibit any organization from using his name as a fundraising tool. He doesn't have to, but he made this pledge.

He has pledged to remove his name from any fundraising or charitable activities conducted by outside organizations.

He has pledged to resign from all boards of directors, except Swarthmore College and the San Francisco Symphony.

Yet, critics of Mr. Hormel argue that he is somehow out of step with American life or American values.

Mr. President, it is Mr. Hormel's critics who are out of step with American values. A fundamental principle of this country is that everyone has an opportunity to serve, that everyone is accepted and judged based on their ability to contribute. Mr. Hormel asks to be judged only by that standard.

Mr. President, through the years, from race to gender to religion to ethnicity, this Senate has had to deal with the painful questions of removing prejudice and learning to deal with people based on the content of character that all individuals face equally and fairly as they seek to serve our country. Mr. Hormel asks no more. He has a right to expect no less.

President Clinton has challenged this Senate to judge Mr. Hormel's nomination to be Ambassador to Luxembourg on its own merits. I hope in the great traditions of this institution we will give Mr. Hormel that chance.

Mr. President, I yield the floor.

INTERMODAL SURFACE TRANSPORTATION EFFICIENCY ACT OF 1997

The Senate continued with the consideration of the bill.

Mr. MCCONNELL addressed the Chair.

The PRESIDING OFFICER. The Senator from Kentucky.

AMENDMENT NO. 1708 TO AMENDMENT NO. 1676

(Purpose: To require that Federal surface transportation funds be used to encourage development and outreach to emerging business enterprises, including those owned by minorities and women, and to prohibit discrimination and preferential treatment based on face, color, national origin, or sex, with respect to use of those funds, in compliance with the equal protection provisions of the 5th and 14th amendments to the Constitution)

Mr. MCCONNELL. Mr. President, I send an amendment to the desk.

The PRESIDING OFFICER. The clerk will report.

The assistant legislative clerk read as follows:

The Senator from Kentucky [Mr. MCCONNELL] for himself, Mr. GORTON, Mr. SESSIONS, Mr. HUTCHINSON, Mr. ASHCROFT, Mr. HELMS, and Mr. SMITH of New Hampshire, proposes an amendment numbered 1708.

Mr. MCCONNELL. Mr. President, I ask unanimous consent that reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

(The text of the amendment is printed in today's RECORD under ''Amendments Submitted.'')

PRIVILEGE OF THE FLOOR

Mr. MCCONNELL. Further, Mr. President, I ask unanimous consent that Melissa Laurenza, an intern on my staff, be granted floor privileges during the consideration of the amendment that is pending at the desk.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. MCCONNELL. Mr. President, I rise today to introduce my amendment to bring the federal highway program into compliance with the Constitution and with the recent landmark case of Adarand versus Pena.

According to the Congressional Research Service, the federal government currently runs approximately 160 preference programs that hand out jobs and contracts based on race and gender. Congress now has an historic opportunity to take a small step toward equal protection for all citizens by ending one of these 160 preference programs.

As the Senate seeks to put a new transportation bill into play, we must allow the costly and divisive ISTEA quota to go into retirement.

ISTEA mandates that ''not less than 10 percent'' of federal highway and transit funds be allocated to ''disadvantaged business enterprises'' (''DBEs''). Firms owned by officially designated minority groups are presumed to be ''disadvantaged.'' The government has placed the stamp of ''disadvantage'' on groups with origins ranging from Tonga to Micronesia to the Maldive Islands.

And, Mr. President, what is the reward for these government-preferred firms? The reward is a $17.3 billion quota. In other words, if the government decides that you are the preferred race and gender, then you are able to compete for $17.3 billion of taxpayer-funded highway contracts. But, if you are the wrong race and gender, then—too bad—you can't compete for that $17 billion pot.

Frankly, I am astonished that any Member of this Senate would ever think such a provision is fair, prudent, or constitutional. In fact, the courts have clearly decided that this $17 billion quota is neither fair nor constitutional.

RESPECT FOR THE CONSTITUTION

First of all, Mr. President, the Constitution requires that we end this race-based quota. ISTEA's racial presumption was specifically addressed in the recent landmark case of Adarand versus Pena, where the Supreme Court found that the presumptions subjected individuals to unequal treatment under the law. The Court ruled that the presumption was unconstitutional—unless the government could establish that the race-based program was narrowly tailored to meet a compelling governmental interest.

Let me repeat. That is the test, Mr. President, narrowly tailored to meet a compelling Government interest.

The court held—and it is illustrated here on this chart, straight from the opinion, that: ''. . . Section 1003b of ISTEA . . . and . . . the regulations promulgated thereunder . . . are unconstitutional.''

The court specifically ruled on this program—yet somehow it is still in the bill—that it is unconstitutional.

Mr. President, I don't need to remind everybody that when we first came to the Senate, we took an oath right down here at the front of the room. And we said, ''I do solemnly swear that I will support and defend the Constitution of the United States.''

So, Mr. President, on the one hand we have a Supreme Court decision striking down this set-aside in the highway bill and, on the other hand, we have the oath that we took to uphold the Constitution.

Mr. BAUCUS. Mr. President, will the Senator yield for a point of clarification?

Mr. MCCONNELL. Let me finish my statement.

Mr. BAUCUS. Just so that the people watching know what the facts are here, I was going to ask the Senator, is that quote on that chart the Supreme Court statement, or is that not the Supreme Court statement—that quote?

Mr. MCCONNELL. It is a decision of a district court. But it is a finding of the district court, upon remand of the Supreme Court declaring that very standard unconstitutional, and sent it back down to the district court which said we looked at it based upon the Supreme Court decision and we found it unconstitutional.

Mr. BAUCUS. That is not the words of the Supreme Court.

Mr. MCCONNELL. I thank my friend from Montana and look forward to debating him on this important issue over the next 8 hours and 45 minutes.

First of all, Mr. President, the Constitution requires that we end this race-based quota.

ISTEA's race presumption was specifically addressed in the case I just referred to where the Supreme Court found that the presumptions subjected individuals to unequal treatment under the law. The Court ruled that the presumption was unconstitutional unless the Government, as I said, could establish that the race-based program was narrowly tailored to meet a compelling Government interest. That is the test.

This past summer, the district court in Colorado, as I just indicated to my good friend from Montana, followed the Supreme Court's lead and found that the Government, in fact, could not meet the Supreme Court's test.

Specifically, the district court ruled, as in the chart that I referred to—and if I said the Supreme Court, I stand corrected—the district court ruled, as I just referred to the chart, section 1003(b) of ISTEA and the regulations promulgated thereunder are unconstitutional.

The court went on to declare that the Government was precluded from the use of percentage goals found in and promulgated pursuant to ISTEA.

It could not be more clear that the Supreme Court set up the standard, sent it back down to the district court, they applied the standard, and found this provision unconstitutional.

It is now incumbent upon the legislative branch to bring ISTEA into compliance with Adarand and the Constitution. That is precisely what my amendment does, plain and simple. It prohibits the highway program from engaging in discrimination or preferential treatment based on skin color and gender.

In fact, as I indicated earlier, we all remember how we began our careers here by swearing to uphold the Constitution. Here is a clear example of a legislative provision that has been litigated, been found unconstitutional, and, surprisingly enough, is still being proposed to continue as part of the law of the land.

So we have, on the one hand, the courts telling us loud and clear that ISTEA's racial preferences are unconstitutional and, on the other hand, our own public oath to uphold, support, and defend the Constitution. We have little choice but to comply with the unambiguous, unequivocal mandate of the courts and end this unconstitutional race-based program.

Every time the Government hands out a highway contract to one person based on race or gender, it discriminates against another person based on race or gender. Michael Cornelius recently spoke poignantly to this point before the Constitution Subcommittee over in the House of Representatives. He explained that his firm was denied a Government contract under ISTEA, even though his bid was $3 million lower than the nearest competitor—$3 million lower. Mr. Cornelius' bid was rejected because the Government felt that the bid did not use enough minority- or women-owned subcontractors.

If you think that ISTEA's quota is only a goal, just ask Michael Cornelius. The Cornelius bid proposed to commit 26.5 percent of the work to firms owned by minorities and women. Yet 26.5 percent was not enough, in the world of so-called ''goals and timetables.'' These goals and timetables are more appropriately called quotas and set-asides. You see, the combined Federal, State, and local goal under ISTEA was 29 percent, and Mr. Cornelius' 26.5 percent did not perfectly match the Government's so-called goal, and thus the Government awarded the contract to the highest bidder—the highest bidder, Mr. President.

Do you know how much the winning bidder proposed to contract to minority firms? I'll bet you can guess. I'll tell you how much work the winning bid promised to funnel to preferred firms—29 percent. Surely that is a coincidence, that the winning firm met the so-called goal exactly, right on the point. But, you know, the average person would hear this story and conclude that 29 percent is not merely a goal. The average person would conclude that this so-called goal is really a quota, and that is, in fact, precisely what it is. It is a race-based quota and it is unfair, unconstitutional and, frankly, just plain un-American.

So here we have the Government committing racial and gender discrimination and paying $3 million extra just to do it. Let me repeat. We have the Government committing racial and gender discrimination and paying $3 million extra just to do it. The message to Mr. Cornelius, his wife, his children and his employees, over 80 percent of whom are women and minorities, is: Sorry about the discrimination against all of you, but the Federal Government requires it. The Federal Government requires the discrimination. Mr. Cornelius has publicly challenged Congress to give contracts to the lowest bidder and spend the excess millions of dollars in ways that will actually help low-income minorities, and that is exactly what my amendment proposes.

This story of unfairness and discrimination is only one of the many, many stories that result from the unconstitutional ISTEA quota mandate. It is important to remember, as we debate this amendment, that discrimination by any other name is still discrimination and it strikes at the very core of the person being discriminated against.

Next, respect for our States and our cities compels Congress to end the ISTEA quota. More and more States are being forced to choose between court decisions, on the one hand, that order the termination of preference programs, and, on the other hand, Federal Department of Transportation officials who order them to promote preference programs as a condition for receiving Federal aid. So here we have it, a situation in which a State or a city is caught between a court decision saying you cannot do this anymore and a Federal Department of Transportation saying you must do it or you cannot have any money. The administration would have the American people believe that Adarand is only one decision by one court. It is much more than that. It is a landmark Supreme Court decision and is now the law of the land. Moreover, it is part of a widespread series of recent court orders striking down preferences.

According to the Congressional Research Service, the Adarand decision ''largely conforms to a pattern of Federal rulings which have invalidated State and local government programs to promote minority contracting in Richmond, San Francisco, San Diego, Dade County, FL, Atlanta, New Orleans, Columbus, OH, Louisiana, and Michigan, among others.'' And new challenges continue to be filed. Congress must act now to allow cities and States to get out of this constitutional crossfire that they are caught between: On the one hand, courts saying you cannot operate that way anymore and, on the other hand, the Federal Department of Transportation saying you must operate that way.

I pointed out in some detail the very real human and societal costs of ISTEA's racial preferences. Let me also point out that ISTEA has serious financial costs for our country. Every time the Government ignores the lowest bidder and pays more for a highway contract based on race, it costs the taxpayers real and substantial dollars. As I pointed out in Mr. Cornelius' case, the cost was $3 million. But there is a global cost as well. Based on a 1994 study by the General Accounting Office, ISTEA's racial preferences over the next 6 years will cost the Nation $1.1 billion in unnecessary construction costs. And that doesn't even include the administrative costs of running the program, certifying firms as officially preferred every single year, and then running an elaborate enforcement scheme to ensure that everybody meets the racial quotas on every transportation contract.

Also, that $1 billion does not include litigation costs. As I pointed out, racial contracting programs are being struck down all across the country and more cases continue to be filed. State governments and the Federal Government are being forced to spend countless dollars defending plainly unconstitutional race-based quotas. So, let me reiterate. We are authorizing a bill that not only requires discrimination, it wastes over $1 billion of taxpayer money by ignoring low bidders and funneling contracts to persons who are of the officially approved race and gender.

The Federal Government ought to take the lead in ensuring that all citizens are given opportunities without regard to race, color, national origin, or gender. In that spirit of equality and entrepreneurship, my amendment displaces the race-based Disadvantaged Business Enterprise Program with a race-neutral Emerging Business Enterprise Program. So let me make sure everybody understands. My amendment replaces the race-based Disadvantaged Business Enterprise Program with a race-neutral Emerging Business Enterprise Program.

My amendment requires every State that receives Federal highway dollars to take concrete and specific action to enable emerging businesses to compete for highway contracts and subcontracts. For example, States will be required to maintain a directory of emerging business enterprises and specifically provide outreach and recruiting for highway contracts. The bill also requires targeted outreach and recruiting of emerging businesses owned by women and minorities. Finally, States will be required to provide technical services and assistance on critical issues such as bonding, lending, and general business management, including estimating and bidding practices.

This amendment requires a major outreach effort to make sure that people understand how to compete for business. The emerging business enterprise amendment offers genuine opportunity for substantive business development of all emerging businesses, regardless of race or gender. The emerging business enterprise program will allow small businesses to learn how to compete instead of simply developing a destructive dependence on bid preferences.

One example of the destructive tendency of preferences comes from a very thoughtful book entitled, ''The Affirmative Action Fraud.'' In that book, Clint Bolick explains that the Rocky Mountain News recently tracked 100 companies that received contracts in 1985 under the city of Denver's racial preference program. Denver's minority contracting program required that a certain percentage of all contracts had to be funneled to minority-owned firms. Ten years later—that was in 1985—10 years later, 42 minority firms had gone out of business, 34 were still dependent on this supposedly temporary program, and only 24 were still in business and actually independent from the program.

In point of fact, the current DBE program has a dismal graduation rate. According to a GAO study, between 1988 and 1992, fewer than 1 percent of the DBE firms graduated from the DBE program. The General Accounting Office reviewed six States to see how the States were preparing DBEs to compete. In 1992, those 6 States had 4,717 certified disadvantaged business enterprises. Out of those, 4,717 DBEs, only 17 graduated—17 out of 4,717. And most of the DBEs had been in the program at least 3 years and apparently had learned very little.

The EBE program is a much needed replacement of the failed and unconstitutional DBE program. Even the Department of Transportation has conceded that the Disadvantaged Business Enterprise Program does not prepare minority businesses to compete in the real world. On May 30 of last year, DOT acknowledged the low graduation rates of its firms and conceded in the fine print of the Federal Register that, ''The DBE program does not provide for an encompassing business development program.''

In short, all Federal contracting programs should meet a four-pronged test. They must be constitutional, colorblind, merit-based, and inclusive—constitutional, colorblind, merit-based, and inclusive. My race-neutral amendment will ensure that the Federal highway program passes this test.

It is time to end the divisive discriminatory practice of awarding highway and transit construction contracts based on race, gender and ethnicity of a company's ownership. Respect for our Constitution, our courts, our States, and our individual citizens demands no less.

It is time to move beyond racial quotas and set-asides and focus our national effort on improving the ability of small businesses, especially those who are women and minorities, to compete through genuine outreach and business development—genuine outreach and business development, and that, Mr. President, is what this amendment would do. It would take

out the clearly unconstitutional Disadvantaged Business Enterprise Program, which is not only unconstitutional, but a conspicuous failure, and replace it with a race-neutral emerging business enterprise program that complies with the Constitution and can succeed.

Mr. President, I will stop at this point and inquire as to how much time I have remaining.

The PRESIDING OFFICER (Mr. SMITH of Oregon). The Senator has 3 hours 38 minutes remaining.

Mr. MCCONNELL. I yield to the distinguished Senator from New Hampshire whatever time he may need.

Mr. SMITH of New Hampshire. The Senator caught me a little bit by surprise. I appreciate the Senator yielding. I will take 3 or 4 minutes to make some comments, Mr. President, on behalf of my colleague's amendment.

Again, the Senator from Kentucky is out in front taking the lead on an issue which, when you look at it on the surface, appears to be the right thing, but when you look deeper, you know that it is not. Again, he has had the courage to take a lead on this.

This amendment would, I believe, end one of the most costly and unfair and unconstitutional, as the Senator from Kentucky has said, minority set-aside programs in our Federal Government. As the Senator has already said, ISTEA mandates that ''not less than 10 percent'' of Federal highway and transit funds be allocated to ''disadvantaged business enterprises.'' These are firms owned by officially designated minority groups presumed to be socially and economically disadvantaged.

The Senator from Kentucky already mentioned the Supreme Court case. In the 1995 case, the Supreme Court spoke on this issue in Adarand v. Pena. Senator MCCONNELL has gone into the details extensively, and I will not go back through it. But in that decision, as he has said, it is explained that not only the Supreme Court but a U.S. district court has ruled that this minority set-aside program is unconstitutional.

It does seem somewhat, I don't want to say odd, but maybe ironic that we on the floor of the Senate have to debate to take language out through an amendment a piece of legislation that has already been ruled unconstitutional. I don't know what that says about the process, but it does not sound very good to me that we have to do that.

It would seem to me that the logical thing to do would be to not have it in here; in other words, let's end this program and let's not have it in the legislation as we proceed. But it is there.

Plain and simple, this is an affirmative action program for contractors. The administration's attempt to comply with the Court's decision by fiddling around with the DOT regulations does not meet the constitutional litmus test. Therefore, it is now incumbent on the Congress to bring ISTEA into compliance with our Constitution.

We now have a major piece of legislation, i.e. the Intermodal Surface Transportation Efficiency Act, ISTEA, and in order to pass it, we have to bring it into compliance with our Constitution.

It is one thing for the Federal Government to carry out unfair quota-based programs, which most reasonable people oppose, but it is bordering on outrageous, if not outrageous in and of itself, to say that the Federal Government should now mandate these very same unfair quota-based systems on its face, which is exactly what is going on without the Senator's amendment.

This is a time-consuming, a very costly burden to the States. Some of the States, like my own State of New Hampshire, simply don't have, to be very candid about it, some of the significantly racial minority populations. So what happens is, it forces us into a position where we have to deal with the bureaucracy and twist and turn and try to jump through as many hoops as possible to meet that 10 percent DBE goal, which, as the Senator from Kentucky mentioned, is not good public policy. As the Senator well knows and has said—and I agree with him—the opportunity to gain employment ought to be based on merit, not be based on any type of quota.

So by continuing this and the other 150-plus, I might add, preferential treatment programs—150 other preferential treatment programs—we are encouraging businesses to tie their business strategies to unconstitutional programs. As I said, what does this say about our process here, that we are encouraging businesses to tie their business strategy to something that is unconstitutional? The Court has spoken; two courts have spoken. Let's listen to the courts. It is sending the wrong message to many people, whether it is constitutional students or whether it is simply the minority startup businesses that we are trying to help.

A better way, as the Senator has suggested, is to encourage minority entrepreneurs with a small business outreach program, which Senator MCCONNELL has in his amendment. It is a good amendment. This alternative will still provide assistance to smaller minority-owned businesses without the heavy-handed mandate upon our States.

Most Americans do not support preferential treatment programs, Mr. President, no matter where they come from or who they are supposed to help. We now have an opportunity to end one right here on the floor of the Senate, to end special preferential treatment. This is an opportunity to do that.

I urge my colleagues to do two things: One, to uphold the Constitution, which, with all due respect to my good friend, is more important than the McConnell amendment, but the language of the McConnell amendment should be the second reason we should support it. So support the Constitution and support Senator MCCONNELL and adopt the amendment. I yield to my colleague.

Mr. MCCONNELL. Mr. President, let me say to the distinguished Senator from New Hampshire, this is not exactly an isolated case. The Senator from New Hampshire mentioned that the trend in the courts—in fact, Richmond, San Francisco, San Diego, Dade County, New Orleans, Columbus, Louisiana and Michigan are all court cases striking down these kinds of preferences; in other words, striking down Government discrimination based upon race in general.

What is astonishing, I agree with my dear friend from New Hampshire, is that this is in this bill in the wake of the decision.

I wonder how long it is going to take, I ask my friend from New Hampshire, at this rate with every single aggrieved party having to sue, I wonder if my friend from New Hampshire has any sense of how long it may take to get these preferences off the books and bring American practice, Government practice into line with the Constitution.

Mr. SMITH of New Hampshire. A lot longer than the Senator from Kentucky and I would want it to take.

Mr. MCCONNELL. We probably won't be here.

Mr. SMITH of New Hampshire. I don't think so.

Mr. MCCONNELL. It is an astonishing development. I thank my good friend from New Hampshire for his important contribution.

Mr. President, I believe the Senator from Alabama is here and would like to speak as well. I yield him whatever time he may need.

Mr. SESSIONS. Mr. President, I thank Senator MCCONNELL. I say to Senator SMITH, we appreciate your comments and thoughtful insight into this very important subject for our Nation. We want to do the right thing with regard to all of our citizens. We want to have a nation in which civil rights are protected and where everyone has an equal opportunity to participate in the American ideal. It is a very, very important issue.

I thank Senator MCCONNELL for developing the kind of amendment that will accomplish, I think, the legitimate goals of those who would like to see more opportunity in contracting Federal road contracts while at the same time protecting the great constitutional privileges that all of us in this Nation have a right to count on.

I serve on both the Environment and Public Works Committee, from which this legislation came, and the Judiciary Committee. In the Environment and Public Works Committee, we had no hearings, took no testimony, did no study as to the advisability and the practicality of how these preferences work out in real life.

For a number of years, I was a U.S. attorney and had the opportunity to prosecute criminal cases of all kinds and sorts. I have a distinct recollection of a case involving a minority individual who had gotten, I think, a $250,000

contract primarily because he was a minority. He was not the low bidder. He got the contract because of the preference set-asides in this highway bill. He promptly turned around and subcontracted the entire contract work to another contractor, presumably not a minority contractor, who did all the work and, in fact, there were false statements made in the course of this situation, for which he was convicted. But there is a lot of abuse in which people put up individuals as straw people just to take advantage of this provision.

There are a lot of problems with the implementation of this act that I could talk about at some length. Fundamentally, I will say the bill is not good policy. It is not the kind of interference into the bid process that we ought to have in this country. But secondly, and most important, I will talk a few minutes about the fact that it is not only bad policy, but unconstitutional.

We had hearings in the Judiciary Committee on this subject, both before the full Judiciary Committee and before Senator JOHN ASHCROFT'S subcommittee. The House of Representatives Judiciary Committee has also had hearings on this, which is chaired by Representative CANADY from Florida, who is an eloquent spokesman on this subject, who has come to see, with absolute clarity, the unconstitutionality and the unfairness of the racial set-asides that we now have in this bill.

Let me say this: The McConnell bill is good. It is a good approach because it encourages new companies; it helps people get involved and get into business for the first time and gives them a lot of other advantages. We ought to do that. We ought to have outreach. We ought to have affirmative action. That is a good ideal for America. It is something that ought to be a part of our law insofar as it is appropriate to do so. But it is wrong to have quotas and set-asides.

We first started affirmative action on March 6, 1961. That was when President John F. Kennedy issued this order:

> The contractors will take affirmative action to ensure that applicants are employed and treated during their employment without regard to race, color, creed or national origin.

That is an ideal with which we can all agree. That is an ideal we can all support. It is something we ought to support and we ought to believe in in this Nation. But President Kennedy did not go as far as we have gone today, where we have actual set-asides that give preferences to one group of people on account of their race and denies a benefit or an equal opportunity to another individual on account of their race. That is what is objectionable about this legislation.

Let me just say, how did we get to this point? I have, I think, an idea about how we got to this point.

Most of us recognize and can remember that there was systematic discrimination against African Americans and other minority groups in this country as little as 30 years ago by law, in some instances. This was an unacceptable event.

When the courts dealt with that, whether it was a police department or a fire department or a State agency, they would enter remedial orders, and they would put demands on those agencies to take immediate steps to make up for the explicit discrimination that had been suffered in that agency or department. The courts have always affirmed that.

Somehow we slipped from these situations into generalized quotas as part of American law. That is a move which is not justified by policy or law, and the United States Supreme Court, and other courts, are beginning to make quite clear that it is unacceptable.

The people of California, with proposition 209, spoke quite clearly as to their view about it, and the courts have promptly affirmed proposition 209, even though this administration and the President of the United States filed a brief saying it was unconstitutional. The Ninth Circuit Court of Appeals ruled that there is no doubt that proposition 209, which prohibited these kinds of quotas and set-asides, was constitutional. I think that we have to deal with this issue because it will not go away.

I was present in the Judiciary Committee hearing when Mr. Pech, who was the chief operating officer of Adarand Constructors, testified. And I have done some research into the law. And I would like to share my thoughts with this body.

The Constitution requires all of us, not just judges, to uphold the Constitution. We swore an oath, as is on that chart to do just that. I believe section 1111 of the ISTEA legislation is clearly unconstitutional under the Adarand Constructors, Incorporated v. Pena case, the landmark 1995, Supreme Court decision.

Adarand involved the same program with the exact same language in this new authorization that was in the previous bill. That was the language the Supreme Court was dealing with and reviewed. In Adarand, the Court ruled all—all—governmental racial classifications, like the ones we have in this legislation, like the one it was considering in the Adarand case—the same language—are subject to the strictest judicial scrutiny.

The Court held ''federal racial classifications, like those of a state, must serve a compelling governmental interest and must be narrowly tailored to further that interest.''.

It ''must be narrowly tailored.'' There must be a compelling interest.

Now, some make the argument—and this is a matter we have heard a lot about recently—some make the argument that the Supreme Court did not strike down this program in Adarand. But I just say this. It did not uphold it, clearly. What they did was set a standard for the validity or invalidity of this program. And they referred the case back to the district court who tried it. And it gave that district court remand instructions. They remanded it, and they gave them instructions as to how they should evaluate whether or not this statute violated the Constitution.

Justice Scalia, who was on the Supreme Court, wrote in his concurrence:

> [i]t is unlikely, if not impossible, that the challenged program would survive under this understanding of strict scrutiny, but I am content to let that be decided on remand [by the district court].

Based on the instructions and the law, as set forth by the Supreme Court, it was not surprising that on remand the Federal district court properly ruled, on summary judgment, that this program, this set aside program, was unconstitutional. They left no doubt about the constitutionality of this program. The district court stated:

> I find it difficult to envisage a race-based classification that is narrowly tailored. By its very nature, such a program is both underinclusive and overinclusive.

Now, those are legal terms. Somebody might think, ''What does that mean, 'underinclusive' and 'overinclusive'?'' What the judge was saying simply: It is unfair. It overincludes people beyond who ought to be included; and when you do that, you underinclude people who have a right to be included in the bid process, and have a right to participate in these programs.

That is the fundamental constitutional wrong. It gives advantages to people who do not deserve it; and it is a disadvantage to people who do not deserve to be disadvantaged. That is a fundamental constitutional principle. It will not go away.

So the Court also enjoined, issued an order stopping the defendants from administering, that is, Secretary Pena, from administering section 1003(b) of the ISTEA.

So I would say to anybody who looks at this matter fairly and objectively, without hesitation, there is no doubt that under the current state of the law, regarding this specific statute, it has been declared unconstitutional by the courts of the United States.

Now, yes, they can appeal this district court ruling. But based on the plain holdings of the Supreme Court, which the district judge clearly followed in his opinion, I submit to you there is virtually no chance that it will be reversed. The Supreme Court of the United States cares about this issue. They care about making sure everybody in America has equal treatment. They want to see race relations in America improve, but they have studied it and they have thought about it.

The courts have fulfilled their responsibility, in my opinion. And what have they thought? And what have they decided? Our federal courts have looked down the long road into the future, and they have asked themselves: Will this Nation be better served if we allocate goods and resources and contracts based on the color of one's skin?

Is that a defensible policy for a nation to undertake? Can we do that? And they have concluded, no, you cannot, because when you do that you deny someone else an equal right to apply.

Other Supreme Court cases have rendered very similar opinions. Bush v. Vera, Miller v. Johnson, Shaw v. Reno, and Richmond v. J.A. Croson Co. all have subjected Government racial preferences and classifications to the strictest scrutiny. In each one of these cases, the Court has found these racial classifications unconstitutional.

Section 1111 simply reenacts, without change, the same statutory language that was invalidated in Adarand Constructors, Inc. v. Pena. Mr. President, section 1111 literally does not change one single word in the definition of ''socially and economically disadvantaged individuals''.

Both the previous ISTEA legislation and section 1111 refer to the exact same definition in the Small Business Act. This definition states—and I have the legislation here before me—it states that ''contractors shall presume that socially and economically disadvantaged individuals, including Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities or any other individual found to be disadvantaged by the administration under the Small Business Act, shall be presumed to meet the standard for socially and economically disadvantaged.''

So that is statute—the problem is not regulations. Some would say ''Well, you're quoting from regulations. They might change the regulations.'' This is the Small Business Act. That is specifically referred to in this highway bill to define what ''socially and economically disadvantaged individuals'' are. And it gives a racial preference. It says that a black individual is presumed to be socially or economically disadvantaged whereas a struggling white businessman may not.

So what we have here is an overtly racial Government classification. That is why the Supreme Court is concerned about it. Consequently, nothing in this reenactment does anything to strengthen the arguments that this section is constitutional. We, indeed, held no hearings on it.

Moreover, there is no legislative record to support this racial classification. The Environment and Public Works Committee did not hear any testimony concerning the constitutionality of this section or the regulations promulgated pursuant to its identically worded predecessor. The only hearings we had were in the Judiciary Committee, as I mentioned earlier.

Now, the Clinton administration suggests that the new regulations promulgated by the Department of Transportation somehow strengthen the case for the constitutionality of this provision. This, however, is a totally ineffective argument. Subsequent regulations simply cannot repair a statute that is, on its face, unconstitutional. It is difficult for me to see how anybody would argue otherwise. The courts have held—and I will read the opinion of the district judge here, the district judge, when he found this thing unconstitutional. He said:

''The statutes and regulations concerning the SCC program are overinclusive, and they presume that all those in the named minority groups are economically or, in some act and regulation, socially disadvantaged. This presumption is flawed.''

The Court held that both the regulations and the statute are unconstitutional. The statute is what the Supreme Court dealt with when it sent the district judge its instructions.

Finally, some suggest that the Adarand v. Pena decision does not render section 1111 unconstitutional. They point to the language of Justice O'Connor when she wrote in the opinion:

> We wish to dispel the notion that strict scrutiny is ''strict in theory but fatal in fact.'' The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and the government is not disqualified from acting in response to it.

So they say, ''Jeff, she just said what you say is not true. Adarand really did not close the door on this statute.'' But, Mr. President, these advocates do not read the very next sentence in Justice O'Connor's decision where she immediately explains this quotation. Justice O'Connor's next sentence cites, as an example, a State governmental agency that had been found to have been engaged in ''pervasive, systematic, and obstinate discriminatory conduct.'' All Justice O'Connor says in this passage is that proven, widespread, systematic discrimination can justify ''a narrowly tailored race-based remedy.'' In other words, a limited racial preference can be constitutional as a remedy for a proven case of specific governmental discrimination.

However, section 1111 is not a remedy for specific governmental racial discrimination. As I said earlier, there has been no determination in this case that the administration of the Federal Highway System is systematically and pervasively biased in its operation.

Mr. McCONNELL. Will the Senator yield?

Mr. SESSIONS. Yes.

Mr. McCONNELL. I was listening carefully to what the Senator from Alabama had to say. So the law is, as I understand what the Senator from Alabama had to say, that the remedy has to be narrowly tailored to meet actual past discrimination. Is that essentially the standard here the Senator from Alabama is talking about?

Mr. SESSIONS. That is correct. Such is the essential holding and the basic law of this country. Where you have systematic, proven discrimination, a court can issue a remedy that may provide advantages to one racial group who has been discriminated against.

Mr. McCONNELL. So that group, I say to my friend from Alabama, actually has to have suffered discrimination?

Mr. SESSIONS. Certainly.

Mr. McCONNELL. The Court was saying, you could not just carve out a big part of a program and hand it out to people based upon what color they are or what gender they are; is that correct?

Mr. SESSIONS. Absolutely. This is not a close question.

Mr. McCONNELL. I ask the Senator from Alabama, isn't that what we are talking about here, what, in fact, has been done in this bill that we are trying to remedy with this amendment?

Mr. SESSIONS. Precisely so. The Senator from Kentucky is precisely correct. He has gone straight to the heart of this matter and I think makes a good point.

You know, many of us go around, and we blame Federal judges for much of the litigation and problems and some of these ideas that many people say are liberal ideas. But in this case, I think it is the Congress that has been passing legislation that goes beyond its bounds and is being brought to task by the courts.

So, fundamentally, I just further state that Environment and Public Works Committee made no findings, we made no factual analysis of the interstate highway program in order to determine there is some sort of systematic discrimination ongoing that ought to be corrected. In fact, I think a good argument can be made that the objectivity and fairness of the bid process is virtually above reproach. So there is just no basis for this. That is why it has no chance, in my opinion, of ever passing Supreme Court muster. And this Congress ought not be passing a bill that is bad public policy and is unconstitutional.

Mr. President, I want to read a quote from Mrs. Valery Pech who testified on this subject. She is the wife of Mr. Randy Pech who owns Adarand Constructors. She is an owner herself, I believe. She said:

> We started our family-owned company in 1976 specializing in the installation of highway guardrail systems. In August of 1989, we lost yet another Federal highway contract on which we had submitted the lowest bid. Adarand lost this job and numerous others, past and future, not because of poor reputation, not because our price was too high, not because we limited our bid date, not for any other reason but one. Randy, as owner and operator of Adarand is a white male. We didn't like it. We fought the decision. We contracted a legal foundation to seek help. Six years later, in 1995, the Supreme Court ruled for us and against race-based decision-making in the Adarand Constructors case.
>
> Adarand is the only nonminority guardrail business in the State of Colorado. All our competitors are classified as disadvantaged business enterprises. Their status is DBE, and contracts are awarded based solely on the owner's race or gender regardless of whether or not they have suffered past discrimination.

She lists those competitors that they compete against. She notes all of these

contractors have been in business—her competitors are minority owned for over 10 years and have solid reputations for getting work done. These four competitors get 95 percent of their work by being low bidder in other than Government contracts; yet when they bid against Adarand for Government contracts, they get a preference and are able to get the bid, although they bid higher.

Do you see the unfairness of it? These are strong competitive companies. One simply happens to be headed by a Hispanic and one is not. The one who is not gets hurt, and the other one has an advantage. That is why the polls of all racial groups feel that these are not fair and just preferences.

Mr. President, I will not belabor the subject. Again, I want to congratulate the Senator from Kentucky for his leadership in coming forward with a remarkable proposal that gives opportunity, gives it affirmatively, reaches out to help disadvantaged, gives them a chance to be successful in getting Government contract work, but at the same time does not violate the Constitution.

In conclusion, I have no doubt that this section is unconstitutional. It is neither supported by a compelling Government interest nor is it narrowly tailored. Therefore, I urge the Senate to consider Senator MCCONNELL's amendment. I cannot in good conscience vote for legislation that I consider to be unconstitutional.

Mr. WARNER. Mr. President, I say to the distinguished Senator from Kentucky, I do not wish in any way to interfere in his presentation, but there are some of us who have a different point of view. I am wondering if I could just talk about 3 or 4 minutes on this amendment.

Mr. MCCONNELL. I say to my friend, that is fine. I have Senator ASHCROFT here in support of the amendment, and we will go to him when you complete.

Mr. WARNER. This will be a very thorough debate because it is a serious issue. It seems to me there are many facets to this debate. One is the important one raised by my colleagues who have just been speaking as to the constitutionality. Then each Senator has to reach his or her own opinion on the constitutionality. Then there seem to be other factors that have to be taken into consideration.

I rise to alert Senators to take a look at the importance of this amendment. It so happens this bill is mine. I was the author of it as chairman of the subcommittee. We considered this issue, and I determined we should keep this provision in, despite the Adarand case and the development of the law in the course of the writing of the bill.

I urge Senators to begin to study, as a part of their preparation for floor statements and decisions, the important aspect of this amendment on the growth of the participation by women in this country in their ability to compete as professionals in this area of work.

There are charts available; for example, in Virginia, the percent of growth since 1987 in firms of women, an 84 percent increase in the number of firms that are managed, owned, and operated by women in my State. Each State is on this chart. I urge Senators to look at that.

Then the department of Federal highways, DOT, has prepared for each State a chart showing the percentage of these DBE highway contracts that go to women. Particularly in my State, 44 percent of these contracts under the DBE Program go to firms that in this instance are nonminority women—a very significant amount of work.

Another chart that Senators should look at is a comparison of the Federal highway programs that have been since 1983 subject to the DBE provisions, and the participation by the minority firms in the Federal program as compared to the participation in State programs. My State is not on this particular chart, but, for example, I will take Connecticut, 15.7 percent participate under the Federal program; 5.2 percent under the State program. Arkansas, 11.9 percent under the Federal programs; 2.9 percent under the State programs. I will let the distinguished Senator from Rhode Island address this chart; 12 percent in Rhode Island under the Federal program; 0 percent under the State program. Maybe there is some explanation.

I just rise to alert Senators to include this as part of their study.

Mr. President, some have made statements to the fact that the DBE Program has not been effective. I want to address—and indeed rebut—that point.

Let's look at the effect on women-owned highway contracting businesses. The effect has been dramatic. Since 1987, when women were added to the DBE, women-owned highway contracting businesses increased in number by 157 percent.

And women-owned businesses get a significant portion of the DBE funds. Here are some examples:

Alaska: 75 percent of DBE funds go to women ($11.8 mil. of $15.7 mil.)
Indiana: 68 percent of DBE funds go to women ($21.5 mil. of $31.5 mil.)
Mississippi: 87 percent of DBE funds go to women ($19.5 mil. of $22.4 mil.)
New Hampshire: 63 percent of DBE funds go to women ($6.0 mil. of $9.6 mil.)

and in my State of Virginia 44 percent of DBE funds went to women ($14.1 mil. of $32.6 mil.).

In sum, the DBE Program has helped promote women's participation in the construction industry, and will continue to do so under this bill and the new regs.

Without this program, it is questionable that women would have this opportunity. Let's compare some State programs—without DBE—and their Federal aid programs:

	Federal (DBE)	State (No DBE)
Arkansas	11.9	2.9
Louisiana	12.4	0.4
Missouri	15.1	1.7

I believe data like that shows that DBE plays a critical role in allowing women to compete. This is not a giveaway; they must still be the low bidder, obtain bonding, and perform the contract according to its terms.

The case for opportunities for minorities is equally clear. Thanks to the DBE Program, persons of all race and ethnicity have had the opportunity to compete for federally assisted State highway contracts.

With regard to the debate about the constitutionality of this program, I reviewed what the Supreme Court said in the Adarand case.

Justice O'Connor, for the majority, made it clear that the Federal Government may undertake affirmative action programs as long as they meet the ''strict scrutiny'' standard. The Court did not outlaw Federal affirmative action.

Indeed, Justice O'Connor stated:

> When race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the ''narrow tailoring'' test . . .

As for the district court, to which the case was remanded, Judge Kane's decision did not ban affirmative action either.

When Judge Kane looked at the program, he said:

> I conclude Congress has a strong basis in evidence for enacting the challenged statutes, which thus serve a ''compelling governmental interest.''

In other words, the program achieves one of the two ''strict scrutiny'' requirements.

As for the second requirement of ''narrow tailoring,'' U.S. District Judge Kane stated the program's regulations did not meet that requirement.

But given that the Department of Transportation is readying new regulations that are specifically designed to meet the narrow tailoring requirement, it seems to me that that problem is going to be taken care of.

In sum, the DBE Program will be in full compliance with *Adarand.* Indeed, as the chairman of the Subcommittee on Transportation, I intend to make sure of that and hold the Department to that standard.

Therefore, I believe that the DBE Program in this bill is both critical to opportunities for women and minorities in the highway construction industry, and constitutional. It is a program important to a wide range of socially and economically disadvantaged persons, including many in the State of Virginia. Thus, I will be supporting the committee bill and opposing the pending amendment.

Mr. President, I ask unanimous consent that two tables be printed in the RECORD relating to this subject matter.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

HIGHWAY CONTRACTING DOLLARS IN VIRGINIA

Year	Federal-aid dollars awarded $(1000)[1]	Federal-aid dollars to DBEs $(1000)[1]	Annual DBE goal percentage	Actual DBE participation percentage
1991	142,821	23,036	12.0	16.1
1992	131,660	20,903	12.0	15.9
1993	197,956	31,915	12.0	16.1
1994	322,354	48,754	12.0	15.1
1995	220,010	32,688	12.0	14.9
1996	246,195	32,633	10.0	13.3

[1] Contracting dollars awarded by the State for the Federal-aid highway program, not the annual apportionment.

Women and Minority-Owned Businesses Share of the Federal Highway Program: In 1996, businesses owned by non-minority women received $14.1 million (or 5.7% of total contracting dollars awarded) and minority-owned firms received $18.5 million (7.5%). Non-DBEs got the remaining 86.8%.

DBE Firms Ready and Able to Perform Highway Construction Work: There are 458 DBEs qualified as prime contractors in the highway construction industry in Virginia. The State reports that there are more qualified DBE firms than non-DBE firms.

Without DBE Programs Prime Contractors don't use DBE Subcontractors on State Contracts: In 1996, DBEs were successful as subcontractors in the federal-aid program, but there was a 34% drop in the use of DBE subcontractors in the state program.

WOMEN-BUSINESS-STATES 1996 STATISTICS

A state-by-state listing of the number of all women-owned companies in 1996 (in thousands) and the percentage change from 1987, as compiled by the National Foundation for Women Business Owners:

State	Firms in 1996	Percent of growth since 1987
Alabama	98,000	87.9
Alaska	26,000	69.6
Arizona	130,000	97.3
Arkansas	68,000	76.0
California	1,082,000	77.7
Colorado	160,000	64.9
Connecticut	103,000	56.2
Delaware	21,000	95.8
District of Columbia	19,000	59.2
Florida	497,000	106.3
Georgia	203,000	112.4
Hawaii	39,000	66.8
Idaho	42,000	104.1
Illinois	37,000	74.8
Indiana	167,000	71.0
Iowa	92,000	58.6
Kansas	84,000	43.5
Kentucky	99,000	70.1
Louisiana	102,000	67.7
Maine	48,000	85.3
Maryland	167,000	87.7
Massachusetts	192,000	58.5
Michigan	263,000	80.4
Minnesota	166,000	73.5
Mississippi	55,000	73.9
Missouri	155,000	62.1
Montana	34,000	76.7
Nebraska	57,000	63.3
Nevada	47,000	130.0
New Hampshire	42,000	69.6
New Jersey	221,000	72.7
New Mexico	57,000	108.0
New York	527,000	70.2
No. Carolina	198,000	94.3
No. Dakota	19,000	37.8
Ohio	306,000	82.5
Oklahoma	107,000	54.3
Pennsylvania	300,000	74.7
Rhode Island	29,000	84.8
So. Carolina	90,000	93.8
So. Dakota	24,000	65.2
Tennessee	139,000	89.9
Texas	552,000	70.1
Utah	63,000	95.5
Vermont	29,000	94.3
Virginia	189,000	84.0
Washington	188,000	91.8
West Virginia	40,000	64.6
Wisconsin	134,000	78.5
Wyoming	19,000	63.7
United States	7,951,000	77.6

Note.—The growth rate in women-owned construction contractors since 1987 was 157% (2.6%–6.7%).

I yield the floor.

Mr. McCONNELL. Mr. President, if the Senator from Montana would like to rotate back and forth, that is certainly fine with me. Senator ASHCROFT has been here and is anxious to speak. I don't particularly want to get into a dispute over the speaking order. Is the Senator from Montana desiring to speak?

Mr. BAUCUS. I have another commitment that starts in about 5 minutes, so if I could speak now that would help this Senator.

Mr. McCONNELL. I yield the floor.

Mr. BAUCUS. I yield myself such time as I may consume.

Mr. President, this obviously is a very important debate. It is the first civil rights debate we have had in a long time. It is very important that the Senate take this extremely seriously because it is such an important matter. It goes to the heart of what it is to be an American.

I begin by emphasizing a fact which puts us into a bigger context, and that is all of us as Americans want to expand the economic pie. We all want to encourage more American entrepreneurs to start new companies, start more companies, create new jobs. That is especially true for women and for minorities.

We, as Americans, will all be a lot better off and the country will be better off if there are more successful businesses owned by women, more owned by African Americans, more owned by Native Americans. All Americans, as a consequence, will have more jobs, will have more community leaders and will have more positive role models for our daughters and our sons. We will be a more cohesive country, a better country. I don't think there is any doubt about that. I think there is a consensus about that.

The question, of course, is how we can best accomplish that goal. The so-called DBE Program, the Disadvantaged Business Enterprise Program, takes an important step to accomplish that objective by giving women and by giving minority groups a fair shot at that economic opportunity. It gives them a seat at the table.

I will take a few moments to explain the program. First, it was created in 1982 as part of the highway bill signed by President Reagan. It began in 1982. It was then expanded in 1987 when the Senate added women-owned construction businesses to the category of businesses that are presumed to be disadvantaged.

Let me emphasize this point: The program we are talking about is based on the small business program usually referred to as the section 8 program. But it is broader than section 8. In 1987, we expanded the highway Disadvantaged Business Enterprise Program to include not only construction companies owned by members of minority groups but also construction companies owned by women. The expanded program was continued without change in ISTEA. That is, in the highway bill passed in 1991, and the committee has here proposed to continue it again in ISTEA II, the highway bill before the Senate.

How does the program work? The law says unless the Secretary provides otherwise, at least 10 percent of the money expended on highway contracts under the official highway program should go to small businesses owned by socially and economically disadvantaged individuals. So who qualifies? First, you have to be a small business within the meaning of the Small Business Act. Beyond that, you have to be socially and economically disadvantaged. There is the presumption that women and members of certain minority groups are in fact disadvantaged. It is only a presumption, a presumption that can be overcome primarily in two ways. One is that a person who is not a member of one of the presumptive groups can show he or she is socially or economically disadvantaged. That can be shown. The other way is for a third party to challenge the eligibility of a particular contractor, such as a competitor, by showing that the person is not, in fact, disadvantaged.

Under our Department of Transportation regulations, each State—let me underline the word ''State''—each State highway program must take various steps to reach out to disadvantaged businesses. In addition, each State—underline again ''State''—must establish an overall goal for the percentage of federally funded highway construction dollars going to women and minority-owned businesses. Once that goal is established—again, it is a goal; some States have more than 10 percent; some States goals are lower than 10 percent. It is a goal depending on the State. Once the goal is established, the State highway department establishes another goal for each particular contract. The goal doesn't have to be 10 percent; instead the State can look at the type of work, and the pool of available subcontractors and decide to set a higher goal for certain contracts and a lower goal for others.

Once the goal is established for a contract, each contractor must make a good-faith effort to meet the goal—not mathematically required, not quota required, but a good-faith effort to meet it. That is all that the program is. If the contractor does make a good-faith effort but finds the qualified subcontracts are not available or that their bids are too high, the contractor has satisfied his obligation. In a nutshell, that describes the program.

So how has it worked? What are the results? The program has been in place now for about 15 years. During that time, the percentage of Federal highway expenditures going to disadvantaged businesses has risen from barely 8 percent in 1992 to almost 15 percent today. In my State of Montana, 1996, the State expended $133 million on ISTEA or highway projects. Of that, $27 million—slightly more than 20 percent—went to DBE's.

To companies like Omo Construction in Billings, MT—Ron Omo started out

with a pick up, that is all he had, and the will to be his own staff. He was certified as a DBE in 1986. In 1997 his company received $4 million in prime contracts and subcontractors.

Or Greenway Enterprises, in Helena, which is run by Dee Hoovestall, who started out with a backyard seeding company and now runs a large construction company in my State.

There are others, people who have created jobs and improved our communities. With that as background, I would like to respond to the principal criticisms that have been made of the Disadvantaged Business Enterprise Program.

Three points: First, the program is constitutional; second, the program is fair; and third, it works.

It has been argued that the Disadvantaged Business Enterprise Program is unconstitutional. I disagree. There are important constitutional questions, and they deserve careful attention, but when you look at the decision of the Supreme Court, the decisions of the district court, and the new proposed regulations, the program passes constitutional muster.

Let's start with the decision of the Supreme Court. In the Adarand decision, the Supreme Court held that a Federal affirmative action program is subject to what the lawyers call ''strict scrutiny.'' In other words, to pass constitutional muster, the Government must show that the program furthers a compelling interest—and that is a given in this case; the lower court even found that—and also uses a narrowly tailored means to do so. Strict scrutiny means compelling Government interest and, second, that the program is narrowly tailored.

The Supreme Court did not hold that the program was unconstitutional. Again, the Supreme Court did not hold that the program was unconstitutional. Nobody can refute that statement.

In fact, the Court went out of its way to say that subjecting the Federal affirmative action program to strict scrutiny was not equivalent to finding that the program is unconstitutional.

In a majority opinion, Justice O'Connor said:

> We wish to dispel the notion that strict scrutiny is ''strict in theory, but fatal in fact.'' . . . the unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it. . . .

The Court gives some examples and then it says:

> When race-based action is necessary to further a compelling interest, such action is within the constitutional constraints if it satisfies the ''narrow tailoring'' test this Court has set out in previous cases.

Having established that strict scrutiny applies, the Supreme Court remanded the case so that the lower court could consider whether the program furthers a compelling interest and is narrowly tailored.

The district court judge issued its opinion in June of last year. It is a mixed bag.

After reviewing the legislative history, the judge found that ''Congress had sufficient evidence, at the time these measures were enacted, to determine reasonably and intelligently that discriminatory barriers existed in Federal contracting.''

Therefore, he concluded that ''Congress has a strong basis in evidence for enacting the challenged statutes'' and that the program was justified by a compelling Government interest. That was the district court speaking.

Then the judge turned to the second part of the test, narrow tailoring.

Looking at the details of the Federal lands highway program, he concluded that it was not flexible enough or sufficiently related to past discrimination to meet the narrow tailoring test. Therefore, because the program did not pass both parts of the strict scrutiny test, he held as a district court judge that it was unconstitutional.

Let me make three points about this decision.

First, the decision itself applies only to the Federal lands highway program in Colorado.

Second, a single district court's decision that a Federal statute is unconstitutional is, obviously, not the last word. Such decisions frequently are reversed on appeal, and this decision has been appealed.

In fact, there are many law professors who have written that, in their view, the district court decision that the statute is unconstitutional is in error.

Third, the court was looking at the current program. But that program is changing.

A few years ago, President Clinton ordered a review of all Federal affirmative action programs. In response, Secretary Slater has proposed significant changes to the DBE Program, designed to make the program more flexible, more targeted, and, in a nutshell, more narrowly tailored. The proposed new rules would make several important changes.

First, they replace the 10 percent goal with a new goal that's based on an estimate of the extent to which discrimination has affected construction contracting in each State. Again, no numerical goal.

Second, they give more emphasis to incentives like outreach and technical assistance.

Third, they confirm that contract goals are not binding. If a contractor makes a good-faith effort to find qualified women or minority-owned subcontractors, but fails to meet the goal, there is no penalty. If you do your best, that is good enough.

Moreover, the regulations allow the Secretary to waive the requirements if a contractor comes up with an alternative approach that is as good or better then the approach in the rules.

Putting all this together, the Supreme Court held that the program is subject to strict scrutiny, but emphasized that it does not mean that the program is unconstitutional.

The only district court to consider the question held that there is a compelling interest, but not narrow tailoring. The proposed new rules directly address narrow tailoring by making the program even more flexible and targeted. In light of this, I believe that the DBE Program is constitutional.

My second point is that the program is fair. It's fair because it helps women and minorities get a seat at the bidding table—not the only seat, not the best seat, but simply a seat at the table, an opportunity to compete against equally qualified contractors.

Let's face the facts. We all wish we lived in a society that does not discriminate based on gender or race. Well, we don't. Women and members of minority groups do face barriers that the rest of us do not. That is why the DBE Program was created. That is why it was expanded in 1987 to include women.

Let me give you an example. In 1984 the Transportation Subcommittee held an oversight hearing to review the implementation of the 1982 highway bill. A woman named Wendy Johnson testified about the discrimination in the construction industry. She said:

> Few, if any, of the major contractors of State departments of transportation are making aggressive, affirmative efforts to recruit women . . . Yet, we have documented that many women want and need these jobs.

Let me make a point about discrimination another way. Look at the statistics. Women still earn only 72 percent of what men earn for comparable work. Women own about one-third of all small businesses. But women-owned businesses only receive 3 percent of Federal procurement dollars. Minorities make up 20 percent of the U.S. population but own only 9 percent of the construction businesses, and those businesses receive only 4 percent of construction receipts.

According to the General Counsel of the Transportation Department, ''Minority and women-owned firms report that they are routinely unable to secure subcontracts on private work where there are no affirmative action requirements and that white-owned prime contractors reject minority or women-owned firms even when they offer the lowest bid.''

The DBE Program helps women and members of minority groups overcome these barriers. That is why, to my mind, the program is fair.

My third point is that the disadvantaged business——

Mr. WARNER. If the Senator will yield, I think that is a very important point, and it supplements what I brought to the attention of the Senators earlier. They better do a little homework on this issue as they approach this particular amendment.

Mr. BAUCUS. That is a very good point, particularly as to how much this has helped women become an equal force in this society—or getting there.

Third, the Disadvantaged Business Enterprise Program works. After the program went into effect, the percentage of highway expenditures going to disadvantaged businesses rose significantly, from 8 percent in 1982 to 12.9 percent in 1983. It has remained pretty stable ever since.

The percentage of expenditures going to women-owned businesses has risen steadily, from 3.1 percent in 1983 to 6.7 percent in 1996. That is still pretty low. After all, women make up more than half of the population and own one-third of all small businesses. Maybe 6.7 percent is nothing to crow about, but it's more than double the percentage of expenditures that went to women-owned businesses in 1983, before women were added to the DBE Program.

We can look at it another way. What would happen if this program were repealed? In recent years, several States have eliminated their own disadvantaged business enterprise programs, and the results have been dramatic.

In 1989, Michigan repealed its disadvantaged business enterprise program for State highway contracts. Within 9 months, the percentage of highway dollars going to minority-owned businesses fell to zero. The percentage of highway dollars going to women-owned businesses receiving highway contracts fell to 1 percent.

By 1996, the total percentage of women and minority-owned businesses receiving State highway contracts was still about 1 percent. At the same time, for Federal highway contracts in Michigan, operating under the Federal program, women and minority-owned businesses received 12.7 percent of the contract dollars.

In other words, on Federal highway construction projects, operating with a DBE program, women and minority-owned businesses received a 12 times greater share of contracting dollars than they did on State projects operating without such a program. Mr. President, that is because the program was repealed in Michigan.

There have been similar results in other States and cities, and this obviously tells us something. It is obviously a warning. That is, if we repeal the Federal program or cut the Federal program way back—which, in effect, the McConnell amendment does—opportunities for women and minority-owned businesses are likely to suffer a sharp decline.

Think about what that will mean for hundreds of new, startup companies all across our country.

In many cases, women and minority group members have worked for years to build up their companies. They have borrowed thousands of dollars for expensive construction equipment, all based on the expectation that in America they will have a fair shot, a fair shot at highway construction contracts.

If now, in this bill, we eliminate the DBE Program, a lot of small businesses will be left high and dry.

Pulling all this together, the Disadvantaged Business Enterprise Program is constitutional, it's fair, it works, and it is good for America. We should maintain the program, not weaken or repeal it.

That brings me to the McConnell amendment. The amendment repeals the Disadvantaged Business Enterprise Program and replaces it with something called the ''Emerging Business Enterprise Program.'' This program requires each State to establish a program for outreach, education, and technical assistance for small businesses. But that is about it.

I am all for outreach and I am all for education and technical assistance. Who isn't? But by eliminating contract goals—not quotas, but goals—the McConnell amendment dilutes the program down to almost nothing. And by doing so, it really misses the point.

Women and minority group members who own small construction companies often do need outreach, they often do need education and technical assistance, but in many cases that is not enough. Even when they have the information and the technical skills, they often find that they just can't crack into the market. That is why we need to do more, why we need to establish goals, goals that should be flexible and should be based on the specific circumstances of each State—and they are. But without goals against which we can measure progress, our commitment to expanded opportunity is nothing more than an empty promise.

Fifteen years ago, we made a commitment. We told women and minority-owned businesses in this country that we would give them an opportunity to compete, we would give them a seat at the table.

The program has worked. It has created more opportunity, not less, and it's still necessary.

As President Clinton has said, ''In the fight for the future, we need all hands on deck, and some of those hands still need a helping hand.''

Mr. President, I urge that we maintain our commitment to opportunity, to inclusiveness, and to lending a helping hand. I urge that the MCCONNELL amendment be defeated.

Mr. ASHCROFT addressed the Chair.

The PRESIDING OFFICER (Mr. SESSIONS). Who yields time?

Mr. WARNER. On behalf of the Senator from Kentucky, I yield such time as the Senator from Missouri wishes.

Mr. ASHCROFT. Mr. President, I ask unanimous consent that, in accordance with an agreement reached between the Members on the floor, that Senator KERRY of Massachusetts be allowed to speak following my remarks.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. ASHCROFT. Mr. President, I am pleased to take part in the debate to reauthorize the Intermodal Surface Transportation Efficiency Act of 1997, commonly known as ISTEA. This debate was originally scheduled to take place the first week in May. As we all know, the current measure is designed to end in the last week in April and, had we not debated this until the first week of May, there would have been an interruption in the funding and the opportunity to build highways in this country. So I express my appreciation to the majority leader for moving this debate up and making it possible for us to address this issue in a timely manner. When we are talking about the construction of infrastructure, which allows the body politic to be nourished by the stream of commerce, I think it is important that we don't interrupt that stream. I thank the majority leader.

Although I rise to speak specifically on the amendment of the Senator from Kentucky, I briefly would like to talk about the underlying bill. I must say, I am grateful, on behalf of the citizens of Missouri, for the work that has been done on this bill to ensure a fair return to Missourians for the kind of contribution that they make to the highway trust fund. I especially thank the senior Senator from the State of Missouri, KIT BOND, for his tireless effort in this battle. No Senator in this Chamber, in my judgment, has made a more conscientious and consistent effort to make sure that there was fairness in the allocation of these highway resources than Senator KIT BOND.

To me, the issue is clear, and it has been clear throughout the entire debate. When a Missourian fills the gas tank and pays 4.3 cents in Federal fuel taxes, that money should go to improving the roads of the State rather than paying for additional Federal spending on some social program in a distant State, and that is another improvement that this bill reflects, putting highway taxes back into the highway trust fund.

Mr. WARNER. Mr. President, will the Senator yield? I compliment the Senator for recognizing the contributions of Senator BOND. As my colleague knows, a good deal of money has been added to this bill. Senator BOND laid the foundation, together with the Senator's support, whereby this became a reality in the sequencing in the Byrd-Gramm-Baucus-WARNER amendment. But that foundation was laid by the distinguished senior Senator. He serves on the committee and helped develop the underlying bill and the amendment.

I thank the Senator for his participation. Missouri sent two strong proponents for this highway bill, and I compliment the Senator.

Mr. ASHCROFT. I thank the Senator from Virginia. His recognition of the contribution of Senator BOND of Missouri is appreciated and appropriate. I think the decision, which involved both the authorizing committee and the Budget Committee, to dedicate the 4.3-cent fuel tax to highways is a good one, and I am pleased to support that aspect of this bill. I believe that when this is all over, Missourians will now see a 91

cent return on each dollar as opposed to a dismal 80 cents that it received under the former funding scheme. Under the formula that was passed out of the Environment and Public Works Committee, Missouri will receive $3.6 billion compared to $2.4 billion that Missouri received over the last 6 years of the 1991 highway bill. Missouri's average allocation per year would be around $600 million as opposed to around $400 million that the State received under the old bill. I believe this allocation of highway trust money to the development and construction of highways is appropriate.

I would add that this is not taking from other Government programs. This is the allocation of highway trust money for highways. Uniquely, we are beginning to get to the place where we focus resources that we take from people who use the highways on the highways. That is a major benefit. I would like to see a 100 percent return on Missouri's investments. I appreciate the advancements made over the last few days, and I am committed to working with the Budget Committee to see that these additional funds are offset so that we can stay within the budget caps that were approved by this Congress last session.

I quickly would like to address one more issue. This is the amendment that was voted on yesterday to take away State highway funds if they do not establish a blood alcohol content of .08 for drunk-driving violations. I opposed this amendment, not because I do not abhor drunk driving. Far too many of us have lost loved ones as a result of this tragedy. However, I believe States are in the best position to make the decision on the best way to eliminate drunk driving. The ''stick'' approach offered in the amendment was rejected by the 104th Congress, when we repealed the Federal speed limit. I believe the ''carrot'' approach, contained in the safety provisions of this bill, which contain a .08 option, is the appropriate method to allow States the freedom to establish comprehensive programs to discourage drunk driving. That is why the National Governors Association, the National Association of Governors' Highway Safety Representatives, the National Conference of State Legislatures, the National Association of Counties, and the American Association of State Highway and Transportation Officials support the safety provisions contained in the bill. I look forward to the continued debate on the underlying policies in this bill.

Now I would like to address the policy and constitutional principles raised by Senator MCCONNELL's amendment, which I have cosponsored. The specific issue raised by Senator MCCONNELL's amendment is whether we should reauthorize provisions in the ISTEA bill which treat two identically situated individuals differently, based solely on their race. Let me just say, again, the question or issue raised by Senator MCCONNELL's amendment is whether we should reauthorize provisions of the bill which require that we treat two identically situated individuals differently only because of their race.

Specifically, a provision in the ISTEA measure requires that 10 percent of the amounts made available under certain titles of the act shall be set aside for small business concerns owned and controlled by socially and economically disadvantaged individuals. The provision goes on to define ''socially and economically disadvantaged individuals'' by cross-reference to section 8(d) of the Small Business Act.

If you go to that section, you will find that a Government contractor shall presume that ''socially and economically disadvantaged individuals'' include black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities. The net effect of these provisions is that if two bids come in from two subcontractors, one owned by a white male and the other by a racial minority, and the bids are the same, or even close, the job will go to the minority-owned company, not the low bidder.

I find this objectionable as a matter of public policy. But the question facing the Senate is more than a debate over policy. The U.S. Supreme Court has made it clear that a constitutional principle is at stake. Members of this body have differed on the question of whether the Government should treat people differently solely because of their race. Personally, I believe that we all desperately want a future of racial reconciliation in which race is simply no longer relevant. People of good faith can differ on how best to achieve racial harmony. My own view is that the best way is to usher in a future of racial reconciliation by ending race-conscious Government programs, starting today. You don't end racial discrimination by promoting racial discrimination.

But, while the race-based set-asides in ISTEA are part of this broader debate about whether the Government should let racial factors cloud its decisions—a debate that raises difficult questions—the ISTEA race-based set-asides are an easy case. In the first place, the particular race-based set-asides in the transportation bill represent an issue of constitutional principle.

We cannot evaluate these set-asides as if we were legislating on a blank slate. The Supreme Court, and now a Federal district court on remand, have considered these set-asides and declared them constitutionally suspect. These courts did not consider a similar program, or a related program, but the exact program that is at issue today.

In the 1995 Adarand decision, the Supreme Court held that race-based Government programs are subject to the most exacting level of scrutiny. The Court rejected the notion that the Government's use of race should be subject to a more relaxed standard because the Government's stated purpose was assisting rather than disadvantaging racial minorities. Instead, the Court made clear that when the Government makes distinctions on the basis of race, it is engaging in a dangerous business, and such laws will survive only if they are narrowly tailored to serve a compelling Government interest.

The Supreme Court stopped just short of declaring the program unconstitutional, leaving that task for the district court after any additional development of the record that was necessary. In June of last year, the district court to which the Supreme Court referred the measure confirmed what seemed obvious; namely, that the Federal Government's race-based set-asides were unconstitutional under the Supreme Court's demanding test of strict scrutiny. As Judge Kane emphasized, the race-based presumption of economic disadvantage is both over- and underinclusive. Indeed, the district court said it is not narrow at all; it is both too broad on the one side and too narrow on the other side. It falls because it is not narrowly tailored. Judge Kane observed that the Sultan of Brunei—I assume because this is an Asian Pacific person, a minority—in spite of being one of the wealthiest persons in the world, would qualify because of race-based consciousness that is specified in the act and would presumptively qualify as a disadvantaged business entity. The district court understands that if you are trying to correct social and business disadvantage, economic disadvantage, and instead of using something that is narrowly tailored to address social and economic disadvantage you use something as broad as race, you are using a category which is overly broad and can't be considered to be strictly tailored—can't be said to be narrowly tailored.

We know there are individuals in the Asian Pacific ethnic group or minority who are as wealthy as any individuals in our entire culture and some as poor as any individuals in our entire culture. The fact is that the racial identity of an individual does not carry an individual into the specific narrow category of being socially or economically disadvantaged.

My concerns with the effect of the court decisions on Congress' ability to reauthorize these provisions, led me to convene a hearing in the Constitution Subcommittee of the Judiciary Committee of the Senate, which I have the privilege of chairing, to examine the constitutionality of the provision. At that hearing we were privileged to receive testimony from Valery Pech, who, along with her husband, Randy, runs Adarand Constructors, the plaintiff in the Adarand cases. She provided the subcommittee with a firsthand look at how this program has operated in practice and the impact it has had on their business.

She testified how this program has caused their firm to lose several contracts, despite being the low bidder on

the job. She has also testified that the beneficiaries of this program, which is purportedly targeted at disadvantaged business entities, are, in fact, well-established firms. It has already been noted on the floor of this Senate that most of the time those firms, when they win a contract, win it based on the fact that they are the low bidders, but when they are involved in this kind of contract for federally related tasks, they do not even have to be the low bidder.

I think it should be said that the general public of the country does not want to spend its money if it is not really helping someone who is needy, but just helping someone who is a part of a broad category to get a job which they don't earn by being the best in the competition. The American way is not to award the prize to the one who has this race or that race, or has this disadvantage or that disadvantage by the law. The American system has been to reward achievement and merit. This is a fundamental value of our culture. It is also reflected in our Constitution, and it was reinforced in the Adarand case, both at the Supreme Court level and on the remand. This is not the only set of cases that has decided this.

As a matter of fact, it has been represented on the floor that there has been no other case in which this has been decided. But I think, if not directly on point at least so similar that one could not ignore it, is the case of Houston Contractors Association v. The Metropolitan Transit Authority of Harris County. In that instance, it was another U.S. Federal district court which ruled, consistent with the U.S. Supreme Court, that such set-asides and quotas and preferences as are contained in the ISTEA bill are simply wrong. Those courts, I believe, would provide more than an adequate basis; they would provide a compelling argument that we adopt the amendment as propounded and proposed by the Senator from Kentucky.

The two Adarand decisions make plain the unconstitutionality of the ISTEA set-asides. But removing this provision from the bill as unconstitutional should be an easy decision for Congress for a second reason—the program uses race for a plainly impermissible end. The Constitution obligates the Congress to reject unconstitutional legislation whether or not the courts have, as here, already held the legislation unconstitutional. Wholly apart from the conclusions of the two Adarand courts, it is obvious that the ISTEA set-asides use racial classifications in an impermissible way.

Reasonable persons can differ as to whether the Constitution forbids the Government from using race as a factor in rectifying past racial discrimination. You might have a different situation if you were saying the statute set up a presumption that there had been racial discrimination and then used race as the basis for rectifying that racial discrimination. That is not what the Disadvantaged Business Enterprise Program does.

As its name suggests, the Disadvantaged Business Enterprise Program seeks to assure that a certain percentage of Government contracting dollars flow to—and here are the words—''socially and economically disadvantaged individuals.''

The statute then defines a disadvantaged business enterprise as any business owned by members of certain ethnic groups and, since 1987, businesses owned by women of any race.

In the statute, you say that you are trying to correct the problem, which is social and economic, and then you get to the remedy, and the remedy that is proposed is not based on social concerns, it is not based on economics; it is based on race.

The truth of the matter is that the Supreme Court says you have to narrowly tailor the remedy and focus the remedy on the problem, but here the statute says that there is a problem that is social and economic but then has a solution which is racial. Obviously, the district court even saw the humor of the lack of fit between problem and remedy. So far does the racial remedy miss the social and economic problem that it would allow the Sultan of Brunei, one of the richest people in the world, to be presumed socially and economically disadvantaged.

It is clear, you do not have to have a Supreme Court ruling, you do not have to have the district court rulings, you do not have to have a second district court ruling in the State of Texas to tell you this. I don't think you have to be a rocket scientist or law school professor. If the problem is social and economic and your solutions should be narrowly tailored, the solution should be social and economic. It should be focused on the problem. But instead of this statute focusing the solution on the problem of social and economic disadvantage, it focuses the solution on race, which wasn't something that was mentioned as the problem to begin with.

The notion that every small business owned by racial minorities is somehow economically disadvantaged is nonsense. It flies in the face of reality. As a matter of fact, it is an affront to many of the businesses owned by racial minorities or women in this country. Many are very successful. For us to presume that because a black person or a Hispanic person or an Asian person owns a business it is disadvantaged or it is economically failing is for us to engage in rank prejudice, in my mind.

I cannot imagine going up to someone and saying, ''I see that your computer business is disadvantaged, it's economically failing, it needs Government assistance, you are a charity case.''

''Why?''

''Because your race is a minority race.''

That is un-American to me. It would be an affront to me if I were told that in spite of my balance sheet, in spite of my portfolio, in spite of the fact that we had orders backlogged, we couldn't supply the demand, in spite of the fact our profits were up, we were still economically and socially disadvantaged just because of the way we were born, the color of our skin. That is an affront to the dignity of the individuals that this law apparently hopes to protect.

I simply could not in good conscience go to my fellow Americans and say, ''Well, your bottom line may show that you are successful and your stock may be worth millions and you may be getting lots of contracts and you may be beating everybody else in your business, but you're a failure because of your race,'' or ''you are disadvantaged because of your race.'' That is something that we should not do as a country. Government should not go to people and say, ''We're going to presume you're a failure, we are going to presume you economically can't make it, that you are socially disadvantaged because you are of a certain race or a certain ethnic minority.''

I can't believe that. Why should we suggest that? We have seen time and time again, and we see it more and more frequently, people without regard to race, because of this economy. The economy of America doesn't make decisions based on race—look how many of the role models that are used in selling products all across this country are people of a wide variety of racial and ethnic backgrounds. Some of the most valuable endorsements in America are endorsements from people who, according to this law, would be socially and economically disadvantaged because of race. I would hate to tell some of those people they were disadvantaged. They might take out their wallet and buy me on the spot. They might buy everything that I own, and they could probably do it out of petty cash.

I think the day has passed when we as a nation should try to tell people because they are of a particular race that they have an economic or social disadvantage, when it is pretty clear, when the facts of the matter just might be incontrovertible that they are not disadvantaged.

At the hearing we held in the Constitution Subcommittee, a number of witnesses testified concerning the unconstitutionality of these set-asides and the futility of the Clinton administration's efforts to implement this flawed program and to continue to tell people that based on race alone they are somehow economically disadvantaged or unsuccessful. For example, Professor George LaNoue, of the University of Maryland, provided a detailed account of how the administration has failed to conduct the kind of detailed statistical analysis necessary to justify a race-based program. There is no evidence of how specific groups have been the subject of particular acts of discrimination and how the program is tailored to address these instances of discrimination. Thus, according to Professor LaNoue, there is no compelling

interest to justify the use of race as a proxy or as a way of defining remedy in this context.

Other constitutional scholars focused on the critical lack of narrow tailoring in this statute. As Professor Eugene Volokh of the UCLA law school stated:

The statute as now written . . . is not something that can be saved through any regulations. It seems to be fatally overinclusive, and that strikes me as an easy case that it is not narrowly tailored.

Easy case.

Professor Volokh's testimony reflects the fact that the Constitution allows the Federal Government to use race as a factor only in the rarest of circumstances and only with surgical precision. Well, surgical precision would probably have lopped off the Sultan of Brunei, I might say.

As the constitutional scholars on our panel concluded, the race-based set-asides in this bill are not drafted with sufficient precision or supported with enough statistical evidence to survive constitutional scrutiny.

I ask unanimous consent to have printed in the RECORD an excerpt of the written testimony of Professor LaNoue and the full written testimony of Professor Volokh.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

THE COMPELLING INTEREST BASIS FOR THE USE OF RACE AND ETHNIC CONSCIOUS MEANS IN THE U.S. DOT PROPOSED REGULATIONS FOR MODIFYING ITS DBE PROGRAM: AN ANALYSIS

(Excerpts of testimony before the Subcommittee on the Constitution, Federalism and Property Rights of the Committee on the Judiciary U.S. Senate by George R. La Noue, Professor of Political Science, Policy Sciences Graduate Program, University of Maryland Baltimore County, and University of Maryland Graduate School Baltimore; Director, Project on Civil Rights and Public Contracts (Phone 410–455–2180); (Currently Visiting Scholar, Institute for Governmental Studies, University of California Berkeley) (Phone-510–527–6088), September 30, 1997)

Criticisms of the Administration's failure to produce information necessary to support a compelling interest or narrow tailoring with regard to the use of racial and ethnic preferences in federal procurement programs.

Despite the fact that more than two years have passed since the Supreme's Court's decision in *Adarand v. Pena,* and despite the fact that the Justice Department and other federal agencies have devoted a considerable amount of their formidable resources to responding to *Adarand,* the federal government still have not produced:

1. Any findings about whether there has been any discrimination by any federal agency in the contemporary procurement process.

2. Any findings about whether any state DOT agency or any other state agency has discriminated in the award of federal contract dollars.

3. Any findings about whether there has been any underutilization of qualified, willing and able MBE contractors in federal procurement or federally assisted procurement as prime contractors or subcontractors. The federal government has completed no disparity study that could create the ''proper findings'' the judiciary requires of governments before they employ race conscious measures.

4. Any findings about whether, when MBEs bid on contracts, they are proportionately successful. No study or who bids on federal contracts has been released.

5. Any statistical analysis of whether the particular racial and ethnic groups granted presumptive eligibility are in fact disadvantaged because of patterns of deliberate exclusion or discrimination in recent years.

6. Any evaluation of the effectiveness of existing federal race neutral programs or the possibility of creating new ones.

7. On May 23, 1996, the Justice Department proposed ''benchmark limits'' for each industry which were intended to represent the ''level of minority contracting that one would reasonably expect to find in a market absent discrimination or its effects.'' and to control the decision of whether race conscious means were necessary in federal procurement related to that industry. (61 Fed. Reg. 26042, 26045, 1996). These benchmark limits still have not been produced. (''Response to Comments to Justice Departments Proposed Reforms to Affirmative action in Federal Procurement,'' 62 Fed. Reg. 25650. 1997) The Department apparently thought such benchmark limits were essential to narrow tailoring and stated: ''Application of the benchmark limits ensures that any reliance on race is closely tied to the best available analysis of the relative capacity of minority firms to perform the work in question—or what their capacity would be in the absence of discrimination.'' (61 Fed. Reg. 26042, 26049, 1996).

Given this premise, the failure to develop the benchmark limits suggests federal goals are not narrowly tailored.

TESTIMONY BEFORE THE SUBCOMMITTEE ON THE CONSTITUTION, FEDERALISM AND PROPERTY RIGHTS OF THE U.S. SENATE COMMITTEE ON THE JUDICIARY

(By Eugene Volokh, Acting Professor of Law, UCLA Law School)

1. THE ISTEA IS UNCONSTITUTIONAL

There are hard cases and easy cases under the Supreme Court's race discrimination jurisprudence. This is a pretty easy case.

To be constitutional, a racially discriminatory program must be narrowly tailored to a compelling state interest. The ISTEA is not narrowly tailored in at least four ways:

A. Overinclusiveness. I know of no evidence that, say, South Asians or Cuban-Americans, or Spanish-Americans, or East Asians are currently suffering from massive race discrimination or the legacy of past discrimination. Doubtless there's some discrimination against these groups, just as there's some against Jews (my own ethnic group), Italians, Irish, and others. But there's no evidence that there's anywhere near enough discrimination to justify preferences for these favored groups, or to explain why Afghans, who are not seen as South Asians, should be treated differently from Pakistanis, who are.[1]

This alone makes the ISTEA unconstitutional under the Court's decision in *City of Richmond v. J.A. Croson Co.,*[2] and unconstitutional in a way that no regulations can fix, because the statute itself contains the impermissible classifications and the regulations must remain consistent with the statute.

B. Mismatch between the alleged discrimination and the remedy. ''Narrow tailoring'' means that the racial classification must closely fit the government's interest in remedying discrimination; but the remedy here simply doesn't correspond to the alleged discriminatory conduct.

Consider, for instance, the supposed lending discrimination against minority-owned businesses. If indeed lenders are refusing to lend to qualified minority businesses, the narrowly tailored remedy is to prevent or compensate for this refusal: For instance, to set up a corporation that will lend to all qualified businesses that have been passed over by other lenders. In fact, if these businesses are really qualified, then there's money to be made doing this; the remedy can thus even be self-funding.

But the statute doesn't contain any narrowly-tailored remedy like this. Instead, it provides a set-aside to all minority-owned businesses, whether or not they have suffered from discrimination in lending, with absolutely no program that specifically addresses the supposedly grave problem of lending discrimination.

In fact, the statute's ''remedy'' here is actually perverse, helping those who seem to need help least. Those businesses that benefit from the set-aside are the ones that ultimately did get the loans they needed. Those that suffered most, that couldn't get the loans, are out of business and aren't helped by the set-aside at all.

C. The need for a race-neutral alternative. The lending example would also be a race-neutral remedy—it would help all businesses that were unfairly denied funding, regardless of their owners' race. The Court has clearly said that race-based remedies are allowed only when race-neutral alternatives are unavailable.[3] But the statute imposes a set-aside that's required regardless of the availability of race-neutral solutions.

D. The need for geographical tailoring. Different parts of the country have wildly different ethnic compositions. Hawaii, which is majority non-white, is a very different place from Maine, and you'd expect very different levels of minority participation in each state's contracting industry.

Likewise, different parts of the country have different levels of participation by women in contracting, and different levels of ethnic discrimination against different ethnic groups. Having a uniform set-aside throughout the country, regardless of all these factors, is the opposite of narrow tailoring.

This is a somewhat controversial point; for instance, the *Adarand* trial court has taken a different view.[4] Still it seems to make common sense. If contracting discrimination against minorities in one state is largely eradicated—or if the paucity of minority contractors in that state is caused by the small minority population in the state—then it's wrong to discriminate against whites there just because substantial discrimination against minorities continues elsewhere. Congress is quite right to try to create nationwide remedies, but ''narrow tailoring'' consists of creating nationwide remedies that are tailored to local conditions, not remedies that treat the entire country as one undifferentiated mass.

Perhaps someone can propose some statutory changes that will make ISTEA's race preference program constitutional. I doubt that this is possible, but one can't know until one sees the specific proposal. But in its current form ISTEA is clearly invalid.

2. CONGRESS'S CONSTITUTIONAL DUTIES

In *Adarand Constructors, Inc.* v. *Pena,*[5] the Court held that race classifications must pass strict scrutiny. This means that the Court will strictly scrutinize them, but it also means that Congress must strictly scrutinize them, too. Before Congress enacts any racially discriminatory program, Congress itself must verify that the program is indeed narrowly tailored to a compelling state interest.

[1] Footnotes at end of article.

This is especially so because the Court has suggested that it may in some measure defer to Congress's factual findings. Though the Court never abandons its own duty to independently review the facts, it acknowledges Congress's factfinding capabilities, and thus listens carefully to Congress's judgments.

This deference, then, would mean that the Court is trusting Congress to do the right thing: To look at the facts carefully and skeptically, and to make sure that race preferences aren't just politically convenient or seemingly useful, but genuinely and ineluctably necessary. Congress's solemn constitutional obligation would thus be made even graver by the fact that a coordinate branch is relying on Congress's faithful discharge of its duties.

3. A PRACTICAL NOTE

So far, I have made two rather technical legal points; I'd like to briefly step back and make a more practical one.

People on both sides of this debate share a common goal: To eliminate discrimination. That's why the government properly demands that contractors not discriminate. But under ISTEA, the government in the same breath tells the Adarand Constructors of the world: ''While we're demanding that you not discriminate—while we're telling you that race discrimination is a horrible evil—we're at the same time proudly discriminating against you because of your race. You must never treat an employee or a subcontractor worse than another because he's black or Hispanic or Asian. But we are treating you worse than others because you're white.''

Is that fair? And will it really work towards our shared goal of ending discrimination? It seems to me the answer to both these question is ''no.''

FOOTNOTES

[1] In theory, the presumption of social disadvantage is rebuttable—but mostly in theory. In practice, neither the federal government nor state grant recipients have a duty to investigate whether a supposedly ''disadvantaged'' minority is indeed disadvantaged. *Adarand Constructors v. Pena* 965 F. Supp. 1556, 1565 (D. Colo. 1997). In fact, state grant recipients are *required* to presume disadvantage until a third party comes forward with contrary evidence. 49 C.F.R. pt. 23, subpt. D, app. A.

Moreover, while members of favored racial groups get the benefit of the presumption, members of other groups who are also socially disadvantaged have to show this disadvantage by *clear and convincing evidence*—a far higher standard than the conventional ''preponderance of the evidence.'' 13 C.F.R. § 124.105(c).

The deck is thus stacked very much in the direction of treating the racial presumption as being essentially dispositive.

[2] 488 U.S. 469, 506 (1989).

[3] Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237–38 (1995); *Croson*, 488 U.S. at 507.

[4] Adarand Constructors, Inc. v. Pena, 965 F. Supp. 1556, 1573 (D. Colo. 1997).

[5] 115 S. Ct. 2097 (1995).

Mr. ASHCROFT. Mr. President, the Constitution gives the Congress an important duty in upholding the Constitution. The oath we take to uphold the Constitution gives us an obligation to vote against unconstitutional laws. The hearing I held in the Constitution Subcommittee convinced me that this is clearly one of those unconstitutional provisions that should be removed from the statute.

I yield the floor.

Mr. MCCONNELL. Mr. President, can I say very briefly to the Senator from Missouri how much I appreciate his fine addition to this debate and how grateful I am for his leadership on this important issue, as well as the distinguished Senator from Alabama, the current occupant of the Chair. They both understand the issue well and make an important contribution to the debate.

The PRESIDING OFFICER. Under the previous order, the Senator from Massachusetts is recognized.

Mr. KERRY. Mr. President, I yield myself, with the permission of the manager, such time as I may use.

I have listened carefully now to a number of the arguments for the amendment of the Senator from Kentucky, and I am confident that a good many of my colleagues will join me in adamantly opposing this amendment and, most important, the arguments and the approach that underlie it. This is a very, very significant debate for the Senate, and it is the first very significant confrontation, though it will probably—not probably, certainly—not be the last on the issue of race.

This is a fundamental challenge to an effort that this country has undertaken to make real the promises of our Founding Fathers and the fundamental values of our Nation: economic opportunity, equal opportunity, a chance to be able to share in the remarkable assets of our Nation.

I listened carefully to the Senator from Missouri, and one phrase in particular in his comments that he kept repeating was that the economy of America doesn't make decisions based on race; let me repeat, the economy of America doesn't make decisions based on race.

First of all, I respectfully submit to my friend from Missouri, the economy, per se, doesn't make the decisions; people make the decisions, people within the economy, CEOs of companies, boards of directors, shareholders, whole companies, individual employers, wholly owned subsidiaries. But it is individuals, it is the bosses who hire, it is the individuals who commit a company to a particular direction.

The fact is that individuals in America discriminate. Even in 1998 they discriminate, and anybody who believes that there is not sufficient level of discrimination with respect to women-owned businesses and minority-owned businesses, minorities themselves or women themselves within the marketplace is not looking at the statistics, is not looking at the cases, is not looking at the evidence which clearly documents the existence of that discrimination. I will say more about that in a minute, Mr. President.

There are three fundamental reasons why we should not accept the amendment of the Senator from Kentucky. Reason No. 1 is the program for disadvantaged business enterprises, the DBE Program, is constitutional. It will pass constitutional muster, contrary to the arguments that are being set forth.

Secondly, because of the discrimination that I have just broadly pointed to, it is necessary.

And thirdly, Mr. President, it works; it works brilliantly. There is no reason that we should take a program which already reaches out to a very small group of disadvantaged people and broaden the definitions so as to give more of the very little that goes to the disadvantaged to the vast majority who are already getting the vast majority of what the Federal Government expends in its programs.

I might add, there is, indeed, a compelling interest in the Federal Government making this kind of choice about how the Federal Government will expend Federal dollars.

Mr. President, let me point out, first of all, this is not a quota. It is a set-aside of a specific amount of money, but there is no specific direction as to who gets that amount of money. There is no quota of numbers of women, no quotas of numbers of particular races. It is open to any disadvantaged business enterprise.

And while we set aside a very specific sum of money, we do not allocate it with specificity. We set a national goal. And it is appropriate in this country to set national goals for what we will do to try to break down the walls of discrimination, the barriers against equal opportunity, in order to give people an opportunity to share in the full breadth of the upside of the economy of our Nation.

Mr. President, this goal is renegotiated annually. And it has worked very well to encourage disadvantaged business participation in these contracts. I add, most States have exceeded the 10 percent goal, but there is flexibility where it is needed. And existing law authorizes the Secretary of Transportation to lower that goal in order to respond to local conditions.

So when my colleague says that there has to be a level of flexibility, and it has to be narrowly defined, I respectfully suggest that part of that narrowness is met by the fact that the Secretary of Transportation has the ability to lower that goal under very clear circumstances.

I point out to my colleagues that since this program began, first as an administrative initiative in the late 1970s, and later by statute in 1982, it has been an extraordinarily successful tool for leveling the playing field in Government contracting and for remedying racial and sex discrimination, which still persist.

I add to my colleagues, where you have a showing of clear cases or a history or a pattern or instances of this kind of discrimination, we have an affirmative obligation, both a statutory one and a moral one, to make certain that we are going to do something very specific to respond to that kind of discrimination. And, as I will show, the evidence is so overwhelming as to what happens when you do not have it, that it is clear why there is a compelling interest for the Government to put this kind of effort into place.

Many of the firms that have been able to use the program, the women-

owned firms or minority-owned businesses, literally would have been excluded from doing so altogether were it not for the DBE program. And it is not, as my colleague from Missouri said—he kept saying that since we set up this kind of goal, some people of race believe that they are at a disadvantage because of their race. Ask people who participate in the program. There are countless people who will tell you they never believed they were disadvantaged. They do not think they are disadvantaged today. And, in fact, it is only because of the existence of the program that they have been able to prove to people that not only do they not believe they are disadvantaged, but they are not because they can perform equally as well as any majority firm. And that, in fact, has been a record which has prompted many States to come back and be extraordinarily supportive of the program.

In 1996, I am pleased to say, Massachusetts exceeded its goal of providing 11 percent of the Federally assisted highway dollars to DBEs by providing about 13.6 percent in total to DBEs. And I add, in one multi-year project alone, Massachusetts provided 147 women-owned businesses and 227 minority-owned businesses with an aggregate amount of some $500 million of contracts. And the program has been an enormous success and very well received, Mr. President.

So, let me look at the constitutional issue for a moment, if I may.

Contrary to the arguments of the Senator from Missouri, and others, I believe that a careful examination of the Adarand case will show that the Court made it very clear that ''strict scrutiny,'' as he said, is the appropriate constitutional review standard. But that means that you then look to the ''compelling State interest'' and to the ''narrowly tailored'' definition in order to see whether or not it will pass muster.

Unfortunately, Mr. President, as I mentioned earlier, there are just countless examples across the country of what happens when you do not have this kind of effort. Although minorities make up over 20 percent of the population, minority-owned firms constitute only 9 percent of all U.S. construction firms, and a mere 5 percent of Federal construction receipts.

So you can see the sort of downward curve between total levels of population, levels of construction, and then levels of receipts with respect to the outlays by the United States to those firms.

Women own approximately 9.2 percent of the Nation's construction firms, but according to the Urban Institute's recent study, their companies earn only half of what is earned by their male-owned counterparts.

Now, let us look at this question of ''narrowly tailored,'' Mr. President.

The DBE program is a very flexibly defined program. It allows for each State to respond to local conditions. And, by definition, by allowing each State to respond to the needs of that State, it becomes very narrowly tailored. In the implementation, the DBE program has authority to waive the DBE goal. It can waive it completely where it is not possible to achieve the goal in a particular contract or for a given year.

In addition, the Department of Transportation recently proposed regulations to modify the program even further so as to help with compliance with the Adarand test. So you cannot come to the floor of the Senate and measure the program exclusively by what might have been in place several years ago, since already proposed are a set of requirements that respond very specifically to the requirements of the Adarand test.

In fact, the Department of Transportation has received over 300 public comments in response to the proposed rules. And the States that commented on the rules overwhelmingly supported the Federal DBE program.

Let me call the Senate's attention to the specific regulatory changes which deal with this question of ''narrowly tailored'' and of ''flexibility,'' and which clearly bring it within constitutional muster.

First of all, the Department of Transportation is building even more flexibility into the program by setting goals that reflect the availability and the capacity of DBEs in a given market. And the contract recipients will be allowed greater flexibility to consider local circumstances in formulating their plans to achieve DBE participation.

Second, states and localities implementing the DBE program will be directed to use race neutral—let me emphasize this. The Senator from Missouri kept saying the decision will be made on the basis of race. In fact, there are specific race-neutral aspects to the program, such as outreach, training, technical assistance, and simplifying bonding or surety costs in the bid preparation. And those are used in order to achieve as broad a DBE participation as possible before any race-based aspect of the program is used. So the race-based aspect is pushed way down to the bottom of the list of criteria—only if you cannot satisfy the goals by virtue of those original considerations.

Third, the new regulations will reinforce existing provisions to ensure that firms owned by wealthy individuals are not certified as DBEs and to clarify that non-minority individuals who have suffered discrimination can be certified as DBE owners and become eligible to receive the same program benefits as minority-owned DBEs.

Now, I do not see how anybody, examining those three regulatory changes as a consequence of the Adarand decision, could say that that is not a legitimate effort to meet the standards of ''narrowly tailored'' and of ''flexibility.''

Mr. President, let me turn to the question of ''compelling interest'' and of ''need.'' Because in addition to being constitutional on its face, it is my judgment that only at peril could you turn your back on the reality of what has happened in many parts of our country.

In some States, the State DBE goals were repealed. So let us look at what happened where they were repealed, Mr. President. Was it a neutral reaction? No. Was it a marginal reaction? No. In point of fact, it was a draconian step backwards. Without a State goal for DBEs, the contracts to women-owned and minority-owned construction businesses in a number of different States plummeted.

We see prime contractors that use DBEs on Federally-assisted construction projects which had DBE goals often excluded DBE goals on State projects where there were no State goals. So in other words, you could have a company come in and they would be adhering to the Federal standards, but where there was no State goal they made absolutely no effort whatsoever in order to try to reach out to a disadvantaged businesses in their State-sponsored contracts.

In Michigan, just to take one example, within 9 months of ending the State DBE program, minority-owned businesses were completely shut out of the State highway construction projects. They received no contracts at all. By 1996, there was a tiny rebound to 1.1 percent, representing only 31 subcontracts. This compared to Michigan's Federal DBE participation of 554 subcontracts worth 12.7 percent. That is the difference, Mr. President—12.7 percent versus first none—zero; then creeping up to 1.1 percent.

Louisiana experienced a similar disparity between Federal DBE participation, where the 1996 DBE negotiated goal was 10 percent, and State participation where there was no State DBE program. In Federally assisted projects, disadvantaged women-owned and minority-owned contractors received 160 prime and subcontracts worth 12.4 percent of Louisiana's Federal contract dollars, compared to a State participation in a mere two prime contracts and 12 subcontracts. That was worth only .4 percent of the State highway construction dollars.

In Hillsborough County, FL, awards to minority-owned contractors fell by 99 percent—99 percent—after the minority contracting program was ended.

In San Jose, CA, suspension of the city's minority contracting program in 1989 resulted in a decrease of more than 80 percent in minority business participation in the city's prime contracts.

Now, I ask my colleagues, is that just the economy of our country speaking, an economy at one moment that is capable of having 12 percent and at another moment, where they lose the incentive to do it, to drop down to zero, to drop down by 99 percent, to drop down by 80 percent, to have .4 percent at the State level while at the Federal level there are 12 percent? You could

not have a more compelling interest if you tried, for understanding why it is that in this country we need to continue to break down those barriers of resistance. And there is nothing compelling in the proposal to take away from that marginal percentage and give it to those majority contracts and contractors who already are getting the lion's share of what we expend for transit and highway construction at the Federal level in this Nation.

Mr. President, as the Ranking Member of the Small Business Committee, I find two aspects of this MCCONNELL amendment particularly troubling.

First, the amendment expands the definition of who is eligible for help to include the vast majority of construction firms. Now, I am in favor of helping small businesses. We have done a lot in the Small Business Committee to make sure that they are helped. As a group, they ought to receive a greater percentage of Federal contract opportunities. And I want them to. All of the growth in our economy comes from small businesses. In fact, I cosponsored a bill with Chairman BOND last year that raised the small business Federal contracting goal from 20 percent to 23 percent.

But this program is intended to help level the playing field for businesses owned by individuals that have historically suffered racial, ethnic or sex discrimination in Federal construction contracting and that continue to suffer that kind of discrimination. It helps women-owned businesses, minority-owned businesses, and majority-owned businesses that have suffered discrimination. They receive about 15 percent of the Department of Transportation-assisted contract dollars.

Mr. President, the other 85 percent still goes to nondisadvantaged majority-owned companies. To increase the assistance to that universe of businesses that, according to the Federal Procurement Data Center, now receive 62 percent of contracts above $25,000, and a higher percentage of those below, would dilute the very salutary effects of the program on companies owned by truly disadvantaged individuals.

Second, and finally, the amendment proposes that the Senate substitute requirements for outreach compilations and directories of assistance and surveys of existing emerging businesses for the national DBE goal and the current DBE program. The proposed substitute program will be expensive to implement because of the detailed requirements for compilation and directories and the frequency with which updates have to be performed.

In addition to being expensive to implement, much of what is proposed as the substitute for the DBE program is simply duplicative of aspects of the existing DBE program and many of the Small Business Administration's programs that are already in place. Each year, the SBA provides outreach, training, technical, bonding, and surety assistance to thousands of Federal contractors through a wide variety of programs. Those programs include the SBA's procurement center representatives, its more than 950 Small Business Development Centers, its Women's Business Centers, and assistance provided through the procurement and minority small business staff in SBA's network of 69 offices throughout the country. It is hardly necessary to duplicate that or to come at it with some kind of add-on program.

Mr. President, time has shown that the DBE program works. It is a program that meets constitutional muster. It is a program that has a rational, national compelling interest. I hope that my colleagues will not undo what has proven to be of enormous benefit to countless minority- and women-owned businesses in the country. Thank you, Mr. President.

The PRESIDING OFFICER. The Senator from Minnesota.

Mr. WELLSTONE. I said to my colleague from Utah I will take less than 5 minutes.

The PRESIDING OFFICER. Who yields?

Mr. BAUCUS. Mr. President, I yield 5 minutes to the distinguished Senator from Minnesota.

Mr. WELLSTONE. Mr. President, I will keep it very simple. As a Senator from Minnesota, I rise in strong support of this Disadvantaged Business Enterprise Program, what we are calling the DBE program. For people who are watching, if you didn't catch it, it is Disadvantaged Business Enterprise Program.

This program sets out a goal of 10 percent of the highway construction funds. The attempt is to make sure that 10 percent of these funds go to disadvantaged businesses, and the focus is on ''minority businesses'' and businesses owned by women.

My State of Minnesota has essentially had the equivalent of this program since 1980. One of the reasons I am really proud of being a Senator from Minnesota is I think we have a really strong, progressive, justice tradition. In the last 5 years, Minnesota Department of Transportation has exceeded the 10 percent goal. We have been between about 11 and 13 percent for contracts that have gone out to ''minority''-owned businesses and to women-owned businesses.

Mr. President, the important point to make for colleagues is that these businesses have been able to win these contracts because of a level playing field. It has enabled them to get their foot in the door. They haven't been able to obtain these contracts because they have a bid that comes in higher than other contractors. Other things have to be equal. They don't get these contracts because they do shoddy work. It is because these are effective businesses that do good work. What you have is a situation where around the country we have made the argument through this Disadvantage Business Enterprise Program, we are serious about entrepreneurship.

We think it is indeed better that the people who make the capital investment decisions in the communities we live in are people who own businesses and live in those communities, not people who make decisions over martinis halfway across the world. We are not talking about big multinational corporations.

Insofar as we are focused on our local economies and insofar as we are talking about entrepreneurship, I will tell you, as a member of the Small Business Committee, I have loved working on these issues. I am not ashamed to say that small businesses have been my teachers. I was a teacher, a college teacher. I never owned a small business, and I have learned a lot about what it takes to do so. But it is absolutely true that most of the growth in our economy is in the small business sector.

It is absolutely true that if we want to expand opportunities and if we don't want to turn our gaze away from an unpleasant reality, which is that we still have discrimination in our country—does anybody believe that America is blind to issues of race? Does anybody believe that we have conquered all of this? Does anybody believe that we don't want to try and redress some major historical grievances? That is what we are doing through this program.

It does just what the title says—it is the disadvantaged business enterprise program. It sets a goal of 10 percent of highway money going to these contractors which are owned by minorities and women. It has been enormously successful in the State of Minnesota. We exceed that goal. It enables people to get their foot in the door, start their businesses, and then they become successful in a whole lot of other areas as well.

I think then you have this kind of marriage between, on the one hand, trying to expand opportunity, on the other hand trying to correct a historical injustice, and—although there are only two hands—on the third hand, also being serious about promoting entrepreneurship, also being serious about making sure that women and people of color in our communities are able to obtain some of the funding that comes out of these contracts.

Instead, it will be a close vote. I hope we win. I think we should win. I do not believe that the U.S. Senate ought to be turning the clock back 30 years. I think we should be moving forward. I think a vote which would eliminate this program, the DBE program, would be an enormous step not forward for expanding opportunities, not forward for promoting entrepreneurship, not forward for women and minorities having these opportunities, it would be a giant leap backward.

That is why I come to the floor to speak in behalf of this program.

Mr. MCCONNELL. Mr. President, I yield the distinguished Senator from Utah such time as he may need.

Mr. HATCH. I thank my colleague.

Over thirty years ago, the U.S. Senate passed the Civil Rights Act of 1964. It was historic legislation, and its supporters showed great moral courage in seeing it through.

The principle underlying that Act was equal treatment: The federal government should treat all persons equally, regardless of their race, color, national origin or sex. Indeed, it should mandate equal treatment from employers, labor unions, providers of public accommodation as well as many others.

Now, Contrary to popular mythology, however, the Senate was not ahead of the moral curve when it passed the 1964 Act. Polls taken at the time show that a majority of Americans supported the legislation. Indeed, they continue to support it. They know that its principle is fundamental. The United States government has no business making distinctions based on skin color or sex. Period.

But there were many vocal opponents too. It is important to give credit to the members of the Senate who resisted those opponents by passing the legislation.

Somewhere over the course of the last generation, the federal government started to fall away from the 1964 Act's fundamental principle. In the name of ''affirmative action,'' is substituted a policy of preference based on race and sex for the policy of equal treatment. And that is why the term ''affirmative action'' sometimes has a bad connotation. The fact is, affirmative action calls for outreach, job training, education—those type of things I think everybody is for, and certainly I am for.

I have no doubt that the supporters of preferences were—and still are—well meaning. They wanted to do something about this country's very real history of racial and gender inequity. But the policy they created stood the color- and gender-blind principle of the 1964 Civil Rights Act on its head.

I believe that it was a serious error to compromise one of our most fundamental principles. Despite assurances from preference supporters that these programs will be only temporary—lasting for a few years at most—preference programs now permeate the Federal Government. Rather than withering away, they are showing a remarkable tendency to expand. New programs are added. New groups demand to be included. Under one program, preferences are now available to no less than forty ethnic groups.

Each time such an expansion occurs, we become less like the color- and gender-blind country that we aspire to be and more like those countries where an ethnic spoils system has been a way of life for centuries.

Who would have thought it would be so difficult for the Federal Government to reclaim the moral high ground? The public has never supported preferences. They have been demanding a return to equal treatment since preferences were first implemented. But the Federal Government's decision to compromise its principles has proven to be habit forming. Despite the public's support for a return to equal treatment, many of our Nation's leaders have refused to stand up for principle.

Even the most indefensible programs are tough to eliminate. ISTEA mandates that ''not less than 10 percent'' of Federal highways and transit funds be allocated to ''disadvantaged business enterprises,'' which firms owned by designated minority groups are presumed to be. It is a set-aside, pure and simple.

Now, I might add here that these so-called disadvantaged business enterprises need not be actually disadvantaged. Minority business owners who qualify for this program need not be poor or even middle class. The secret about this program is that, like many racial and gender preference programs, its beneficiaries are quite often wealthy. It is worse than no help for those—of all races and ethnicities—who could really use a helping hand. Such programs lull the good people of this Nation into believing that something's being done when in fact little or nothing is being done to help out those who really need the help.

If any set-aside program ought to be eliminated, this should be the one. It is the very same program confronted by the Supreme Court in the 1995 landmark case, Adarand Constructors v. Pena. At that time, the Court laid down a standard of strict scrutiny for this program and others like it. Under such a standard, the program is unconstitutional unless the federal government can demonstrate a compelling purpose and has offered a solution that is narrowly tailored to serve that purpose. It's a tough standard meet, but it's the standard our Constitution demands.

Last year, on remand, the District Court in Colorado applied the strict scrutiny standard and found this program to be wanting. The Court therefore held the program to be unconstitutional. That was after the Supreme Court had remanded it to the court to determine whether it deserved to see the light of day and the District court of Colorado in applying the scrutiny standard found this program to be unconstitutional.

That decision was no fluke. Since the Supreme Court's decision in Adarand, set aside programs have been consistently found to be unconstitutional by the federal courts. Yet, the bill being considered by the Senate blithely reauthorizes the program. In doing so, it ignores our responsibility to bring the program into compliance with the Constitution. That is a responsibility we cannot shirk.

The United States Senate is now seriously behind the moral curve on this issue. The public supports a return to principle. The courts are demanding it. The proposed amendment can do that. It eliminates set-asides based on race and sex and substitutes a non-discriminatory program of assistance for ''emerging business enterprises,'' something that most of us can agree on. It will help put us back on the right road. I urge you to support it.

Now, if you want the litany of the forty ethnic groups, here it is: African Americans, Hispanic Americans, Native Americans—including American Indians, Eskimos, Aleuts and Native Hawaiians), Asian-Pacific Americans—including persons from Burma, Thailand, Malaysia, Indonesia, Singapore, Brunei, Japan, China, Taiwan, Laos, Cambodia, Vietnam, Korea, the Phillipines, the Republic of Palau, the Marshall Islands, Micronesia, the Northern Mariana Islands, Guam, Samoa, Macao, Hong Kong, Fiji, Tonga, Kiribati, Tuvalu, and Nauru, and Subcontinent Asian Americans—including persons from India, Pakistan, Bangladesh, Sri Lanka, Bhutan, the Maldive Islands and Nepal. Just think about that. What we are doing is creating all kinds of special interest groups who are vying for these programs and, in the end, the wealthy are getting them anyway. But if we have the amendment of the distinguished Senator from Kentucky, we will be providing an opportunity for those truly emerging businesses that are disadvantaged.

To me, I see a tremendous difference between the language in the bill and the language proposed by the Senator from Kentucky, and I think the language proposed by the Senator from Kentucky is constitutional, where the language in the bill is unconstitutional.

I yield the floor.

Mr. MCCONNELL addressed the Chair.

Mr. CHAFEE. Does the Senator have a short request? I wanted to speak.

Mr. MCCONNELL. I thank the distinguished Senator from Utah. He has been a leader in this field of getting rid of unconstitutional quotas and preferences, and has been one of the principal cosponsors of the bill to eliminate all of the unconstitutional quotas and preferences in the Federal Government. I thank the Senator from Utah for his support and contribution to the debate.

Mr. CHAFEE. Mr. President, I have great affection for the Senator from Utah, but I don't greet his remarks with the enthusiasm that the Senator from Kentucky has.

The truth of the matter, Mr. President, is that this is the wrong amendment, at the wrong time, in the wrong place. Why do I say this? This is a transportation bill that every single one of us in this Chamber knows is a very important and difficult bill. Trying to balance everybody's interest has been very, very difficult. There isn't a Senator in this place who doesn't know exactly how much his or her State was getting under ISTEA I, then how much under the first proposal of ISTEA II,

and finally how much under these new proposals. And all of them want more. As I say, trying to satisfy all of these senators is very difficult.

To come forward with an amendment like this doesn't help. It flies right in the face of an October 1997 letter sent to the majority leader by the Secretary of Transportation. In that letter, which was sent when we first brought up this bill last fall—and there have been no changes in his position since then—Secretary Slater talks about the President's view on this whole Disadvantaged Business Enterprise, or DBE, Program. He closed his letter by saying this:

> This critical effort to achieve equal opportunity must continue. Removal of the DBE program from S. 1173 would be a serious blow to our efforts to assure fundamental fairness to the citizens of this country. I would find it difficult to recommend ISTEA reauthorization legislation to the President for his signature that did not include the DBE program.

This is a gentle way of saying, listen, folks, if you knock out the disadvantaged business enterprise section of S. 1173—which is exactly what the Senator from Kentucky is proposing to do—then there is going to be a veto of this legislation.

I see the Senator from Utah here. If I could get his attention for a moment. Now, he spoke against the DBE provision of our bill. But my question is, why pick on the provision in our bill? It is my understanding that similar affirmative action language is contained in some 160 different federal statutes or regulations. The Senator from Utah chairs the Judiciary Committee—and certainly he is masterful in that role, with all the great powers that supposedly appertain to the chairmanship of a committee—and thus out of that committee comes legislation he wants and bottled up in that committee is legislation he doesn't want. I notice that the Senator from Utah now has before him, in his own committee, legislation to eliminate all federal affirmative action programs, not just this program. So I am asking him—don't pick on our little program here that we are desperately trying to get through. Imagine, here is an amendment that puts the whole bill under the threat of a veto if it is adopted. If the Senator wants to debate affirmative action at the federal level, I would say to him, go ahead and deal with that issue in your own committee. Don't pick on our program. I can't name all 160 federal affirmative action programs, but certainly there are Small Business Administration programs and many others that have special provisions for disadvantaged parties.

So if the senator so wishes, go ahead and do a generic bill on eliminating affirmative action, and go ahead and have it out here on the floor. But I feel helpless here as you all come forward with a amendment like the one the senator from Kentucky has offered on our bill.

Mr. MCCONNELL. Is the Senator asking a question?

Mr. CHAFEE. I retract that word ''helpless.'' I feel frustrated. I am not totally helpless.

Mr. MCCONNELL. Mr. President, if the Senator was asking a question about why the Supreme Court and the district court ruled this provision unconstitutional, I say to my good friend that it cried out for correction.

Mr. CHAFEE. Let me answer that quickly. There may be many arguments against the DBE, but I must say that your weakest one is this so-called unconstitutional argument. We all know about the constitutionality issue. In 1995, the Supreme Court handed down a decision in Adarand v. Pena. In Adarand, the justices specifically said that federal affirmative action programs are not unconstitutional. As long as the programs meet a compelling governmental interest and are narrowly tailored, then they can pass constitutional muster. Now, US District Judge Kane, to whom the case was remanded, ended up holding that part of the DOT regulations were unconstitutional on the grounds they were not narrowly tailored. But that is going to be corrected under the new regulations that are due out this spring. So as I say, of all your arguments, that really is the weakest. As a matter of fact, I will give you an opportunity to jettison that argument, if you want.

Mr. MCCONNELL. I say to my good friend from Rhode Island, there has been no compelling interest found here, no such finding at all. I guess——

Mr. CHAFEE. Wait a minute. I don't want you to get on with that. Judge Kane found there was a compelling interest.

Mr. MCCONNELL. But not narrowly tailored. There have to be two standards: narrowly tailored and compelling interest. Narrowly tailored was not met and, consequently, this effort to jimmy around with the regulations is not going to cure the problem. What is going to happen, if the Senator is successful in defeating the amendment, is that some other plaintiff is going to have to bring some other case, at a cost of thousands in legal fees, to get this struck down one more time.

Mr. CHAFEE. Mr. President, I haven't heard from the Senator from Utah, the distinguished chairman of the committee who has power over all these affirmative action programs. Why doesn't he go after all of them? That would be a rather magnificent effort. It certainly would shake things up. The senator could come to the Senate and try to get rid of all 160 different affirmative action programs. Why doesn't he do that instead of picking on the highway program? Go after all of them. There is a suggestion for you. I certainly would not support that effort, but I am saying that if you really want to get into an affirmative action debate, why you don't do that, through your committee.

Mr. HATCH. If the Senator will yield, let me just say that we are going after all of these preferential programs. This is the first of the 160. We may have to do them one by one, because it is very difficult to even get an all-embracing bill up. But whether we go after them one by one or en bloc, it is important that we go after them. If we allow them to go on, we will be violating one of the basic principles of the Constitution—that is, treating people equally. We will be violating the actual, legitimate, straightforward language of the Constitution and the 1964 Civil Rights Act, which provide equal opportunity for all, not for a select few.

Now, with regard to this particular bill, I want to compliment my dear friend from Rhode Island and my friend from Montana, the two distinguished Senators, because they have carried what is a very difficult bill all the way to this position. I am not here to give them a rough time, but I do think that it's time that we do something about these unconstitutional set-asides and preferences. Whether we do it individually, each of the 160 programs, or whether we do it en bloc, it's time to try and set the record straight with regard to how these funds should be used.

Now, if the distinguished Senator from Kentucky were asking to prevent disadvantaged businesses from benefiting from these funds, I probably would part company with him. But he has a specific provision in here that would help emerging new business enterprises that otherwise might have difficulty competing to obtain some of this money. I heard one of our colleagues talk about various companies—I think it was the Senator from Minnesota—he talked about companies owned by minorities and women who literally deserve a right to compete because they are very competent and very good. Well, if they are very competent and good and they can compete, then they ought to compete for this work on the same terms and conditions as anybody else.

We should not be opening up a loophole here where companies that are very capable of competing have an absolute set-aside so they don't have to compete. I think that is what the Senator from Kentucky is doing. As far as I am concerned, I think we ought to go after these programs and straighten them out so they are not lacking in constitutionality—one at a time, or 10 at a time, or 160 at a time. Ultimately, I think we will probably vote on a full en bloc amendment. Until then, let's make these bills as constitutional as we can.

The PRESIDING OFFICER (Mr. HUTCHINSON). Who yields time?

Mr. BAUCUS. Mr. President, I yield myself such time as I may consume. I see the Senator from Maine on the floor, so I will be brief. I want to just make a couple of points here.

One, I will reiterate a point made by Senator CHAFEE. We, in the Senate, have received a letter from the Secretary of Transportation, Rodney Slater, who said he would find it difficult to recommend to the President

for signature ISTEA legislation that did not include the DBE Program, which has been noted in a statement that he would recommend the President veto this bill if the DBE Program is taken out.

I don't want to belabor this constitutionality argument, but it's clear that the Supreme Court did not rule that the Federal highway DBE Program in Colorado was unconstitutional. The Supreme Court did not rule it unconstitutional. It is clear. All Senators who have studied this know that. The Supreme Court said that program, like all affirmative action programs, must be subjected to a strict scrutiny test. That is what the Supreme Court held, that the Colorado public lands DBE Program had to be subject to the strict scrutiny test. That is all they held—nothing more, nothing less. The strict scrutiny test has two parts, compelling interest and narrow tailoring. Even the district court in Colorado said it looks like a compelling interest. So the only question is whether the program was narrowly tailored. A district court judge found, in his judgment, that it was not narrowly tailored. Well, that is one man's opinion. That is a district court judge's opinion. District court judges declare statutes unconstitutional all the time, only to find them overturned by the Supreme Court.

There is only one body that determines whether a statute is really constitutional or not, and that is the Supreme Court. The Supreme Court has not ruled up or down on the constitutionality of the program in Colorado. They have not ruled. In fact, the U.S. Government has filed an appeal on the district court decision. I have a letter from Associate Attorney General Raymond Fisher to Senator DASCHLE, which states that:

> As we discuss further below, we believe that the ISTEA program is narrowly tailored to meet this compelling interest and is constitutional under the Adarand standards.

The U.S. Government is going to appeal.

I ask unanimous consent that this letter printed in the RECORD.

There being no objection, the letter was ordered to be printed in the RECORD, as follows:

> U.S. DEPARTMENT OF JUSTICE, OFFICE OF THE ASSOCIATE ATTORNEY GENERAL,
> *Washington, DC, March 3, 1998.*
>
> Hon. THOMAS A. DASCHLE,
> *U.S. Senate,*
> *Washington, DC.*
>
> DEAR SENATOR DASCHLE: This letter responds to your request for the Department of Justice's views regarding the constitutionality of the Disadvantaged Business Enterprise (DBE) program of the Intermodal Surface Transportation Efficiency Act (ISTEA). I have been charged with supervising the Department's review of affirmative action programs at federal agencies, to ensure that such programs meet the constitutional standards enunciated by the Supreme Court in *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200 (1995). The Congress has repeatedly found that racial discrimination and its effects continue, and that eradicating the effects of discrimination is a compelling interest. As we discuss further below, we believe that the ISTEA program is narrowly tailored to meet this compelling interest and is constitutional under the Adarand standards.
>
> Under the ISTEA DBE program, the Department of Transportation takes steps to ensure that firms qualifying as disadvantaged businesses are made aware of contracting and subcontracting opportunities in federally assisted state and local construction projects, and that prime contractors use DBEs to do some portion of federally assisted construction projects. As explained below, Congress has found that without the use of affirmative action measures such as the ISTEA DBE program, minority-owned firms would be severely disadvantaged in federally assisted construction projects. The program serves a compelling interest and is narrowly tailored to accomplish that interest.
>
> Congress originally established the federal highway DBE program in the Surface Transportation Assistance Act of 1982, based on a compelling record demonstrating that efforts were needed to ensure that federal highway dollars were not used to perpetuate the effects of racial discrimination on the ability of minority-owned small businesses to participate in government contracting opportunities. Indeed, the Supreme Court in 1980 addressed a very similar provision involving federally-assisted public works projects. See *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980). The Court analyzed a number of Congressional studies and reports issued prior to the provision at issue there, and found that ''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 perpetuate the effects of prior discrimination.'' 448 U.S. at 477–478.
>
> Since that time, Congress has continued to oversee the DBE program and has frequently reevaluated the continuing need for it. See, e.g., The Disadvantaged Business Enterprise Program of the Federal-Aid Highway Act: Hearing Before the Subcomm. on Transp. of the Senate Comm. on Environment and Pub. Works, 99th Cong., 1st Sess. (1985) (testimony on need for program and capacity of minority-owned firms); Review of the 10–Percent Set Aside Program, Section 105(f) of the Surface Transportation Assistance Act of 1982: Hearings Before the House Comm. on Small Business, 98th Cong., 2d Sess. (1984) (testimony on problems faced by DBEs).
>
> On the basis of extensive evidence that the effects of discrimination continue to hamper the efforts of minority firms to compete equally in public construction contracting, Congress has twice reauthorized the program, first in the Surface Transportation and Uniform Relocation Assistance Act of 1987 (which also added a provision including women-owned businesses in the program[1]), and again in 1991 in ISTEA. In 1987, Congress expressly found that ''barriers still remain'' to full participation by minorities and women in the highway and mass transit construction industry. S. Rep. No. 100–4 at 11. The House Committee on Small Business found ''discrimination and the present effects of past discrimination'' caused minority businesses to receive ''a disproportionately small share of Federal purchases.'' H.R. Rep. No. 100–460 at 18 (1987).
>
> The compelling interest that supported the DBE provisions of prior legislation still exists today. Congress has continued through the 1990s to hear testimony and review statistical evidence supporting the ongoing need for race- and gender-conscious measures to ensure that minority- and women-owned firms are not disproportionately excluded from federally assisted highway and transit projects. For example, in 1994 the House Committee on Government Operations found that minority-owned firms face particular difficulties in the construction industry due to negative perceptions by commercial lenders and domination of the industry by ''old buddy'' networks and family firms. H.R. Rep. No. 103–870 at 6–8, 15 & n.36 (1994). One particularly troubling area is discriminatory treatment in obtaining credit and bonding, which creates a negative cycle in which minority firms are unable to overcome their perceived high-risk status. See, e.g., Discrimination in Surety Bonding: Hearing Before and Subcomm. on Minority Enterprise, Finance, and Urban Development of the House Comm. on Small Business, 103d Cong., 1st Sess. 2–3, 7–9, 16, 18, 25–26, 41 (1993); Availability of Credit to Minority-Owned Small Business: Hearing Before the Subcomm. on Financial Institutions Supervision, Regulation and Deposit Insurance of the House Comm. on Banking, Finance and Urban Affairs, 103d Cong., 2d Sess. 19–20, 22, 27 (1994). See generally 61 Fed. Reg. 26,042 26,057–26,058 (1996). Congress's examination of these problems demonstrates quite clearly that discrimination is in part responsible for the condition of firms owned by minorities and by women, and that remedial action is still necessary to ensure that the effects of discrimination do not prevent minority- and women-owned small businesses from competing on an equal footing for the federal expenditures that will be authorized in the new highway and mass transit bill.
>
> In addition, the ISTEA program is narrowly tailored to meet the compelling interest identified by Congress. The ISTEA goals are not quotas, are renegotiated on an annual basis and are not mandatory. Rather, the program allows recipients the flexibility to determine the level of DBE participation appropriate to current local conditions. Moreover, under the current program, agencies are permitted to waive goals when achievement in a particular contract, or even for a specific year, is not possible.[2]
>
> Recent regulations proposed by the Department of Transportation will further ensure that the ISTEA's DBE program is operated in a constitutional manner. The new regulations would require the state or local goal for DBE participation to be based on an assessment of the availability and capacity of DBEs in the state or local construction market. In this way, non-minority firms will not be unfairly disadvantaged by the use of affirmative action measures. The regulations also direct states and localities first to use race-neutral means (such as outreach and technical assistance, or simplifying bonding or surety costs in bid requirements) to achieve their goals; where the state or locality achieves the goal in that manner, affirmative action measures that provide competitive advantages to DBEs would be unnecessary. The regulations also bolster provisions that ensure that firms owned by wealthy individuals will not be certified as DBEs, and clarify that non-minority individuals who also have suffered discrimination can be certified as owners of DBEs and therefore receive the same benefits that may be available to minority-owned DBEs. Finally, the new regulations expand methods by which challenges can be filed by third parties, as well as by state and local officials, where questions are raised about the bona fide status of any firm certified as a DBE.
>
> In sum, as we have stated in defending the ISTEA program in court, the Department of

Footnotes at end of letter.

Justice believes that the ISTEA program is constitutional.

Sincerely,

RAYMOND C. FISHER.

FOOTNOTES

[1]Courts have applied intermediate scrutiny to gender-based affirmative action programs, requiring that such programs serve important governmental objectives and be substantially related to achieving those objectives.

[2]The ISTEA program was addressed in *Adarand* v. *Pena*, 965 F.Supp. 1556 (D. Colo. 1997). On appeal, we have argued that the district court improperly reached the constitutionality of the ISTEA program.

Mr. BAUCUS. Here is another letter signed by many law school professors. I see 40 or 50, I don't know. They have the same conclusion—that the district court's decision in Colorado was wrong; that is, that the program is narrowly tailored and is constitutional.

Now, if that is not enough, the Department of Transportation has new regulations, which go even further, and with more flexibility, to make it even more clear that the program is narrowly tailored. Some Senators spoke up and said, gee, wealthy people are, under this definition, socially disadvantaged. Not true under the new regs. They have a net worth test. If you are wealthy, you don't qualify. There are lots of new provisions in the new regulations that will go into effect. They are in the drafting stage now.

Again, just because a district court judge says it is unconstitutional doesn't make it so. The only thing that does that is a decision by the U.S. Supreme Court. They haven't ruled on this.

Second, many think the judge is wrong—many. Finally, there are new regs which are much more flexible and which clearly make this narrowly tailored. For that reason, this is not unconstitutional because it is fair and helps people and it works. It should remain in the bill.

Ms. COLLINS addressed the Chair.

The PRESIDING OFFICER. Who yields time?

Mr. CHAFEE. I yield the Senator from Maine such time as she desires.

The PRESIDING OFFICER. The Senator from Maine.

Ms. COLLINS. Thank you, Mr. President.

Mr. President, there is much in the amendment offered by the Senator from Kentucky that I support. I particularly support its expansion of outreach efforts designed to help emerging small businesses compete for Federal contracts.

I think that those specific provisions of the amendment offered by the Senator from Kentucky would truly be very helpful to a lot of small businesses regardless of their ownership. Moreover, I share the opposition of the Senator from Kentucky to numerical quotas. I don't like the numerical quotas that are in current law. Whether or not they are constitutionally suspect, they are certainly inflexible, and they are often unfair.

I am also opposed to creating a permanent entitlement or preference for businesses based upon their ownership by minorities or women. We should be providing such businesses a hand up, not a permanent handout. However, I believe that the amendment offered by the Senator from Kentucky goes too far. In my view, the programs funded under ISTEA should include a nonnumerical goal—not a quota, not a 10-percent set-aside, but a goal aimed at increasing participation by disadvantaged business enterprises.

Unfortunately, the Senator from Kentucky has indicated that he is unwilling to alter his proposal in this manner, and, for that reason, I am going to vote against his amendment.

Mr. President, we all talk about the legalities of this issue. But I would like to try to put a human face on the matter before us. Let me tell you of a specific example of the benefits of the Disadvantaged Business Enterprise Program, a specific case involving a woman from Maine named Tina Woodman. Tina, in her own words, went from being a waitress to being an ironworker, to being the president of her own company. As a matter of fact, I talked with Tina just this afternoon about her story, with which I was already very familiar.

Tina, after receiving specialized training, was able to go from being a waitress for 10 years to learning to be an ironworker, to opening up and becoming president of her own company, Maine Rebar Services. In fact, she and her company worked this past summer on the Casco Bay Bridge project in Maine, one of the largest construction projects our State has ever had.

By building her own business, Tina has not only been able to provide for her 6-year-old daughter, but for the first time in her life she has also been able to buy her own home. She told me, and her daughter told me, that the best part of this was that they could now plant flowers in their own front yard.

Every time I drive across or see the Casco Bay Bridge, I think of Tina Woodman, and I think of her daughter and the flowers growing in their front yard.

All of this wonderful story would never have come about but for the opportunity given to Tina through the Disadvantaged Business Enterprise Program. Hers is the kind of success story that this kind of program can bring about when it is properly applied.

Mr. President, we do need to reform this program. We need to make sure that it is carefully tailored so as to give people a little bit of a hand up so that they can participate in the American dream.

For this reason, Mr. President, I am going to reluctantly oppose the amendment offered by the Senator from Kentucky. I hope, however, that he and others will be willing to work with me in order to reshape these programs.

Thank you, Mr. President. I thank the managers of the bill, and I yield the floor.

The PRESIDING OFFICER. Who yields time?

Mr. McCONNELL addressed the Chair.

The PRESIDING OFFICER. The Senator from Kentucky.

Mr. McCONNELL. I yield such time has he may need to the distinguished Senator from Washington.

The PRESIDING OFFICER. The Senator from Washington is recognized.

Mr. GORTON. Mr. President, the 14th amendment to the Constitution of the United States relevant to this discussion reads ''nor shall any State deny to any person within its jurisdiction the equal protection of the laws.''

There was over an extended period of time a debate in the Supreme Court as to whether or not that equal protection clause, applicable by its terms only to States, applied as well to the Federal Government. The Supreme Court has decided that question essentially in the affirmative simply by stating that the fifth amendment to the Constitution, through its due process clause, incorporates the philosophy identical to the equal protection clause in the 14th amendment.

The next debate is over whether or not a nonmember of a minority has the ability to claim discrimination by reason of a provision like the one that is at issue here today. The Supreme Court in the Adarand case, a case already discussed at length during the course of this debate, says, ''The principle of consistency simply means that whenever the Government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and the spirit of the Constitution's guarantee of equal protection.''

Finally, with respect to this provision here, the Court in that case said, ''It follows from that principle that all governmental action based on race, a group classification, long recognized as in most circumstances irrelevant and therefore prohibited, should be subjected to detailed judicial inquiry to ensure that the personal right to equal protection of the laws has not been infringed. A free people whose institutions are founded upon the doctrine of equality should tolerate no retreat from the principle that government may treat people differently because of their race only for the most compelling reasons. Accordingly, we hold today that all racial classifications imposed by whatever Federal, State, or local governmental action must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling government interests.''

As against that, what do we have here? The heart of the amendment proposed by the Senator from Kentucky strikes a section identical to the present law that says, ''Except to the extent that the Secretary determines, otherwise not less than 10 percent of the amounts made available for any program under titles I and II of this

Act shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals.''

The dual statutory definition of ''disadvantaged'' deals with sex and with racial minorities.

Mr. President, I do not see that it can seriously be maintained that a national quota stating ''no less than 10 percent'' can possibly be justified under that Supreme Court language granting neutral equal protection of the laws of the United States to every single individual.

Clearly, the Supreme Court allowed a case-by-case evaluation of disfavored classes, mostly racial minorities, to determine whether or not they had suffered discrimination and, therefore, required specific aid in order to catch up and to be put on an equal plane. But nothing in the portion of this bill which the McConnell amendment would strike speaks to that kind of consideration. It simply says that all of those not defined as disadvantaged in our society are absolutely barred and prohibited from getting certain governmental contracts.

Once again, I read from the Supreme Court decision. ''A free people whose institutions are founded upon the doctrine of equality should tolerate no retreat from the principle that government may treat people differently because of their race only for the most compelling reasons.''

Not only are there no compelling reasons in this section of this bill, there are no reasons at all. Simply 10 percent of contracts are barred from being awarded to any person outside this disfavored class.

Is it any wonder that the district court on remand summarily entered judgment in favor of the plaintiff in that case? Of course. There is no possible way of finding this statute to be constitutional.

That district court opinion is now on appeal in the 10th circuit, I understand. It is possible that the ensuing decision may again be appealed to the Supreme Court. I would give 20-to-1 odds that the Supreme Court will simply deny certiorari since the conclusion is so obvious.

This does not mean that the sponsors of this bill could not have written in this bill a narrowly tailored specific set of preferences for people against whom specific discriminatory actions had been taken, tailoring it to meet the very requirements of the Constitution laid down by the Supreme Court in a decision, the result of which, it seems to me, was obvious.

But, Mr. President, the sponsors of this bill did not do that. Whatever excuse the authors of the previous proposal 5 years ago may have had, the authors of this bill had none. They know what is required in order to discriminate. They ignored the views of the Supreme Court. And they say, we don't care, we are going to continue this flat quota. This is not the affirmative action about which we have been having a legitimate debate over whether or not there ought to be certain forms of assistance provided to disadvantaged people. This is a debate about the most explicit quota one can possibly imagine and it is simply irresponsible for us to continue.

If the sponsors of the bill do not like the specific proposal that is substituted for this quota, proposed by Senator MCCONNELL, fine. Let them come up with one that meets constitutional muster. I think they can. It is just that they have simply not done so to this point.

Mr. President, the preceding speaker has talked about what the advantages of the present system have been, in a simple case. I ask unanimous consent to have printed in the RECORD correspondence from a general contractor, Frank Gurney, Inc., in Spokane, WA.

There being no objection, the letters ordered to be printed in the RECORD, as follows:

FRANK GURNEY, INC.,
Spokane, WA, October 9, 1997.

Hon. SLADE GORTON,
Hart Senate Building,
Washington, DC.

Re McConnell amendment to the D.B.E. program for Federal aid highway construction.

DEAR SENATOR GORTON: We are a small subcontracting firm in Spokane, Washington. We specialize in highway guardrail and signing. More than 95% of our market is Federal, State or County agency work—funded mostly with State and Federal moneys. We are writing to you on the issue of Affirmative Action. We are *not* a ''woman'' or ''minority'' owned firm—we are simply Americans. My step-father, Frank Gurney, started the firm in 1959—my brothers and I working with him to build the business from nothing. We all worked very hard for a lot of years to make it a good sound company. Frank Gurney passed away in 1989 with the Affirmative Action quotas that discriminated against our Company as the worst nightmare he had ever experienced and could not overcome. Since Frank passed away the nightmare of discrimination for our Company goes on every week at the bidding table as it has for the last 14 years.

So then please find enclosed correspondence regarding the years of discrimination our firm has experienced.

Most Prime Contractors refuse to write these letters because they always fear litigation—they also know that they are in the middle of government mandated discrimination—that it is in fact not only Constitutionally wrong but morally wrong!

Please know that the intent of this letter is to inform you with our documentation of legislation that No. 1, is very constitutionally wrong and No. 2, does not work at all as intended.

Our M.B.E.—W.B.E. competitors in Washington are mainly Junlo Corp. (D.B.A.)—Asian owned, and Peterson Corp. (W.B.E.—Woman owned, from Western Washington along with other out of State M.B.E. firm—Dirt and Aggregate Inc. of Oregon (? owned), Alexander—Martin of Boise, Idaho (W.B.E.) Women owned—Omo Construction of Billings Montana—M.B.E. (Indian owned). We compete with these firms at the bidding table here in the Northwest nearly every week. They are all strong well run firms that have been in business long before the era of Mandatory quotas. We welcome them as competitors on equal footing, but the D.B.E.—M.B.E. quotas in Federal and State funded projects is an unfairness that is very, very hard to overcome. They are larger firms than ours—they need no help—yet they continue to enjoy that advantage of being awarded work that they are not low bidder on simply because of M.B.E.—D.B.E. quotas in government contracts.

We have realized long ago that Affirmative Action attitudes are strongly entrenched in our government—and you as a politician (until possibly now) would view your vote against Affirmative Action as possible ''political suicide'' regardless of your inward belief—it just ''seems so right'' but is so wrong!

We like all conscientious Americans are very much in favor of helping the truly disadvantaged but reverse discrimination and quotas are not the way!!!

The thousands of dollars that our firm was low bidder on through the years could have easily paid for a teacher that would give 25 disadvantage minority children the economic, social and academic headstart that would help them to become responsible mainstream American citizens—but instead those dollars simply lined the pockets of a few that did not need help at all.

It is true—simply look into it with the Washington State Department of Transportation. We of course do not have access to exact numbers but we are most certain that if you were informed of the truth you would find less than 5% of registered M.B.E.—W.B.E. firms in Washington are doing more than 95% of the quota dollars and that most of these firms doing 95% of the dollars should have graduated from the program long ago—but they remain in the program simply because they are unchallenged. There is no course of action allowing the Washington Department of Transportation, The Idaho Transportation Department, or the Montana Department of Transportation or anyone else to challenge them. They are the same firms—week after week—month after month—year after year that fill the quota requirements. These firms then squeeze out and suffocate other smaller minority owned firms that try to get started. After an on going gift of 14 years—the large and established minority owned firms can and do price the small ''Trying to get going'' minority firm out and it is usually does not take very long at prices below cost to do so. So then none of the Department of Transportation want these larger firms out of their programs because they are needed to comply with the legislative quotas that come with Federal Dollars. We on the excluded side of this program are an exact mirror of the ''Adarand'' guardrail firm in Colorado which now is the focus of the Supreme Court ruling—and until now we all know that the courts of America have strongly ruled in favor of M.B.E.—W.B.E. regardless of the nature of litigation. Litigation that no small company such as ours could ever afford without financial ruination—which would occur before a challenge could ever be heard.

We are not insinuating that anyone in the Department of Transportation or any other agency is doing anything wrong—in fact they are simply doing their job carrying out the wishes of Congress. We are simply trying to display the poor investment of tax dollars under the stewardship of Congress that does not do as it was intended and is compounded with promulgating more discrimination—that very same discrimination that our country is trying to abate!!!

Our firm is not unlike any other small white male owned firm in America that suffer daily from the discrimination promulgated by the government of the United States in its contracting policies.

We believe that God created us all equal. The Constitution of the United States—the

most powerful document of democracy the world has ever known, clearly was written by our Founding Fathers—that is God created all men equal then it follows that the document of the Constitution would be so written that is govern all men and women under it as equals. So then why are we not being governed equally? Our government now has preferences based on race and color—the Government has simply uprooted and set the Constitution aside and entered the business of discrimination.

It is wrong.

We, again would like to affirm that we are simply displaying our experience so that indeed you may be informed with knowledge of the reality regarding this very difficult issue—thus the attached sampling of correspondence from our very large files. We love our Country—we pay our taxes and we play by the rules. We, again, do believe in helping the truly disadvantaged and would and do very much support programs that do so—but mandatory goals and quotas are again simply not the way.

Sincerely,

THOMAS STEWART,
President.

STEELMAN-DUFF, INC.,
Clarkston, WA, July 17, 1996.

Mr. TOM STEWART
Frank Gurney, Inc.
Spokane, WA.

Re Contract no. 4916, East Lewis Street Interchange.
Subject: Quote.

DEAR TOM: This letter is written as per our conversation regarding your recent quotation on subject project. I had informed you that you were apparent low quote on bid items 72, 73, 74 and 75, but due to MBE and WBE goals I could not utilize you. Your quote on the above bid items amounted to $29,031.27. Petersen Brothers, a WBE firm quoted $31,902.00 for the same work. I was forced to utilize the WBE firm as the difference in your two quotes was very small and created the least amount of inflation to meet assigned goals.

We thank you for your quote and understand your situation. We are forced to inflate our bids to cover added costs on all Federal, State, County and City projects that have DBE, MBE or WBE goals assigned. This particular project the added cost ranged in the vicinity of $20,000.00.

We trust you understand and if added information is needed, please contact us.

Very truly yours,

WAYNE L. VAN ZANTE,
Vice President.

ASSOCIATED SAND & GRAVEL CO., INC.,
Everett, WA, April 7, 1981.

Frank Gurney Inc.
Spokane, WA.

Re State highway bid for SR 90, Tyler to Salnave Road, bid date April 1, 1981.

GENTLEMEN: We acknowledge receipt of and we thank you for your guard rail quotation for subject project.

While your bid was lower than the quotation we used in preparing our bid, we were obligated to use the higher quotation to satisfy the 6% Minority Business Enterprise goal as set forth in the specifications for subject project.

While we were unable to use your lower price quotation, we trust you will continue to quote prices to our firm on future projects.

Very truly yours,

JACK ZEIGLER,
Chief Estimator.

ROBERT B. GOEBEL
GENERAL CONTRACTOR, INC.
Spokane, WA, April 25, 1996.

Frank Gurney, Inc.
Spokane, WA.

Attn: Tom Stewart.
Re Laurier Bridge replacement, Stevens County, WA, CRP–601A; BROS–2033 (018); 5A–2802.

GENTLEMEN: We were apparent low bidder at $1,393,851.00 on the referenced project which bid on 4/23/96 at 11:00 AM.

We received two bids from guard rail subcontractors:

(1) Gurney: $29,598.00.
(2) Petersen Brothers (DBE): $34,745.25.

As you know, there was a 10% DBE requirement in the solicitation documents, which amounted to just under $140,000.00. Even though you were significantly lower than Petersen Brothers, we regret to inform you that we felt compelled to use their amount to help achieve our DBE goal.

Sincerely,

STEVEN R. GOEBEL.

GILMAN CONSTRUCTION,
May 1, 1995.

Frank Gurney Inc.,
Spokane, WA.

Attn: Tom Stewart.
Re Monida-Lima.

DEAR TOM: We would like to thank you for your guard rail quotation on the Lima-Monida Project. Although you had the low guard rail quotation, we were forced to use a higher quotation to meet our DBE requirements.

Listed below are the guard rail prices we received on the project:

Frank Gurney, Inc.—142,906.45.
Omo Construction, Inc.—150,351.55.
Scott Long Construction—151,278.00.

Once again, we would like to thank you for your quotation and hope you will continue to quote any future work.

Sincerely,

GEORGE M. FRIEZ,
Engineer.

WESTWAY CONSTRUCTION, INC.,
Nine Mile Falls, WA, June 28, 1995.

FRANK GURNEY, INC.,
Spokane, WA.

Attn: Tom Stewart.
Re: SR 27 & 23 bridge rail update/bridge replacement.

TOM: We regret we cannot use your quotation for this project. Although your price for the guardrail items was $2000.00 lower than Petersen Brothers, we were unable to use you as we needed Petersen to meet our DBE goal.

Sincerely;

MARK JOHNSON,
Estimator.

FRANK GURNEY INC.,
Spokane, WA, October 29, 1997.

SENATOR SLADE GORTON,
Hart Senate Building,
Washington, DC.

DEAR SENATOR GORTON: Please find another letter of rejection attached that we just received today from Inland Asphalt Company of Spokane. Peterson Bros. is a well run firm—larger than ours—that is—and has—for 15 years—benefited from your discriminatory ''Quota'' affirmative action policies and legislation. We are not crying ''Sour Grapes'' or ''Belly Aching'' we simply are again wondering how you would feel if this were you in receipt of letter after letter of this rejection (our file has many of them—dating throughout 16 years) How would you feel about displaying this letter to your employees and your family. How do I tell my sons—who work in the company—and my employees; not to hold prejudice? I don't know—I only know I really don't know—I only know that it is wrong! Very Very wrong—yet promulgation of this wrong continues in America by our Government. It surely seems that the very discrimination that you as government are trying to abate simply continues with you at the top of the list as its greatest advocate. We expect as usual no response—of course realizing we are the ''down side'' of the ''greater good''—regardless of right or wrong.

Sincerely,

THOMAS C. STEWART,
President.

INLAND ASPHALT CO.,
Spokane, WA, October 27, 1997.

TOM STEWART, P.E.,
Frank Gurney, Inc.,
Spokane, WA.

DEAR TOM: I regret to inform you that although yours was the lowest guardrail quote that I received for the WSDOT Project SR 26 to Lind Coulee Bridge, I found it necessary to use the third lowest guardrail quote in order to meet the DOT requirement of 10% DBE. The second low guardrail quote was from Coral Construction Company but they also are not a DBE firm. The third lowest quardrail quote and lowest DBE guardrail quote came from Petersen Brothers, Inc. (DBE/WBE #D2F0901575). By using Petersen Brothers, Inc., along with DBE traffic control and planing, we were able to just barely meet the 10% DBE requirement at a cost of $11,768.76 to the project.

We at Inland Asphalt Company think highly of the professionalism and quality of work that we have always received from Frank Gurney, Inc. I hope that this does not discourage you from quoting us on future projects.

If you have any questions, please call me at 536–2631.

Sincerely,

LEE T. BERNARDI,
Project Manager.

Mr. GORTON. This illustrates what happened in the real world. It includes a half dozen responses to this small business company with respect to contract submissions in which it was the low bidder, in which the general contractor says, we would like to have picked you, we would have saved money for the taxpayers had we picked you, but we cannot pick you because of absolute orders from the Department of Transportation because of a quota system.

Ironically, the winning high bidders in several of these contracts are larger business enterprises than is Frank Gurney, Inc., with a longer history. The net result is fewer roads are built and improved in order to provide contracts for people less disadvantaged than the low bidder. That is the real world impact of what we have done here.

The Senator from Kentucky knows that we have certain disagreements over what the affirmative language in his amendment should have included. I would have done it somewhat differently. But I am here because I believe that the fundamental approach he has taken to strike an express percentage racial quota is not only the only appropriate response under the Constitution but is the only appropriate,

just response in a society based on the proposition that people deserve equal treatment and only equal treatment.

Mr. President, it seems to me that this is an open-and-shut case. We should repeal the sections to be stricken here. If a majority of this body believes in a form of affirmative action, then it should devise a form of affirmative action that meets the strict-scrutiny standards set down by the Supreme Court and does not include a quota system that is entirely unrelated to whether or not its beneficiaries have ever suffered any discrimination whatsoever.

The PRESIDING OFFICER. The Senator from Kentucky.

Mr. MCCONNELL. Mr. President, there are many lawyers in the Senate, some out in the land believe too many. But it is my judgment that the finest lawyer in the Senate is the Senator from Washington. I thank him for his clear explanation of what the law demands in this situation.

No effort by the other side to obscure the obvious, it seems to me, should fool anyone. The Senator from Washington has laid it out with extraordinary clarity. This provision in the bill before us is unconstitutional. I thank the Senator from Washington for his support of the Constitution.

Mr. President, a number of the opponents of the amendment have said they know discrimination exists in this kind of economic activity because the numbers of minority participants have dropped in Michigan and in Louisiana. Colleagues have lamented the loss of the DBE programs in those two States, Louisiana and Michigan, but what they fail to point out was that those DBE programs were terminated based on court decisions that held that the preferences were unconstitutional, and that is, of course, precisely what we are discussing here today, the constitutionality of these kinds of race-based set-asides.

Even the Department of Transportation has quietly conceded that disparity figures do not prove discrimination. Let me share this quiet concession buried in the jungle of Federal regulations. The administration notes that:

> Minority firms may receive less work because of the following reasons: Lack of interest in the work, other commitments, limitations of the amount of work they can handle or lack of qualifications, especially where a State spends a large portion of its funds on a single large project requiring special contractors.

There has been some suggestion by those opposing the amendment that the Adarand case not only wasn't determinative of the race-based set-aside in this bill, but it somehow is an isolated case. The Congressional Research Service has found no—I repeat no—court ruling after a trial where a race-based contracting program has met the Supreme Court test of strict scrutiny. Let me say that one more time. There has been an effort to portray the Adarand case as kind of an aberration, or actually not determinative, not really on point. The fact of the matter is it is just one more in a whole series of cases indicating that these kinds of race-based programs are unconstitutional. In fact, CRS has explained that Adarand conforms to a pattern of Federal rulings across the country, striking down race-based contracting programs as unconstitutional. Let me just mention some of them: Associated General Contractors of California v. San Francisco. That was in the ninth circuit. Michigan Road Builders Assoc. v. Milliken, which was in the sixth circuit; Groves & Sons Co. v. Fulton County, which was in the seventh circuit; Associated General Contractors of Connecticut v. New Haven; O'Donnell Construction Company v. the District of Columbia, in the D.C. circuit; Arrow Office Supply v. Detroit, a Michigan case; Louisiana Associated General Contractors v. Louisiana, Associated General Contractors of America v. Columbus; Engineering Contractors Ass'n of South Florida v. Metropolitan Dade County in the 11th circuit; Contractors Ass'n of Eastern Pennsylvania v. Philadelphia, in the third circuit; Monterey Mechanical v. Wilson in the ninth circuit, just last September; Houston Contractors Association v. Metropolitan Transit, which is in the Southern District of Texas, November 13 of last year, 1997.

Quoting from the Houston Contractors case, right out of the case, the District Court for the Southern District of Texas, the court said:

> Because race is inescapably arbitrary, basing governmental action on race offends the American Constitution.

The court went on to say:

> Assigning governmental benefits to people by their skin color does not quit being arbitrary because the advocates claim that a program has a progressive purpose; a principle wrong for Eugene Talmadge is wrong for Jesse Jackson.

The court went on to say:

> Nothing about transportation depends upon the race of the person—not employees, officers, taxpayers, riders, suppliers, or contractors.

It has been suggested that these are all sorts of lower court decisions and somehow they are off on their own or something, not following the mandate of the Supreme Court.

In the Croson case, way back in 1989, the Court said that:

> . . . a generalized assertion that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy. It ''has no logical stopping point.''

The Court went on to say:

> ''Relief'' for such an ill-defined wrong could extend until the percentage of public contracts awarded to MBE's in Richmond mirrored the percentage of minorities in the population as a whole.
>
> Appellant argues that it is attempting to remedy various forms of past discrimination that are alleged to be responsible for the small number of minority businesses in the local contracting industry. Among these the city cites the exclusion of blacks from skilled construction trade unions and training programs. This past discrimination [the Court said] has prevented them ''from following the traditional path from laborer to entrepreneur.'' [That is the city talking.] The city also lists a host of nonracial factors which would seem to face a member of any racial group attempting to establish a new business enterprise, such as deficiencies in working capital, inability to meet bonding requirements, unfamiliarity with bidding procedures, and disability cased by an inadequate track record.
>
> While there is no doubt that the sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for black entrepreneurs, this observation, standing alone, [standing alone] cannot justify a rigid racial quota in the awarding of public contracts in Richmond, Virginia. . . . [A]n amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota.
>
> It is sheer speculation how many minority firms there would be in Richmond absent past societal discrimination, just as it was sheer speculation how many minority medical students would have been admitted to the medical school at Davis absent past discrimination in educational opportunities. Defining these sorts of injuries as ''identified discrimination'' would give local governments license to create a patchwork of racial preferences based on statistical generalizations about any particular field of endeavor.

So the Court concluded:

> The 30% quota cannot in any realistic sense be tied to any injury suffered by anyone.

So the Court said:

> We, therefore, hold that the city has failed to demonstrate a compelling interest in apportioning public contracting opportunities on the basis of race. To accept Richmond's claim that past societal discrimination alone can serve as the basis for rigid racial preferences would be to open the door to competing claims for ''remedial relief'' for every disadvantaged group. The dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement would be lost in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs. ''Courts would be asked to evaluate the extent of the prejudice and consequent harm suffered by various minority groups. Those whose societal injury is thought to exceed some arbitrary level of tolerability then would be entitled to preferential classifications. . . .'' We think such a result would be contrary to both the letter and spirit of a constitutional provision whose central command is equality.

The Court went on:

> There is absolutely no evidence of past discrimination against Spanish-speaking, Oriental, Indian, Eskimo or Aleut [Indian] persons in any aspect of the Richmond construction industry. . . . It may well be that Richmond has never had an Aleut or Eskimo citizen [the Court said]. The random inclusion of racial groups that, as a practical matter, may never have suffered from discrimination in the construction industry in Richmond suggests that perhaps the city's purpose was not in fact to remedy past discrimination.

If a 30% set-aside was ''narrowly tailored'' to compensate black contractors for past discrimination, one may legitimately ask why they are forced to share this ''remedial relief'' with an Aleut citizen who moves to

Richmond tomorrow? The gross overinclusiveness of Richmond's racial preference strongly impugns the city's claim of remedial motivation.

Mr. President, even if by way of some disparity study mirror this administration could show a finding of specific, pervasive discrimination in the highway contracting arena, the administration would still be unable to show that the ISTEA quota is narrowly tailored to remedy that alleged past discrimination. ISTEA and the DBE Program funnels not less than 10 percent of Federal highway funds to disadvantaged business enterprises. The Government presumes that an individual is disadvantaged if that individual can trace his or her roots to one of over 100 different countries. These countries range from Argentina to Spain and Portugal to Sri Lanka and Madagascar to Japan and to the Fiji Islands.

Just look at the map I have to my right. If you are from one of the countries with a ''P'' on it—it is probably hard for people to see—you are in the preferred group. Look at the worldwide web of preferences that we have created, and who can figure out this web? If you happen to be from these countries, you get a preference. If you happen to have emigrated from some other country, you do not.

If you are so unfortunate as to be from Poland, you are out of luck; you actually have to compete and win on the merits. But if you are from Pakistan, you are in the preferred group.

If you are from Nigeria, you are disadvantaged, but if you are from Algeria, you are not disadvantaged.

If you are from Spain or Portugal, you are disadvantaged, but if you are from Bosnia, you are not disadvantaged.

If you are from Israel, you are not disadvantaged, but if you are from Pakistan, you are disadvantaged.

If you are from China or Japan, then you get a preference, but if you are from Russia, sorry, you don't get a preference.

If you are from the Fiji Islands, it is your lucky day; you win the preference prize. But if you are from New Zealand or are an Australian Aborigine, you lose; you are not disadvantaged.

In the Adarand case, the plaintiff explained this overbreadth problem to the Supreme Court. Specifically, the plaintiff's lawyers stated in oral argument:

> We have a situation here where a Hong Kong banker, a Japanese electrical engineer, or the son of landed gentry from Spain could come to Colorado Springs and . . . [run] a [Disadvantaged Business Enterprise].

And, in fact, the district court in Adarand agreed the DBE program is so overly broad that it violates not only common sense, but it violates the Constitution. Indeed, under these standards, as Senator ASHCROFT and others have mentioned, the Sultan of Brunei would qualify as disadvantaged.

By the way, let me tell you a little about our friend, the disadvantaged sultan. This is a man who has an estimated $40 billion fortune, making him the wealthiest monarch in the world. He lives in a sprawling palace, which you can see reflected in this picture, the palace of the Sultan of Brunei. This palace has 22-karat gold-plated mosque domes and 37 types of marble. He has 150 Rolls Royces. And if that is not enough, the sultan keeps his prize thoroughbred horses in hundreds of air-conditioned stables.

So, the sultan could leave his estate in Brunei, forsake his Rolls Royces, abandon his horses in their air-conditioned stables, and then move to my home State of Kentucky and get a bid preference as a DBE over a contractor from the hills of Appalachia. Mr. President, something is wrong with this picture.

In 1980, Justice Stewart poignantly explained what was wrong with this picture. To quote Justice Stewart directly, Congress has ''necessarily paint[ed] with too broad a brush.''

He said:

> In today's society, it constitutes far too gross an oversimplification to assume that—

And this was in 1980—

> every single Negro, Spanish-speaking citizen, Oriental, Indian, Eskimo and Aleut potentially interested in construction contracting currently suffers from the effects of past or present racial discrimination. Since the . . . set-aside must be viewed as resting upon such an assumption, it necessarily paints with too broad a brush. Except to make whole the identified victims of racial discrimination, the guarantee of equal protection prohibits the government from taking detrimental action against innocent people on the basis of the sins of others of their own race.

Congress has a substantial burden of ''inquir[ing] into whether or not the particular [entity] seeking a racial preference has suffered from the effects of past discrimination.''

This is what they were talking about in the Croson case, a Supreme Court case.

Again, let me quote the Supreme Court:

> The random inclusion of racial groups, that as a practical matter, may have never suffered from discrimination in the construction industry . . . suggests that perhaps the . . . purpose was not in fact to remedy past discrimination . . . The gross overinclusiveness of [a government's] racial preferences strongly impugns the . . . claim of remedial motivation.
>
> If there is no duty to attempt either to measure the recovery by the wrong or to distribute that recovery within the injured class in an evenhanded way, our history will adequately support a legislative preference for almost any ethnic, religious or racial group with the political strength to negotiate ''a piece of the action'' for its members.

Again quoting Croson.

Or, as the Fifth Circuit Court of Appeals recently explained in striking down racial preferences:

> A broad program that sweeps in all minorities with a remedy that is in no way related to past harms cannot survive constitutional scrutiny.

Hopwood v. the State of Texas.

As I have explain today, the Government has placed the stamp of disadvantaged on a stupefying array of groups—groups and individuals that are not similarly situated.

As Professor LaNoue has explained:

> Some of the groups on the presumptively eligible list have been in this country since its beginning; some are very recent arrivals. Some are relatively poor; some are relatively affluent. Some have very high rates of business formation; some are very low. Some have well-documented histories of discrimination; some are virtually invisible.

Again quoting Justice Stevens:

> The statutory definition of the preferred class includes ''citizens of the United States who are [black], Spanish-speaking, Orientals, Indians, Eskimos and Aleuts.'' . . . There is not one word in the remainder of the Act or in the legislative history that explains why any Congressman or Senator favored this particular definition over any other or that identifies the common characteristics that every member of the preferred class was believed to share. Nor does the Act or its history explain why 10 percent of the total appropriation was the proper amount to set aside for investors in each of the six racial subclasses.

In summary, as numerous speakers have said, the DBE program is not narrowly tailored. As the district court concluded in Adarand just this last summer, directly from the court:

> I find it difficult to envisage a race-based classification that is narrowly tailored. By its very nature, such a program is both underinclusive and overinclusive. This seemingly contradictory result suggests that the criteria are lacking in substance as well as in reason.

Or as the Supreme Court held in Croson, a program is unconstitutional where ''a successful black, Hispanic or Oriental entrepreneur from anywhere in the country enjoys an absolute preference over other citizens based solely on their race. We think it obvious that such a program is not narrowly tailored to remedy the effects of prior discrimination.

I cannot imagine how the courts would spell this one out any clearer for us. This program is not designed to remedy past discrimination, it is not narrowly tailored by any stretch of the imagination, and it is plainly and clearly, as the distinguished Senator from Washington so eloquently put it a few moments ago, not constitutional.

Mr. President, I yield the floor.

Mr. CHAFEE addressed the Chair.

The PRESIDING OFFICER. The Senator from Rhode Island.

Mr. CHAFEE. Mr. President, I know the distinguished Senator from Illinois wishes to speak, and I will be very brief in commenting.

I have listened to the learned Senator from Kentucky speak this afternoon. He spent a lot of time on the Adarand decision. The only thing we ought to stress about the Adarand decision is that the Adarand decision was a 5–4 decision that did not find that affirmative action is not possible to have in our country. Indeed, I will give you a couple of quotes from—I like to go to the Supreme Court. I am not big on

district courts and circuit courts. Yes, they are nice, but I like to go to the top and see what the top people have to say. This is what Justice O'Connor said:

> It is not true that strict scrutiny is strict in theory but fatal in fact. Government is not disqualified from acting in response to the unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country.

Later on, Justice O'Connor stated for the majority:

> When race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the narrow tailoring test.

So it can be done, and affirmative action is not unconstitutional. If that is the implication that is derived from the remarks of the Senator from Kentucky, I say it is just plain not accurate.

Mr. BAUCUS. Mr. President, I yield 20 minutes to the very distinguished Senator from Illinois, Ms. MOSELEY-BRAUN.

The PRESIDING OFFICER. The Senator from Illinois is recognized for 20 minutes.

Ms. MOSELEY-BRAUN. Mr. President, thank you. I rise in strong opposition to the pending amendment that would dismantle the Department of Transportation's affirmative action programs and roll back 15 years of gains that have been made by minority and women contractors.

The Department of Transportation's DBE program, Disadvantaged Business Enterprise Program, ensures that small women- and minority-owned companies have the opportunity to participate in the Federal aid highway program. It does not guarantee anything; it simply allows an opportunity to compete. It levels the playing field, giving small and women-owned businesses and minority-owned businesses an equal opportunity to submit winning bids. The DBE program is fair; it is necessary, and it works.

This program—and let me suggest another way to look at this issue, Mr. President—the DBE program is no more and no less than a structural response to a structural distortion of our society, a distortion that is caused by 200 years of slavery and segregation and, frankly, the status of women and an age-old tradition that set women apart as second-class citizens as well. It responds to the unfortunate but obvious fact that our society was constructed on the traditional station of women and minorities.

Women do not earn 75 percent of the earnings of men who have the same jobs because they are 25 percent less competent or because they pay 25 percent less for food. African Americans are not proportionally poorer, sicker, more imprisoned, or less educated because of accident but, again, because of those distortions created in today's society by those institutional structures that were crafted centuries and decades ago.

The DBE program addresses these underlying realities. It helps to weave thousands of small businesses into the fabric of our economy and our society. It creates for us a stronger Nation. A society that taps the talent of 100 percent of its people is a stronger society because it can draw on a broader pool of talent. A community that gives all of its members a chance to contribute to the maximum extent of their abilities is a stronger community because it benefits from a broader range of contributions.

America is never so magnificent as when she reflects her nobler tradition. Justice and equality, opportunity based on merit and capacity—these are among some of the defining values of our country, and these values are reflected in this DBE program.

The debate over the DBE program has so far been characterized by distortion of the structure and the results of the program. I have heard more than a few in the debate this afternoon. The facts are, it is a fair program that operates within the bounds of the Constitution. It has worked well, and it has created opportunities for thousands of minority- and women-owned businesses.

I have heard a lot of conversation about the constitutionality. I point out, Mr. President, if you read the Constitution of the United States—and here is a copy. I took Senator BYRD's advice and I carry mine around with me. If you read article I, it is very clear that Americans of African descent were not citizens of this great country when the Constitution was written. Similarly, women were not voters of this country when this Constitution was written. Americans of African descent did not receive the rights of citizenship until the passage of the 14th and 15th amendments in 1868, and women were not enfranchised to vote in this country until this century, until 1920, with the passage of the 19th amendment. But ours is a living Constitution. And it is a Constitution that changes over time to reflect the realities of the community as a whole, to keep the core values as it adjusts to changes in the makeup and composition and demographics of the country.

This Constitution has lived so long precisely because it responds to distortions in our society, precisely because it adapts itself to the realities of the time, and because it continues to reflect those core values that bring us together and make us all Americans. And the fact of the matter is that this legislation is constitutional, as has been discussed on this floor.

In 1982, Mr. President, Congress established a national goal for at least 10 percent of Federal highway and transit project funds to be expended with small businesses owned and controlled by socially and economically disadvantaged people.

In 1987, Congress extended this initiative to include women-owned businesses. And in 1991, the program was first included in ISTEA, which is, of course, the legislation that is sought to be amended today. President Reagan signed the 1982 and 1987 measures into law; and President Bush signed the 1991 legislation, again, to bring women, to bring minorities into the economic mainstream of our country.

I will make one other point. This is another digression. But I have listened to the debate today. And even on the screen when this gets broadcast on C-SPAN, it says, ''Amendment re minorities.'' This legislation is not just about minorities, Mr. President. It is about women as well. And we need to make certain that every person who listens to this debate understands that by casting it just in terms of minorities, it changes the focus of the debate, it becomes a subterfuge for a set of buzzwords that, frankly, in my opinion, do not reflect well on this Senate and on this debate.

Under the Federal DBE program, State and local governments work to achieve goals they set for themselves based on the ability of qualified disadvantaged businesses in their areas, without quotas, without set-asides, and without penalty if they fail to meet their goals after good-faith efforts.

In 1996, most States set 10 percent goals for themselves. Some States set higher goals, up to 14 and 16 percent. Only three States failed altogether to achieve their DBE goals in 1996. And only two States failed to reach 10 percent. Most States exceeded their DBE goals, in some cases by large margins.

In my home State of Illinois, which set a 10 percent goal for itself in 1996, 15 percent of its highway construction funds were awarded to DBEs. Again, you are talking all minorities, you are talking all women. So you are really talking about a majority minority set-aside, if you think about it, because if you take women as a proportion of the population, you take minorities, all of them as a proportion of the population, what you really have is a majority of the population. Again, this legislation simply seeks to address a structural distortion in which that majority of the population participates at an unduly low and restrictive level of our economic activity.

The DBE program is flexible in its work. In 1980, DBE participation in Federal highway construction was only 3.6 percent—again for the majority of the population of this country. Only 3.6 percent of the contracts given out by the Federal highway construction efforts were for DBEs.

DBEs realized small gains over the next couple years when the Department of Transportation encouraged participation. Sharp gains were made, however, after Congress put the program into the law in 1982. DBE participation climbed to almost 17 percent in 1984, and it has hovered around 15 percent ever since.

Now, who are the disadvantaged business enterprises? In 1996, DBEs again received slightly less than 15 percent of

the Federal-aid highway construction money. Of that small slice, again, here we are—14.8 percent. This is everybody. These are women, minorities, Hispanics, Asians, Native Americans—these are all the majority minority of the population that is described as ''minorities'' in the debate. They got all of 14 percent of Federal highway spending.

Remember, we are all taxpayers now. Everybody is in the pool putting money in to make this happen, but 14 percent went out to women- and minority-owned businesses in 1996. And 85 percent went to the traditional white male business owners.

Now that is just the reality. This is not about taking anything away from anybody. But it has to be said, and in very clear terms. Here is everybody else. This is the traditional economics. This is a reflection of an attempt to address a distortion in our society that comes out of the tradition of excluding women and minorities. The exclusions are no longer there, but inclusion has not yet happened. Integration has not yet happened. And that is why this debate is so vitally important.

Let us take a look for a moment at the division within this 14.8 percent. African Americans are 14 percent of the 14 percent. Native Americans are 9 percent of the 14 percent. Asian Americans are 3 percent; Asian Pacific, 3 percent of the 14 percent; Asian Indian, 3 percent of the 14 percent. And we are not talking about the Sultan of Brunei either. He is not involved with any of this. We are talking about citizens of this great country. Hispanic Americans, 20 percent of this 14 percent. But look at this, Mr. President, 51 percent—51 percent—of this 14 percent are women-owned businesses.

I ask the question why 50 percent of the conversation that has been going on this afternoon has not talked about the impacts on women that this repeal, if it is successful, will cause?

So the DBE program then redresses gender discrimination as much as it does lingering racial imbalances. It provides economic opportunities for businesses and entrepreneurs who would otherwise be shut out of the construction industry. I have received a number of letters from DBEs urging me to oppose this effort to repeal the program, letters from women and minorities who own and operate small business, small construction firms in all corners of Illinois.

Their letters ask for the continued opportunity to compete. They drive home the point that the DBE program is not about taking contracts away from qualified male-owned businesses and handing them to unqualified female-owned firms. The program is not about denying contracts to Caucasian low-bidders in favor of higher bids that happen to have been submitted by Hispanic or African Americans or Asians or women.

Instead, this program is about creating a climate of competition that brings everybody in. That is what all these business owners in Illinois want, the opportunity to compete. They want a level playing field in which to make the case that they can do the best job for the taxpayers for the least amount of money. They just want a fair chance.

Listen to a letter from Sharon Arnold, who is president of SSACC, Inc., a certified women-owned disadvantaged business enterprise in Pontiac, IL:

> I know that without the [DBE] program I would lose the opportunity to compete. That is all this program does for me; it gives me the opportunity to compete.

Ms. Arnold started her construction firm in 1986, the year before Congress added women to the DBE program. She writes that at the time ''I was certain I had made the biggest mistake of my life. Contractors who I had been working with in the bidding process [as a former employee at another construction firm] had no interest [at all] in what I was trying to accomplish . . . Now, the reality is, they still don't care unless my . . . prices are the lowest. In this program competition is the name of the game.''

Mr. President, that is the basic concept of the DBE program. Low bids still get the contracts. The program does not create special preferences for more expensive or less qualified bidders. It does not increase the cost of highway construction.

The General Accounting Office has in fact examined this issue and concluded that the program results in less than a 1 percent increase in construction costs—1 percent, Mr. President—to begin to correct some structural distortions that everybody here in this room and certainly everybody in this country knows we have to be able to correct and resolve.

All the DBE program does is open doors. Again, listen to Victor Wicks, President of Wicks Construction Services in southern Illinois. This is a man.

> The DBE program is an economic development program for both minority- and women-owned businesses. The program merely levels the playing field for minorities and women and affords them an equal opportunity to compete for federal construction dollars. . . . All we are asking for is a fair chance—an equal opportunity—a level playing field, for all Americans.

That is what the DBE program provides for Mr. Wicks and the rest of the thousands of qualified disadvantaged businesses across this country.

Mr. President, there has been some debate over whether the DBE program is constitutional in light of the Supreme Court decision in the case of Adarand Constructors v. Pena. Some of my colleagues have asserted that the Senate must ''bring ISTEA into compliance with Adarand and the Constitution.''

The fact is, the Senate need not do anything except extend current law in order to keep ISTEA in compliance with Adarand and the Constitution. The DBE program was not declared unconstitutional. On the contrary, the Supreme Court wrote the Federal Government must subject affirmative action programs to ''strict scrutiny,'' meaning that the programs must be ''narrowly tailored'' to meet a ''compelling government interest.''

The Court, in fact, explicitly stated that affirmative action is still a necessary function of our Government. And it wrote:

> The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and the government is not disqualified from acting in response to it.

Mr. President, the ''lingering effects of racial discrimination'' of which the Court spoke are exactly the distortions in our society that I referenced earlier. Racism and sexism are indeed unhappy, but still very real, phenomena in our society. The DBE program is one of our responses to those lingering effects, and it works.

Anyone who thinks there is not a ''compelling government interest'' to justify the DBE program need only to look at the States that do not have them in place for their State-funded highway construction programs.

Data from these States provide side by side comparisons of two construction programs within each State—the Federal-aid highway program, which includes a DBE initiative; and those States' own highway programs for non-Federal-aid highways, which do not include DBE programs.

I want you to consider the following examples from fiscal year 1996.

In Arizona, DBEs received only 3.8 percent of State-funded highway construction dollars, State funded. They received 8.9 percent of the Federal-aid highway program. Again, DBE exists here; it does not exist there.

In Arkansas, 2.9 percent of State dollars; 11.9 percent of Federal dollars. DBE program here; did not exist there.

In Delaware, DBEs received less than 1 percent—less than 1 percent of State-funded highway construction dollars, while they received 12.7 percent of the Federal-aid highway funds in that State.

The next one, the DBEs in Louisiana received only .4 percent —.4 percent—of funds under the State's highway construction program, which does not include a DBE initiative. They received 12.4 percent of funds awarded by the Federal program.

In Michigan, another State without a DBE program, DBEs received only 1.4 percent of State highway construction funds. By contrast, they received 15 percent of Federal highway construction funds.

I can go through Missouri, Nebraska, Oregon—Rhode Island, look at this. In Rhode Island we have the State program without a DBE program, and the State effort is zero percent for all the women and minorities put together. Zero percent of the State highway construction funds; 12 percent of the Federal highway construction funds where there was a DBE program.

Now, this evidence, Mr. President, is incontrovertible. Where there are no DBE programs, women- and minority-owned small businesses are shut out of the highway construction. The Federal DBE program serves to redress the inequality and redress the unfortunate fact that all across the country women and minorities would not otherwise have access to construction contracts.

Now, consider another example—the State of Michigan. In the second quarter of fiscal year 1989, the State of Michigan awarded 5 percent of its highway construction funds to small and minority-owned businesses, and 9.9 percent to small women-owned businesses. Again, I make the point that this debate has been focused on minorities, but it is women that are just as much at risk from this amendment as minorities. Near the end of that quarter, the State ended its DBE program. OK. Here we are right here. So 9.9 percent, 5 percent. Then the end of the program. Within 6 months, by the fourth quarter of that same fiscal year, minority disadvantaged businesses were completely shut out of the State's highway construction program. Less than 1 percent—.6 percent. They received zero contracts. By the first quarter of the following year, women were down to only 1.7 percent of the State's highway programs, down from 9.9 percent.

So this was the experience. Look at this. Here we go. Just totally wiped out from the modest gains that had been made in that State.

Well, Mr. President, that is exactly what would happen if we ended the Federal DBE program. Women- and minority-owned small construction companies would go out of business by the hundreds of thousands.

I have to ask the question, is that really the result we want to have coming out of this debate? Is that really the legacy that the 105th Congress would like to impart on transportation policy—a legacy of no economic opportunity for thousands and thousands of small businesses?

Nationwide, minorities represent 9 percent of all construction funds but receive only about 5 percent of all business receipts. That is overall—9 percent of all funds but 5 percent of all receipts. Women, who own one-third of all firms, get only 19 percent of business receipts. Let us not see 1998 go down as the year in which those opportunities to compete were further eroded.

I urge all of my colleagues to consider the facts—the fact that the DBE Program is constitutional, that it is a program of economic opportunity, that it is a program of fairness, and that it is a program that works. I urge my colleagues to cast their votes for the ideals of opportunity and equality, which describe our Nation, which are described in this Constitution, in this living document.

More to the point, Mr. President, I urge my colleagues to move beyond the politics of division and zero-sum games. Those who oppose having this modest opportunity provided for women and minorities—this modest step to correct a structural distortion that has existed in our country since its founding, this tiny step to bring women and minorities into the economic mainstream and to integrate the business of our country—those who would oppose that are pushing buttons to divide Americans; to pit one against the other; to say this is a zero-sum game, you can't progress, you can't be integrated in this society without someone losing out. No one loses out in this program. No one loses out from opening up the doors of opportunity.

Indeed, opportunity to compete, to have a level playing field, to move beyond race and gender, is what this country has got to be about. I urge my colleagues to reject this ill-considered amendment.

Mr. McCONNELL. I yield to the distinguished Senator from Michigan such time as he may need.

Mr. ABRAHAM. Mr. President, I rise to discuss the amendment of the Senator from Kentucky to the ISTEA legislation. Mr. President, the Supreme Court decision in Adarand v. Pena appears to mean that section 1111 of the existing ISTEA legislation is unconstitutional. That being the case, it is our duty, in my view, to replace this provision with one that meets the test of constitutionality.

In its Adarand decision, the Supreme Court held that programs that create race-based preferences must be narrowly tailored to further a compelling governmental interest. On remand, the Federal District Court determined that the presumption of social and economic disadvantage on account of race included in an earlier version of ISTEA section 1111 violated the equal protection clause of our Constitution. This provision of our Constitution has been crucial to the ongoing struggle for civil rights in this country. It has been behind a number of important Supreme Court decisions dating back to the seminal Brown v. Board of Education.

The Adarand Court continued a long tradition of jurisprudence, establishing a colorblind Constitution, one which demands equal treatment under the law for members of all races. In acting, the Court has drawn a clear distinction between preference or quota programs and affirmative action efforts aimed at providing more opportunity for the less advantaged.

In my view, Mr. President, this is a crucial principle and distinction, one that will not allow the Government to give preference to one individual over another simply on account of status—absent direct evidence of past discrimination that the program is narrowly tailored to address—but does permit us to provide special assistance to those economically disadvantaged.

But our Constitution's principle of equality under the law must not be allowed to conflict in any way with outreach programs aimed at helping the economically disadvantaged of our society. Indeed, it points to public policies more in keeping with America's constitutional heritage, our commitment to fair play, and our desire to help the disadvantaged become full participants in our market economy and the prosperity it provides.

To that end, Mr. President, I believe that Senator MCCONNELL's amendment to the ISTEA legislation is potentially helpful. This amendment would strike section 1111 from the legislation on the basis that the changes between the language in this ISTEA and the version deemed unconstitutional by the District Court based on the Supreme Court's Adarand ruling are not sufficient to overcome the Court's constitutional objections. I wish to state that while I realize there is a difference of opinion on this issue, I agree with this constitutional analysis. The amendment would replace section 1111 with a requirement that every State in receipt of Federal highway dollars engage in ''emerging business enterprise development and outreach.'' Under the language, ''emerging enterprises'' are defined as contractors whose average annual gross receipts do not exceed $8.4 million over a period of 3 years. To be eligible, the businesses also must be small businesses that have been in existence for not more than 9 years.

Under this amendment, States would be called on to provide a number of services to emerging businesses, including periodic review of construction plans to ensure fairness and opportunity, as well as offering seminars, compiling and publishing lists of interested businesses and related companies, and providing networking opportunities on a regular basis.

The McConnell amendment offers significant outreach programs aimed at emerging businesses. By so doing, it aims Government assistance at those who need it most. In the process, it avoids rewarding well-to-do businesses simply on account of status, while providing assistance to minorities and women truly in a position to need and make use of it.

In addition, Mr. President, I thank Senator MCCONNELL for accepting my language in modifying his amendment. That language directs States to also aim efforts at business enterprises that are located in economically distressed communities and employ a majority of their workers from such economically distressed communities.

Finally, Mr. President, the McConnell amendment is constitutional. Because it does not base the awarding of Government contracts or benefits exclusively on the race of the recipients, it upholds the principles of our Constitution and the equal protection clause in particular. Support for this amendment is fully in keeping with our sworn duty to uphold the Constitution on which our Government is based.

However, Mr. President, in my view, the McConnell amendment does not go far enough. We must do more. I continue to believe, in other words, that

economic empowerment initiatives are crucial to the well-being of disadvantaged members of our society, and in the end, to our society as a whole.

It was in order to promote these efforts that I joined a number of my colleagues, including the Presiding Officer, in forming the Renewal Alliance, an alliance dedicated to renewing the families and communities which lie at the heart of our way of life and which are crucial for success in America.

To further these efforts, we have formulated legislation aimed at creating ''renewal communities.'' In these communities, targeted, pro-growth tax benefits, regulatory relief, brownfields cleanup, and homeownership opportunities will combine to produce jobs, hope, and a sense of community. By targeting distressed communities for Federal relief from onerous rules and taxes, we can assist the ongoing revival of our inner cities by spurring growth and productive rebuilding efforts.

In order to become a renewal community, a community must meet several criteria to qualify:

First, it must need the assistance. According to the legislation we have drafted, this means that the area must first be eligible for Federal assistance under section 119 of the Housing and Community Development Act of 1974. Second, it must have an unemployment rate of at least 1½ times the national rate. Third, it must have a poverty rate of at least 20 percent. And finally, at least 70 percent of the households in the area must have incomes below 80 percent of the median income of households in the metropolitan statistical area.

In addition, state and local governments must enter into a written contract with neighborhood organizations to do at least five of the following:

(a) reduce tax rates and fees within the ''renewal community;''

(b) increase the level of efficiency of local services within the renewal community;

(c) formulate and implement crime reduction strategies;

(d) undertake actions to reduce, remove, simplify, or streamline governmental requirements;

(e) involve private entities in providing social services;

(f) allow for state and local income tax benefits for fees paid or accrued for services performed by a non-governmental entity but which formerly had been performed by government; and

(g) allow the gift (or sale at below fair market value) of surplus realty in the renewal community to neighborhood organizations, community development corporations or private companies.

Third, the community must agree to suspend or otherwise not enforce the following types of restrictions on entry into business or occupations;

(a) licensing requirements for occupations that do not ordinarily require a professional degree;

(b) zoning restrictions on home-based businesses that do not create a public nuisance;

(c) permit requirements for street vendors that do not create a public nuisance;

(d) zoning or other restrictions that impede the formation of schools or child care centers; or

(e) franchises or other restrictions on competition for businesses providing public services including but not limited to taxicabs, jitneys, cable television and trash hauling.

State and local authorities may apply such regulations on businesses and occupations within the renewal communities as are necessary and well-tailored to protect public health, safety and order.

Now, in return for its reforms, Mr. President, the community will receive a number of renewal benefits.

First, a capital gains tax rate of zero for the sale of any qualified zone stock, business property or partnership interest held for at least five years.

Second, increased expending for purchases of plant and equipment in the community.

Third, a 20 percent wage credit for local businesses hiring qualified, low income workers who remain employed for at least 6 months.

Fourth, a provision allowing taxpayers to expense costs incurred in cleaning up contaminated sites within the zone.

Fifth, a provision allowing financial institutions to receive Community Reinvestment Act credit for investments in, or loans to, community groups within the zone. These groups would then provide loans and/or credit to local small businesses.

All of these provisions would encourage investment and job creation within the zone. In my view, this approach, as opposed to the existing preferences structure, or the McConnell approach standing alone, is the way to go.

Accordingly, Mr. President, while Senator MCCONNELL's amendment is, in my view, part of the answer to our challenge of providing all Americans the economic opportunity they deserve, it is not enough.

It can, and in my view should, be part of a larger program aimed at helping all Americans rebuild the community institutions which alone can provide the support and training people need to succeed in our competitive world marketplace.

Thus, if the motion to table the Amendment fails, I will attempt to augment it with a broader package of economic empowerment proposals as outlined above.

In addition, should the McConnell Amendment pass, I reserve the right to offer amendments making certain specific modifications to the language in this amendment.

That language would specify that state and federal outreach and dollars under USTEA shall be directed toward emerging business enterprises located in and/or employing the majority of their workers from ''targeted areas.'' A targeted area is defined as a community meeting the same criteria regarding poverty rates and so on necessary to be deemed an empowerment community. This will concentrate our effort where they are most needed and can provide the greatest benefit.

I appreciate the opportunity to speak on these issues today, and I look forward to hearing the rest of this debate. I also look forward to proceeding further in this area—whether in the context of this legislation or at a future point this year—because I think that the ideas which I have tried to outline, and which our Renewal Alliance has been working on, must be part of a broader approach and a broader set of solutions we are responsible for bringing to the American people.

Mr. MCCONNELL. If I could take a moment to thank the distinguished Senator from Michigan for his important contribution and the thought that he and the occupant of the chair have put into their proposal. I think is a very important contribution.

Mr. ABRAHAM. Thank you.

Mr. BAUCUS. I yield 10 minutes to the distinguished Senator from Virginia.

The PRESIDING OFFICER (Mr. COATS). The Senator from Virginia.

Mr. ROBB. Mr. President, I rise to support the Disadvantaged Business Enterprise Program and oppose the amendment of the Senator from Kentucky which would eliminate it.

This amendment, at least, implies that there is something wrong with supporting socially and economically disadvantaged businesses. I see nothing wrong with supporting socially and economically disadvantaged businesses. I believe it is entirely appropriate we do whatever we can, legally, to help small businesses flourish, businesses that might otherwise get swamped by larger, better financed competitors.

Mr. President, it is a sad fact that as we near the end of this century, socially and economically disadvantaged businesses tend to be minority owned. If we don't focus our attention on helping these businesses succeed, we are never going to achieve the dream of an economically colorblind society. The evidence of this, regrettably, is compelling and disturbing. White-owned construction firms receive 50 times as many loan dollars as African American-owned firms that have identical equity.

Where DBE programs at the State level have been eliminated, participation by qualified women and qualified minorities in government transportation contracts has plummeted. There is no way to know whether this discrimination is intentional or subconscious, but the effect is the same. This experience demonstrates the sad but inescapable truth that, when it comes to providing economic opportunities to women and minorities, passivity equals inequality.

If we don't exercise diligence, we are going to stifle businesses owned by

qualified women and minorities. It is that simple.

I do not support numerical quotas and I never have. I would never advocate awarding work to anyone who is, or any business that is unqualified for the task. But I do support lending a helping hand to individuals and businesses that, without special attention, might be overlooked, even though they are perfectly capable of performing the necessary work.

And that, Mr. President, I believe is the key to eliminating discrimination over the long-term. We cannot simply declare that a world where inequality exists is otherwise an equal world. We need to recognize that inequality and address it by making an affirmative effort to give qualified businesses a realistic chance to participate.

As Julian Bond remarked recently in a sentiment that I think is right on mark in this case:

> Affirmative action isn't a case of unqualified people getting a leg up, but of qualified people getting an opportunity.

Finally, I would like to commend the managers of the bill and, in particular, my colleague from Virginia for taking a courageous stand to support the DBE, despite the pressure that I am sure he is getting on this particular issue.

Mr. President, the managers are on the right side of this particular issue, and I urge my colleagues to support them by opposing this amendment.

With that, I yield the floor.

The PRESIDING OFFICER. Under the previous agreement, the Senator from New Mexico is recognized to speak for up to 45 minutes, if he so chooses.

Mr. DOMENICI. Mr. President, if somebody needs 5 minutes or so; I am awaiting a document that I need for my remarks.

Mr. BAUCUS addressed the Chair.

The PRESIDING OFFICER. The Senator from Montana.

Mr. BAUCUS. Mr. President, I yield myself 5 minutes.

Mr. President, I want to ruminate about this concept of quotas and goals. First of all, nobody likes quotas. They are rigid, they are unforgiving, they are almost insulting. The DBE program does not use quotas; it uses goals.

Now, some say the goal is 10 percent, 15 percent, or 20 percent, or what not; so is it really a goal? To be honest with ourselves here, it is a goal, but it does have a number associated with it. For example, the number is 10 percent. Some States ask for a lower goal—not a quota, but a lower goal. Some States are granted those lower goals. Some States ask for higher goals and they are granted those higher goals. Some States say, ''Our goal is going to be 10 percent,'' and lo and behold, it turns out that the disadvantaged business enterprise program does not meet 10 percent, it is a lower percent. That has happened in a couple of States. In 1996, in Arizona and in Alaska, the goal was 10 percent, but those two States did not reach the 10 percent goal. In Alaska, it was 8.6 percent. In Arizona, it was 8.9 percent. You might ask: What happened? Why didn't those States meet their goals? As far as I know, nothing has happened, which is further evidence that this is not a quota; it is just a goal.

We all know that goals are important. We know that if we want to achieve something, it is good to have a goal. If you don't have goals, often we slip, we rationalize, and things fall between the cracks and they don't happen. Sometimes it is helpful to have numerical dates or to quantify your goals, again, to help assure that you reach them, like benchmarks. We all know that sometimes quantifying a goal helps make it happen. In this case, we are not talking about a rigid goal. It is a goal that has a lot of flexibility to it in a lot of different ways.

I was a bit bemused when I heard Senators chafing at this concept of goals, I guess the same way Senators resist unanimous consent agreements. A unanimous consent agreement is a kind of a goal. It is a statement that, within 2 hours we are going to vote or something, or within an hour and a half we are going to do something else. We have to have limits sometimes to make something happen. Look at newspapers. Newspaper reporters know they have a deadline to get the paper out.

So if we do want greater inclusion of minority groups participating in highway contracting, and if we want more women enterprises to participate in highway contracting, it is good to have a goal to help make that happen. That is what we are attempting to do here. It is not unconstitutional because it is very flexible. It has a lot of give. I might say that the proposed regulations that the Department of Transportation is working on and, in fact, will probably finalize in a couple of months, make the program even more narrowly tailored. For example, the regulations include further emphasis on good-faith efforts. All a contractor has to show is good faith, not a numerical number. Also in the proposed regulations is a broad waiver allowing States to come up with their own program that will replace the Department of Transportation's program if the State can show that its own program will effectively redress discrimination. That is a broad waiver.

In addition, the proposed regulations would add a net worth cap. That is, if your net worth exceeds a certain amount, you are not eligible, even if you are a woman or a minority. So all those statements about the Sultan of Brunei are irrelevant. The proposed regulations make it very clear that the Sultan of Brunei, with all his palaces and gold-plated Rolls Royces, and so forth, would not even begin to be eligible for the DBE Program. I might say that it is not only the Sultan of Brunei; it is a bunch of other folks whose net worth is significant and who should not be part of the DBE Program.

So the basic point is, again, that this is very narrowly tailored, it is flexible, it is based on good faith efforts. It is not a quota. And the proposed regulations will be even more flexible and narrowly tailored, with more emphasis on good-faith effort.

The PRESIDING OFFICER. Who yields time?

The Presiding Officer had earlier recognized the Senator from New Mexico to speak under a previous agreement, if he is prepared to do so.

Mr. DOMENICI. Mr. President, I yield 5 minutes of my time—although he may have a different view than I have—to Senator BROWNBACK.

The PRESIDING OFFICER. The Senator from Kansas is recognized to speak for 5 minutes.

Mr. BROWNBACK. I thank the Senator from New Mexico.

Although I think our views of the world are similar on many issues and actually quite a bit similar on this particular issue, we end up coming at it, in the end conclusion, a bit differently. I appreciate the Senator from New Mexico yielding me 5 minutes for this purpose.

Mr. President, the Senate will soon vote, of course, on an amendment proposed by the Senator from Kentucky on the ISTEA bill. As the bill stands, it mandates that ''not less than 10 percent'' of Federal highway and transit funds may be allocated to ''disadvantaged business enterprises.''

I want to speak specifically about this amendment that does away with racial set-asides and replaces it with an outreach program to emerging small businesses. I have really struggled with this vote. I find this a very difficult issue, not because I support quotas or because I believe racial set-asides will help bring about racial reconciliation, which is really my point of view and my difficulty with this because we desperately need racial reconciliation in this country. We need that to take place. We need that process to start in earnest, to move forward with the hearts and souls of people in this country. My problem is that I don't think quotas and set-asides alleviate the disadvantages many Americans face or to increase their ability to compete on a level playing field, nor do I really believe it is going to help us out with this racial reconciliation that our country so desperately needs.

Nevertheless, this has been a hard decision to make. It will be a hard vote to cast. I would like to explain why I will vote in favor of Senator MCCONNELL's amendment and why I have misgivings about doing so.

First, I believe that quotas are unconstitutional. Each of us, in serving in this body, has taken an oath to uphold the Constitution. The Supreme Court's ruling in Adarand is very clear. I took my oath of office to uphold the Constitution seriously. I could not, in good conscience, vote for a measure that I believe, and the Court has ruled, violates the highest law of this land.

Second, I do not think quotas are the answer to the problems that divide us and deny equal opportunity. Quotas do nothing to address the problems that we face as a country, of not having a colorblind society. Indeed, it actually perhaps makes us more aware of the differences, rather than less aware of the differences. It doesn't address some of the underlying problems such as the break-up of families, which is the single greatest predictor of opportunities and income later in life—coming from a solid family that cares and loves the children. Quotas do not help the millions of children who attend schools where violence is commonplace and drug use is rampant. They do not help children to read, write, do arithmetic, or have the basic skills in society that we are having so much trouble with.

Finally, I believe that set-asides are not only ineffective in bringing about racial reconciliation—this is my key point; I don't think they bring about racial reconciliation. Indeed, I think they have been counterproductive. The last several years have shown that quotas in some cases, indeed many, are an acid that further divides our Nation and corrodes the principles of equality. More than 30 years ago, Dr. Martin Luther King, Jr., shared his dream of a society where men and women would be judged ''on the content of their character, not the color of their skin.'' We all, as a country, saw those words as electric and true. This is a dream that almost all Americans continue to share—that we be judged on the content of our character, not on the color of our skin. Although we may disagree on the best means of getting there, I cannot believe that the best way to achieve a colorblind society is to call more attention to race, to count by race, and to divide by race.

That said, the reason I have struggled with this vote is I believe that it is incumbent upon us to open the doors of opportunity to all and reach out to those Americans who have been denied those opportunities. Unfortunately, the way this debate has been spun, a vote for quotas has been equated to show concern for the disadvantaged—a portrayal both false and destructive, I think. We need to do more to extend a helping hand to those in need and to open the doors of opportunity and not only level but expand the playing field for all Americans.

The Senator from Michigan has spoken and the Senator presiding, the Senator from Indiana, has spoken frequently about initiatives of the Renewal Alliance. I want to draw my colleagues' attention to these efforts. I think this is a serious effort at reaching out and truly showing that the way to racial reconciliation is to truly level the playing field and to expand the playing field in the areas where we are having the most opportunity. So the work in the inner cities and the work of the Renewal Alliance has been key in that.

I think this work of the Renewal Alliance is critical because, as I have struggled with this debate—and the reason I have struggled with this vote is not because I believe quotas are the answer, because they just are not, they are not constitutional—is that if we don't have a colorblind society, what do we go to if we don't think quotas are right or constitutional? Then what? I don't think we have answered that question yet in this body. How do we address the needs to create a colorblind society? That is where I think the Renewal Alliance is reaching out and doing that and saying, here are some ways we can truly develop in inner cities, and reach out and say: We care, we want these places, we want you to have opportunity and growth and hope. It is just that we aren't going to do it by acid tests that we have talked about in these quotas and that we can really reach Martin Luther King's vision of a colorblind society if we try to bid out and to reach out and to hold.

I ask my colleagues to look at the work of Senator COATS from Indiana and other people that have truly put their hearts into this and said, here is a way we can go, this is what we can do, this is not constitutional quotas. It is just not going to be. But this is what we can do, and let's do that, and let's reach out as Americans and bind arms together, of all creeds, of all kinds, of all races, of all religions, and make a bigger, better playing field in this country.

That is why, Mr. President, I will be voting for this amendment. It is a difficult vote. And I really hope and pray that we will revisit this issue along the lines of what has been put forward as a way of expanding the hope and opportunity.

With that, I yield the floor.

Mr. MCCONNELL addressed the Chair.

The PRESIDING OFFICER. The Senator from Kentucky.

Mr. MCCONNELL. Mr. President, if I could just have one moment to thank the Senator from Kansas for his important contribution to this debate, and thank him for his support.

The PRESIDING OFFICER. Under the Senate agreement, the Senator from New Mexico is recognized.

Mr. DOMENICI. Mr. President, thank you, very much.

Mr. President, I rise today in opposition to the Amendment offered by the Senator from Kentucky, Mr. MCCONNELL. The Senator from Kentucky proposes to replace the Department of Transportation's Disadvantaged Business Enterprise (DBE) program with a new ''emerging business'' program. The amendment is intended to eliminate the DBE program and would have a devastating effect on the opportunities for DBE's to participate in federally funded highway and transit projects.

The proponents of this amendment urge Senators to vote for this amendment by saying that it is incumbent upon the Senate to bring ISTEA into compliance with the Supreme Court's ruling in Adarand versus Pena. They assert that just this summer, after the Supreme Court sent the case back to the District Court, that it found the DBE program was unconstitutional. Furthermore, they declare that the District Court in Colorado followed the Supreme Court's lead and found that the government, in fact, could not meet the Supreme Court's test.

The proponents go on to remind Senators that every member of Congress has publicly and solemnly sworn to support and defend the Constitution of the United States, and that we now have little choice but to comply with the unambiguous, unequivocal mandate of the courts and end the DBE program.

If Senators are considering voting in favor of the McConnell amendment on the basis that the program has been ruled unconstitutional, and that it is now incumbent upon us to bring the program into line with the Supreme Court's rule, then I would ask them to take the time to listen to a different view, and one that I believe is closer to the real facts.

The proponents of this amendment make the argument that we should stand for the rule of law and on this point we agree. However, many Senators will be interested to know that the District Court itself appears not to have followed the rule of law as outlined by the Supreme Court and therefore should not be mislead. I will say this again, because if you listen to the proponents of the amendment, and I have, you are compelled to consider their argument seriously. But if you look at the facts closely, you will find that the very constitutional rule of law the proponents ask us to uphold was itself not precisely followed by the District Court.

In 1995, in Adarand, the Supreme Court did not find the DBE program—or any other affirmative action program—unconstitutional. In fact, seven of nine Justices upheld the constitutionality of affirmative action and its continued need in certain circumstances. Instead, the Supreme Court established a new standard of review—''strict scrutiny''—for federal programs using race conscious measures. This new two pronged test requires that affirmative action programs are ''narrowly tailored'' to meet a ''compelling governmental interest.'' Without deciding whether the DBE program met this new strict scrutiny test, the Supreme Court sent the case back down to the District Court for consideration in lieu of its holding.

Mr. President, this is the rule of law the Supreme Court said must be followed, and it is the rule of law I would urge Senators to support. However, it is not the rule of law that the District Court followed on remand from the Supreme Court, and that is why the District Court's finding that the program is unconstitutional should be viewed with skepticism.

On remand, the District Court accepted Congress' determination that

there was a compelling need for the program. The District Court stated, ''I find on the record before me, Congress had sufficient evidence, at the time these measures were enacted, to determine reasonably and intelligently that discriminatory barriers existed in federal contracting . . . I conclude Congress has a strong basis in evidence for enacting the challenged statutes, which thus serve a compelling governmental interest.'' This meets the compelling governmental interest prong of the Supreme Court's ''strict scrutiny'' test.

The District Judge, however, decided that the program was not sufficiently narrow in its scope. In this part of his decision, the Judge took a position which directly contradicts the Supreme Court's rule in Adarand.

While seven of nine Justices of the Supreme Court said that there could be affirmative action programs that are both narrowly tailored and meet a compelling governmental interest, this District Court Judge found, and I quote, ''Contrary to the Court's pronouncement that strict scrutiny in not 'fatal in fact,' I find it difficult to envisage a race-based classification that is narrowly tailored.''

Obviously, Mr. President, the key words in the District Court's ruling are ''Contrary to the Court's (meaning Supreme Court's) pronouncement. . .'' I agree with the proponents of this amendment that every member of Congress took an oath to support and defend the Constitution of the United States, and we should be vigilant in adhering to that oath. But, the fact of the matter is that the District Court itself does not view the constitutional rule the Supreme Court set in Adarand as being able to be followed because it found that it would be difficult to envisage any affirmative action program that could be narrowly tailored. The Supreme Court said that it could envision a program that was both narrowly tailored and furthered a compelling governmental interest, and herein lies the flaw in the argument of the proponents of the amendment. On this point, Justice O'Connor, writing for the majority stated, ''We wish to dispel the notion that strict scrutiny is strict in theory, but fatal in fact. The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from action in response to it.''

The very District Court ruling that the proponents ask us to rely on is currently being appealed by the Department of Transportation and the Department of Justice in the 10th Circuit Court of Appeals. The case has been fully briefed, but no date has been set for oral argument. So while the proponents suggest that a decision on this matter has been fully resolved by the courts and constitutes a mandate that we should follow, the fact is that it is still an open question.

Furthermore, Mr. President, although the District Court found that the scope of the program was not narrowly tailored, it did not take into account the changes that the Department of Transportation has proposed to the program to respond to the Supreme Court's narrow tailoring guidelines. The Department of Transportation has issued a proposed rule to improve the DBE program and respond to the Adarand decision. The proposed rule is specifically designed to meet the narrow tailoring requirement of the Supreme Court's strict scrutiny test.

Specific narrow tailoring proposals include: Ensuring that specific goals are set to correspond to the availability of qualified DBEs in a given market. The new goal-setting methods will ensure that DBEs receive the same opportunities they would have but for the presence of discrimination—no more, no less. Giving priority to race neutral measures, such as outreach and technical assistance, in meeting overall goals. Recipients would look to these approaches before using race-conscious measures, such as contract goals. Emphasizing the need for recipients to take good faith efforts to meet contracting goals seriously. Recipients must award a contract to a bidder who documents adequate good faith efforts, even if the bidder does not fully meet a contract goal. Providing waivers that will afford recipients increased flexibility in implementing the program.

So while the District Court found it difficult to envisage an affirmative action program that could be narrowly tailored, it did not even have before it the proposed rule that purports to meet that test. These regulations are to be finalized within the next month. After thorough review, both the Department of Transportation, and the Department of Justice have determined the DBE program is constitutional.

The proponents have urged us to comply with the ''unequivocal mandate'' of the courts and end the DBE program. The only ''unequivocal mandate'' the courts have stated is that race-based programs must meet the strict scrutiny test. Contrary to the Supreme Court's decision that an affirmative action program could be both narrowly tailored and meet a compelling governmental interest, the District Court found it ''difficult to envisage'' any narrowly tailored program, and moreover, it did not have before it the very rule proposed to address the aspect of the Supreme Court's strict scrutiny test.

President Eisenhower, when he was still general, used to say that he ''. . . never liked to make decisions too quickly . . .'' I would urge my colleagues to heed the advice of President Eisenhower, and not make a decision to quickly on this matter prior to a determination being made of whether the proposed rule can meet the narrow tailoring aspect of the Supreme Court's test.

The Senator from Kentucky's amendment requires states to take action to enable emerging businesses to compete for highway and transit contracts and subcontracts. These actions include outreach to emerging small businesses in the construction industry, technical services and assistance with bonding and lending, and technical services and assistance with general business management. The amendment prohibits discrimination and preferential treatment based, in whole or in part, on race, national origin, or gender.

Mr. President, the proponents of this amendment have lead members to believe that the DBE program is really a ''quota program''. I want to stress at the outset that this program is not a ''quota program'' as some have suggested. There is a great difference between an aspirational goal and a rigid numerical requirement. Quotas utilize rigid numerical requirements as a means of implementing a program. The DBE program utilizes aspirational goals.

Under the DBE program, state and local government recipients of Department of Transportation funds administer the DBE program. Each year, they determine how much DBE participation is reasonable to expect based on the availability of DBEs and the types of work involved. The recipient's annual goal may be more or less than the national 10% goal established by Congress, and it is worth noting that if they do not meet that goal there are no penalties. In fact, the Department of Transportation has never penalized or sanctioned a state or local recipient for not achieving their goals. This provides flexibility to meet local conditions. Contract goals are not operated as quotas because they only require that the prime contractor make ''good faith efforts'' to find DBEs. If a prime contractor cannot find qualified and competitive DBEs, the goal can be waived.

In as much as the DBE program is not a quota program, neither does it constitute reverse discrimination as the proponents have suggested. The DBE program works to remedy discrimination, not cause it. In fact, nonminority business people who are disadvantaged have applied and been accepted into the DBE program. In fact, any white male, as long as he can demonstrate social and economic disadvantage, can be admitted to the program.

Let's remember, the Department of Transportation reports that 85% of the contracting receipts under ISTEA programs go to non-DBEs with the current DBE program in place. This figure indicates that minority firms do not dominate the construction industry. The role in the construction industry will only be diminished by the elimination of the DBE program.

The DBE program works to ensure a level playing field for qualified DBEs which have for years confronted discrimination and been blocked out of contracting opportunities. That discrimination is evidenced by District Court's finding that the program meets the compelling governmental interest

prong of the Supreme Court's strict scruity test.

THE NEED FOR A DISADVANTAGED BUSINESS ENTERPRISE PROGRAM

There is discrimination in the construction industry. Minorities make up 20 percent of the U.S. population, but minority-owned businesses are only 9 percent of construction firms and they get only five percent of the construction business. Women own a third of all small businesses but received less than three percent of federal procurement contract dollars in 1994.

Lenders discriminate against minority firms. It is a lot harder to capitalize a minority construction company. Black construction firms can raise fifty times fewer dollars per dollars of equity capital than White firms. When there is no affirmative action program, DBEs don't get any work.

In Michigan within six months of ending the state DBE program minority-owned businesses were completely shut out of state highway construction. During the same period, in the same state, under the Federal-aid highway DBE program the same DBEs received 554 subcontracts worth 12.7 percent of the federal aid dollars. When there is no affirmative action program white-owned prime contractors reject minority or women-owned firms even when they offer the lowest bid.

The DBE program follows the Supreme Court's Requirements. The current DBE program sets a national participation goal of 10 percent for disadvantaged business enterprises.

The goals are flexible. DOT can, and has permitted, a lower goal based on availability of DBE firms and opportunities for subcontractors.

The goals are sometimes waived completely if a prime contractor, despite good-faith efforts cannot find a qualified disadvantaged business to meet a specific contract. The proposes regulations respond to the ''narrow tailoring standards'' set out by the Supreme Court.

Courts have said: specific goals should correspond to the availability of qualified DBEs in a given market. Provide the same opportunity to DBEs that they would have received but for the presence of discrimination—no more no less.

Courts have emphasized the importance of ''race neutral'' measures such as outreach, training, and technical assistance.

Race-neutral measures would be used to achieve as much DBE participation as possible before any ''race-conscious'' measures are used. Only use ''race-conscious measures to extent, and only for as long as, they are needed to achieve a level playing field. Goals are not quotas. Prohibits set-asides except in most severe cases of discrimination.

Mr. President, for those who are managing the bill, or might be waiting to speak this evening, I don't believe I will use all of my time. If I am not holding anybody up, I might reserve some of it until tomorrow, or whenever we finish it.

How much time is allocated to the Senator from New Mexico?

The PRESIDING OFFICER. The Senator from New Mexico has 36 minutes remaining.

Mr. DOMENICI. Mr. President, needless to say, the Senator from New Mexico who comes from a State that has about 11 percent American Indians as part of our population mix and about 38 percent Hispanics—needless to say, I have lived my adult life in an atmosphere where I have rubbed shoulders with those members of the minority—American Indians and Hispanics—in my State as they spoke of opportunity and as they spoke of a chance to own a business and of their hope that their children would get a good education so they could have a chance like all of us had in New Mexico who are not Hispanics or Indians.

I have seen a great number of successes in terms of business by the minority community in New Mexico. Much less by the Indians proportionately—American Indians—than by the Hispanics. And that has a lot of cultural nuances to it also, and tribal nuances and the like.

But I have strived most of my life to try to be part of the kind of community and the kind of lawmaking that gave the minorities an equal chance to own businesses. That is essentially what we are talking about here. And we are engaged in a debate—I don't think a debate about whether everyone, including minorities, ought to have a chance to own businesses in America. I would assume if we put that question to everyone, they would all say of course. But the question is, even though we all say of course, do they really have an equal opportunity? Is it as easy for an intelligent, well-educated Hispanic American, New Mexican, or a Native American to get into business? I will say that without any of the Government involved, they are getting more and more opportunities. And there is no question that more Hispanics are in business in the United States on their own without the benefit of the Federal Government programs than those who are in business because of the Federal programs.

But I can also assure you that the Hispanic Americans who live in my State and in other States are genuinely listening today to this debate. And if they aren't tuned in on C-SPAN, they will soon be hearing what people tell them we are doing here on the floor of the Senate. I guarantee you, Mr. President, and my good friend, exceptionally good friend from Kentucky, who happens to be on the opposite side of this issue today, on the precise formulation of the issue—I guarantee you that whether Hispanics and Native Americans, or other minorities, or women who are part of this program and are scurrying around to catch up with the men in business ownership—incidentally, as an aside, the fastest growing portion of the American business ownership portfolio is now women.

As a matter of fact, as of 2 years ago, women-owned businesses in America, believe it or not, and all by themselves, employed more people than the Fortune 500 in America. And it was the fastest growing piece of those who were entrepreneurs. On the other hand, that doesn't mean that they don't need some help sometime to break into the private sector.

So I have come to the floor concerned because I do not want to be part of an America that is saying, because we don't want quotas and we don't want set-asides, which I will agree we should not have—we are not going to have a major program within the highway programs of this country, which we are currently thinking is $173 billion worth of business, more or less, over the next 6 years, and add to it $41 billion more or less for mass transit. I do not want to leave the floor with that bill and with people being able to say there may not be any minority participation in the businesses that put this fantastic roadway and mass transit system together. That may be a bit of an exaggeration. But essentially what we have done in the past is to try to make sure that there was participation. And we have broadened that to women as part of a group of Americans that are disadvantaged when it comes to owning their own businesses.

So I have for the last 3 days—not for months—studied this issue. And I must say I didn't have hours upon hours to do it; I have a lot of other things I have to do around here. But I have come to the conclusion that we do not have to wipe out the Disadvantaged Business Enterprise Program in this bill in order to accomplish our goal, which I think is rather unanimous, that there be no quotas yet there be some positive direction so that women and minorities will get a reasonable portion of the business under this very, very large multimillion-dollar contract authority that is going out to American business, large and small, to fulfill.

The more I read, and the more I said, ''But you can't be right, Senator DOMENICI, because of your wonderful friend from Kentucky whose thoroughness and constitutional acumen on the bill called campaign finance''—I read the same cases with him, and I agreed with him. In fact, I told him that I had come full circle and could clearly understand in campaign finance how it was a freedom of speech issue. He recalls that. I would not have gotten to that point. I was still fuzzy about it until I heard his interpretations of the Supreme Court.

But I tell you that I do not agree that this minority business program that we have in this ISTEA bill before us is a program that mandates quotas and mandates set-asides. In fact, I don't believe it is even fair to just look at the face of the statute, as has been done here on the floor, and read it, and say it is patently a quota system because, Mr. President, it is not implemented without regulations. And the

regulations and the way the program is being implemented, from everything I can find out, do not establish quotas or set-asides.

Then I said, ''Well, my friend from Kentucky, whom I have just expressed my admiration for, keeps saying the Supreme Court has already ruled it unconstitutional.'' And I said, ''If that is really true, he should get 100 votes.''

So I started asking. I have some lawyers on my staff. I don't think necessarily I have Laurence Tribe on my staff. I could have sent it up to Harvard for them to look at it. Maybe my friend from Kentucky would say that wouldn't be a very good place to send it; I don't know. But maybe over to Stanford. Well, let's settle for old Michigan, the University of Michigan.

But in any event, the truth of the matter is that I have now received very, very different information that I think makes sense about whether this Disadvantaged Business Enterprise Program as currently being administered has been declared unconstitutional by the Supreme Court. As a matter of fact, let me say I am convinced that it has not.

What I have done—and I hope the Senate will find this interesting—is I have asked the Attorney General's Office of the United States and the Secretary of Transportation to answer some very precise questions. I have them answered. They are so interesting and so precise. Maybe that is because I asked the questions that I wanted answered. I would like to read them. There are only six. When I am finished later this evening, I will pass out the letter to whoever wants it. It will be then signed by the Attorney General of the United States and by Secretary Slater.

Let me read the letter. The letter is dated March 5, 1998, directed to me.

It says:

DEAR SENATOR DOMENICI: This letter responds to questions that you have posed regarding the Disadvantaged Business Enterprise (DBE) Program currently authorized by the Intermodal Surface Transportation and Efficiency Act.

1. Has the text of section 1111 been ruled on by the Supreme Court, and if not, how does section 1111 differ from the statute that was before the Supreme Court in *Adarand v. Pena*?

The Supreme Court in *Adarand v. Pena* did not find this or any other program to be unconstitutional. Indeed, the Supreme Court did not even consider the constitutionality of section 1003(b) of ISTEA, which sets a 10% goal for expenditure of the authorized funds with DBEs. The *Adarand* case involved a different program: the Department of Transportation's use in its own direct federal contracts of compensation to encourage federal prime contractors to use DBE subcontractors. The compensation was provided through a specific contract provision used only in DOT's own direct contracts for highways on federal lands. Even as to this compensation program, the Supreme Court's opinion merely establishes that federal race-conscious programs, like state and local programs, are subject to strict scrutiny. The Court made clear, however, that such scrutiny is not ''fatal in fact,'' and that the federal government has a compelling interest in remedying the lingering effects of discrimination through properly tailored programs.

2. How do you conclude that Section 1111 of the ISTEA bill was not before the Supreme Court in *Adarand v. Pena* and has not been declared unconstitutional?

The Supreme Court's opinion in *Adarand* addresses only the DOT's subcontracting compensation program, not the ISTEA DBE program. The Supreme Court's remand in *Adarand* makes this clear—it states that the courts below were to determine only ''whether any of the ways in which the Government uses subcontractor compensation clauses can survive strict scrutiny.'' 515 U.S. at 238. Only one district court judge—the judge who is considering the remand in *Adarand*—has found the compensation clause program unconstitutional. While that district court judge also ruled the ISTEA program unconstitutionality of ISTEA was not properly before the court. The Justice Department has argued on appeal to the Tenth Circuit that the district court improperly addressed the constitutionality of ISTEA and, in any event, erroneously concluded that ISTEA was unconstitutional.

3. Section 1111 of the ISTEA bill states, ''not less than 10 percent of the amounts made available under this program shall be expended with small business concerns controlled by socially and economically disadvantaged individuals.'' In view of this language, why is the DBE program not a mandatory set aside or rigid quota program?

The 10 percent figure contained in the statute is not a mandatory set aside or rigid quota. First, the statute explicitly provides that the Secretary of Transportation may waive this goal for any reason—specifically, the language quoted above is preceded by the phrase ''[e]xcept to the extent that the Secretary determines otherwise.'' Second, in no way is the 10 percent figure imposed on any state or locality. Under the program, it is the states that really set goals for contracting. They may set goals higher or lower than 10 percent depending upon the local availability of DBEs, projected contracting needs and past results of their efforts. Moreover, state agencies are permitted to waive goals when achievement on a particular contract or even for a specific year is not possible.

The DBE program does not set aside a certain percentage of contracts or dollars for a specific set of contractors. Nor does the program require recipients to use set asides. The DBE program is a goals program which encourages participation without imposing rigid requirements of any type. Neither the Department's current or proposed regulations permit the use of quotas. The DBE program does not use any rigid numerical requirements that would mandate a fixed number of dollars or contracts for DBEs.

4. The comments to the new rule states, ''[i]f race-neutral means are the first resort under this proposed section, then set asides and other more intrusive means, such as a conclusive presumption, are the last resort.'' In view of this language, why is this not a mandatory set aside or rigid quota program?

The comment is intended to make clear that race- and gender-neutral mechanisms (e.g., outreach, technical assistance) are the means of first resort for recipients to use in seeking to meet overall goals. In fact, the rule itself prohibits setting aside particular contracts unless the state has been unable to meet its goals for a number of years *and* there is a court-order or state law which directs the recipient to use set asides. Such set asides would not be permitted, even where state law authorizes their use, unless it can be shown that less restrictive measures, including race neutral programs and flexible contract goals, were insufficient to address the demonstrated effects of discrimination. As discussed above, the DBE program thus neither mandates set asides nor permits the use of rigid quotas.

5. Are there sanctions, penalties or fines that may be imposed on any recipient who does not meet DBE program goals? In the fifteen years that this program has been in operation, has any state been sanctioned for not meeting its program goals? In answering please provide specific examples to support your conclusion.

No state has ever been sanctioned by DOT for not meeting its goals. Nothing in the statute or the regulations imposes sanctions on any state recipient that has attempted in good faith, but failed, to meet its self-imposed goals. In 1995, two states failed to meet their goals; in 1996, two other states failed to meet their goals; and, in 1997, three states failed to meet their goals. There were no sanctions, penalties or fines of any kind imposed against any of those states.

6. Is this program only for minorities and women?

No. Any individual owning a business may demonstrate that he is socially and economically disadvantaged, even if that individual is not a woman or minority. Both the current and proposed regulations provide detailed guidance to recipients to assist them in making individualized determinations of disadvantaged status. And, in fact, businesses owned by white males have qualified for DBE status.

7. What recourse is available to low bidders who have made good faith efforts to meet DBE contract goals, but despite those efforts were not able to do so? Is it true that low bidders who have tried but failed to meet the contract's DBE goal are automatically eliminated from consideration for the contract?

Under the current regulations, if a prime contractor is unable to find available and qualified DBEs to meet a specific contract goal, the goal may be waived. Under the proposed rule, the goal must be waived. No low bidder who tried in good faith but failed to meet the goal is automatically eliminated from receiving the contract.

Thank you for your interest in, and support of, this important program.

Sincerely,

JANET RENO.
RODNEY E. SLATER.

That is the extent of the letter which I have now read into the RECORD. Mr. President, let me say that, obviously, reasonably oriented Senators, who have good motives, maybe even the same motives and same goals, can disagree. But I take very seriously whether I should come down and vote for a statute that is patently unconstitutional, and I am very confident that, when I vote against the amendment of the distinguished Senator from Kentucky to strike that provision and substitute for it, that I am, when I vote against it, voting to leave in this bill and the regulations accompanying it, a constitutional provision with reference to helping the disadvantaged, including women and any business that might qualify that is economically disadvantaged.

I hope, and I say to the administration very clearly right now: You have now put the signature of the Attorney General of the United States and the Secretary of the Treasury on the answer to these seven questions. And this Senator, and I think a number of other Senators, is going to be voting to keep

the provision in the bill based upon these kinds of assurances. Let me make sure that the President of the United States understands that if it turns out that, as they produce the completed regulations for the program, as they attempt it across the board for all programs—they are in the process of doing that; there are many other departments other than the Department of Transportation that need refined regulations. If, in fact it comes out in a few months that the regulations are not being interpreted in the way suggested here, then I assure you that we will change them. I am not suggesting we will do away with help and assistance in the area that is encompassed here, but many are voting because they have confidence that the rules, as they implement this, will not be inconsistent with these statements. This better become a very, very serious challenge to the administration as they finally implement this program.

If they do that, and they are done as suggested in these responses, then I have no doubt that anybody attempting to appeal will lose. I have no doubt that the issue will not be before us again, because it will not have any set-asides to it, it will not have any fixed ratios, the kinds of things that we all know we don't want—quotas, numerical quotas and the like.

With that, I reserve the remainder of my time. But I would say to the leadership, if the rest of the time is running out and we are ready to vote at any time in the near future, I believe a call to me will get me to relinquish the remainder of my time. But for now I will reserve it.

I yield the floor.

The PRESIDING OFFICER (Mr. ALLARD). The Senator form Kentucky.

Mr. MCCONNELL. I can say to my good friend from New Mexico, for whom I have the greatest respect, I would like to just mention what the Supreme Court said in the Adarand case. Basically what the Supreme Court did was to lay out the standard, and they said that any racial presumption must be narrowly tailored to meet a compelling governmental interest. ISTEA uses that racial presumption. Then what the Court did was they sent the case back to the district court to determine what statutes and regulations were in play in Adarand and whether the statutes and regulations met the strict-scrutiny standard.

In the district court case—I apologize to my good friend from New Mexico if I said the Adarand case declared the regs unconstitutional. I don't think I said that on the floor here today. I may have said that in some conversation we had yesterday. But what the Adarand case did was lay out the standard, sent the case back to the district court, and the district court said, and this is a direct quote, ''Section 1003(b) of ISTEA and the regulations promulgated thereunder are unconstitutional.'' So the district court, applying the standard of Adarand, said the case was unconstitutional.

The Department of Transportation, in trying to appeal the district court decision—they don't like that decision. They are going to appeal it to the 10th circuit. The Department of Transportation in their brief, in describing the lower court decision, says, ''This order declares unconstitutional the program operated by DOT, but also the Federal aid DBE program operated by the State of Colorado under ISTEA.''

So, I think we are in the same place here. Technically, the Supreme Court only laid down the standard in this case. But that was a landmark standard. It was sent back down to the district court, which applied the standard and found this unconstitutional. And the Court in another case, a very similar case to this—the Court meaning the Supreme Court—has addressed this issue. So it is not like the Supreme Court has never spoken, I would say to my friend from New Mexico, on this subject. In the Croson case the Court said, ''In sum, none of the evidence presented by the city''—this was referring to the city of Richmond, a similar factual situation:

> None of the evidence presented by the city point to any identified discrimination in the Richmond construction industry. We therefore hold that the city has failed to demonstrate a compelling interest in apportioning public contracting opportunities on the basis of race.
>
> To accept Richmond's claim that past societal discrimination alone can serve as the basis for rigid racial preferences would be to open the door to competing claims for remedial relief for nearly every disadvantaged group. The dream of a nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement would be lost in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs. Courts would be asked to evaluate the extent of the prejudice and consequent harm suffered by various minority groups. Those whose societal injury is thought to exceed some arbitrary level of tolerability then would be entitled to preferential classifications. We think such a result would be contrary to both the letter and spirit of a constitutional provision whose central command is equality.

Finally, let me say the Supreme Court has addressed a similar issue in the Croson case. The Supreme Court laid down the standard in Adarand, sent it to the district court, which applied the standard which found the very provision we are talking about unconstitutional. That is on appeal to the 10th circuit. And the sufficiency of the new regs that my good friend from New Mexico and other speakers on the other side of this issue have referred to I suppose is the issue before us today. In other words, has the Department of Transportation, bearing in mind the Adarand decision and the subsequent district court decision, adjusted the regulations in such a way as to come into compliance with the law?

I cite on that point a letter from George LaNoue, who is an expert in this particular field who has testified before a number of congressional committees on this subject. Professor LaNoue addresses the adequacy of the new regs. He says:

> It is being asserted that various alterations and proposed regulations for ISTEA solve the constitutional problems created by the use of race, ethnic and gender preferences in awarding of contracts under that program. That assertion is incorrect for two reasons. First, the regulatory alternatives go only to the issue of narrow tailoring—
>
> Narrow tailoring—
>
> not to the constitutional requirement that a compelling basis of remedying identified discrimination be established before any, for the use of preferences, be considered. None of the fundamental evidentiary requirements necessary to support the preferences in this legislation have been established by the administration or by Congress.

He concludes his letter, which I will ask to have printed in the RECORD:

> Proposed regulations are either irrelevant or incomplete to the major requirements of narrowly tailoring, and they do not begin to supply a compelling basis for the use of preferences.

So where I think we are is that reasonable people can differ about what the courts are saying. I think it is pretty clear that the Senator from New Mexico probably speaks for the majority here in the Senate, and we will get an opportunity, as he indicated, to find out what the law is because it is on appeal to the 10th circuit.

It is also very, very clear that quotas and preferences are going to die hard, Mr. President, in this country. There are roughly 160 preferential quota and preference programs in the Federal Government which dole out benefits on the basis of gender and race. It looks as if the only way we will be able to dismantle those is case by case by case.

The Senator from New Mexico is certainly correct, the district court decision applying the standard in Adarand is on appeal to the 10th circuit. But there are numerous Supreme Court and circuit court decisions that give us an indication of what the result will be. It will probably be a denial of cert, which someone will argue, again, is not a Supreme Court decision. But a denial of cert, if the 10th circuit upholds the district court, will, in fact, finish the case.

I am not saying the Senator from New Mexico will take this position at all, but I bet you there will be some, I say to my good friend from New Mexico, who, if we offer this amendment at some later time, will say, ''Well, there wasn't a Supreme Court decision on it, it was only a denial of certiorari.

So I thank the Senator from New Mexico. I understand the sensitivity of this issue. I certainly agree with him that he could rely on the Attorney General's opinion about this, if he chose to. She is a part of the administration. The administration opposes dismantling this particular program. Just speaking for myself, I am not surprised that she would take the position she does, and ultimately the courts will decide.

Mr. DOMENICI addressed the Chair.

The PRESIDING OFFICER. The Senator from New Mexico.

Mr. DOMENICI. I yield myself up to 5 minutes.

Let me say to my friend from Kentucky, actually, I am very pleased with the remarks he has made, because essentially there is no question that the amendment which he offers, as I view it, is premature if the purpose is to make this bill eliminate any program that has been ruled by the Supreme Court to be unconstitutional, because obviously, whatever the district court did with it—and it has not been rendered unconstitutional prior to this district court decree—whatever they did to it is on appeal. As a consequence, we don't even know if the appellate court agrees that it is unconstitutional as determined by the district judge who, incidentally, did not even have ISTEA before the court when this decision was rendered.

Let's just make one other observation about the administration. And I hope Democrats will join me with this. I have just said they better be right. They just told us what it does and doesn't do and how they are going to make sure it is tailored that way. But I think it is fair to say to the President that some of us remember when the decisions came down from the Supreme Court about set-asides and the 8(a) program and others that, as the President said—and I can't quote him verbatim nor do I remember the time, but I can assure you it was sometime back—''I will have my administration go through all these laws and correct them so that they meet what the Supreme Court's test is.'' Frankly, there are a lot of people who have been waiting for them to get that done.

Mr. MCCONNELL. I ask my friend, did they find any they thought were inappropriate?

Mr. DOMENICI. As a matter of fact, I understand from conversations this morning, the conversations that preceded this letter, that they are in the process of rewriting rules and regulations for all of them, not just ISTEA, and I said, ''You better hurry up.''

We all know that they have to be rewritten. The minority community knows they have to be rewritten. This debate may have been avoidable. Had they written these both generic and specific rules, we might not have had this argument.

The answer I received, so the Senator will know, is that it is very difficult when you look at the whole array of programs. The Senator says there may be more than 160?

Mr. MCCONNELL. Close to. Between 150 and 160.

Mr. DOMENICI. It is very difficult for the lawyers and those who put them together to get it all finished. I think this debate and this letter will push them to get it done, and get it done as quickly as possible.

I yield the floor, and I thank the Senator.

Mr. MCCONNELL addressed the Chair.

The PRESIDING OFFICER. The Senator from Kentucky.

Mr. MCCONNELL. Mr. President, with regard to the likelihood of the district court decision in Adarand being overturned—I see my friend from New Mexico is leaving—just to close the discussion on what is likely to be the outcome in the case, I asked the Congressional Research Service about the cases in this particular area of the law.

Let me, Mr. President, for our colleagues in the Senate, point out that the Congressional Research Service has found no—no, not a one—no court ruling after a trial where a race-based contracting program has met the Supreme Court's test of strict scrutiny.

I say to my friend from New Mexico, there hasn't been a single case that the Congressional Research Service could find where a race-based contracting program has met the Supreme Court's test of strict scrutiny. In fact, CRS has explained that Adarand conforms—this is not sort of an aberration out there—it conforms to a pattern of Federal rulings across the country striking down race-based contracting programs as unconstitutional:

Associated General Contractors of California v. San Francisco, a ninth circuit case; Michigan Road Builders v. Milliken, a sixth circuit case; Groves v. Fulton County in the Northern District of Georgia; Milwaukee County Pavers Association v. Fiedler in the seventh circuit; Associated General Contractors of Connecticut v. New Haven, district court in Connecticut; O'Donnell Construction Co. v. District of Columbia in DC Circuit; Arrow Office Supply v. Detroit, Eastern District of Michigan; Louisiana Associated General Contractors v. Louisiana in Louisiana; Associated General Contractors of America v. Columbus, Southern District of Ohio; Engineering Contractors Association of South Florida v. Metropolitan Dade County in the 11th circuit; and finally, Contractors Association of Eastern Pennsylvania v. Philadelphia in the third circuit; and more recently, Monterey Mechanical v. Wilson in the ninth circuit, decided last September; Houston Contractors Association v. Metropolitan Transit, decided last November.

Mr. President, CRS was unable to find a single court ruling where after a trial a race-based contracting program has met the Supreme Court's test of strict scrutiny.

I think it is extremely unlikely, in conclusion, I say to my friend from New Mexico, that we are going to have a court decision overturning the district court finding after Adarand laid down the standard. I thank him for his important contribution.

This is a very, very important issue about what kind of a country we are going to have, what kind of America we are going to have. Are we going to realize Martin Luther King's dream of a colorblind society, or are we going to continue down what the Senator from Kentucky believes is a mistaken path of putting people into boxes, into groups, and to doling out benefits and rights based upon what ethnicity they may be, whether they are male or female? Are we going to continue to go down that path or really work to achieve a colorblind society? I think the courts are telling us that quotas and preferences based on race, ethnicity, and sex are not going to be upheld. The pattern is clear, and it seems to me we ought to follow what is, it seems to me, the law of the land in this particular instance. I yield the floor.

Several Senator addressed the Chair.

The PRESIDING OFFICER. The Senator from Montana.

Mr. BAUCUS. Mr. President, I note Senator KENNEDY is on the floor. He has been over here many times seeking to speak. I yield to the Senator 15 minutes.

Mr. KENNEDY addressed the Chair.

The PRESIDING OFFICER. The Senator from Massachusetts.

Mr. KENNEDY. Mr. President, I welcome this opportunity to continue the debate on the steps needed to achieve the goal of equal opportunity for women and minorities. Clearly, we have made substantial progress toward the goal of equal justice under law, but just as clearly, we still have a long way to go.

From President Kennedy to President Nixon to President Clinton, there has always been bipartisan recognition in the White House and Congress that the playing field is not level for women and minorities and widespread acceptance of the need to take steps to remedy the effects of persistent discrimination.

Civil rights is still the unfinished business of America. We have made significant progress toward justice for all and opportunity for all. But, as the church arson epidemic, the Texaco and Mitsubishi scandals, the Good Ol' Boys Round Up, and the brutalizing of a Haitian immigrant by police officers in New York City demonstrate, we are not there yet.

Incredibly, there are some who believe that discrimination is a thing of the past, and that the playing field is now level for women, for minorities, and for other victims of discrimination. They are wrong. Job discrimination is still a persistent problem for minorities in all aspects of the economy. The glass ceiling still prevents large numbers of women from attaining important job opportunities.

Nowhere is the deck stacked more heavily against women and minorities than in the construction industry. African American contractors still report arriving at job sites to find signs with racial epithets. One African American contractor was told to leave a home site by a white customer who said, ''You didn't tell me you were black and you don't sound black.'' In California, a female contractor was told that the reason her asbestos-removal business had declined, even though her work was good, was because ''it's back to the good ol' boys club. Haven't you heard affirmative action is out?''

There is no doubt that if we terminate meaningful programs, like the

Disadvantaged Business Program in ISTEA, the clock will be turned back—back to bigotry, back to closed-door deals, back to denial of opportunity. The door that America is steadily opening to women and minorities will be shut once again.

Proof comes from communities across the Nation. If we terminate a State disadvantaged business program, public contracts awarded to businesses owned by women and minorities decline rapidly.

In Philadelphia, contracts awarded to women and minorities dropped 97 percent—97 percent—in the first month after the city terminated its disadvantaged business ordinance.

In Tampa, contracts awarded to black-owned firms dropped 99 percent—when that city ended its goals program.

In Michigan, minority firms were eliminated as contractors on State highway projects within 6 months after the suspension of the State's disadvantaged business program in 1989. Within 9 months, participation by women-owned businesses had dropped to 1 percent of total awards.

Can it be that no qualified minority contractor was available for a highway construction contract in Michigan after the State program ended? It defies reason to believe that is true.

The Disadvantaged Business Enterprise Program and others like it have brought new faces to the table. Many women and minorities have had the opportunity to participate—to show they can excel. An electronics company in Orlando—a steel assembly firm in Illinois—a crane and crane operator supplier in Chicago—all owned by women. This program gave them the opportunity to prove themselves. But if these programs end, they are deeply concerned that the major contractors that called them and the companies that praised their work will disappear—not because they do bad work, or charge more than their competitors, but because they are women.

Dorinda Pounds, currently president of Midwest Contractors, Inc., an Iowa highway construction business, had trouble getting startup capital. After 9 years in the construction business, she had decided to start her own business and was faced with the task of raising $500,000 for equipment and expenses. She turned to banks and investors, but they initially expressed concern that the male contractors would lock her out and the banks would not recoup their investment. The DBE program certification was indispensable in persuading bankers and investors to take a chance on her new company.

Three years later, prime contractors ask for her—not because she is a DBE, but because she can get the job done.

Jennylynne Gragg, president of G and G Signals and Lighting, is another example. After 6 years in her parents' construction business, she became the company's general manager, and was able to increase profitability immediately. Her father, acting on his belief that the construction industry is ''no place for a woman,'' offered her job to a younger brother with no experience, and Jennylynne decided to prove him wrong.

Eight years later, she operates a successful contracting business of her own. But it has not been easy. She and her mother—now a business partner—have to struggle to obtain financing. General contractors often solicit their bids with no intention of hiring them. Even when they are the low bidder, general contractors have often used another firm and accepted a higher bid.

Why would a general contractor accept a higher bid? It doesn't make sense—unless you remember that the traditional business network doesn't include women or minorities. At a Judiciary Committee hearing on this issue, Janet Shutt, who operates an Indiana construction company, said some general contractors would rather lose money than deal with female contractors.

The Department of Transportation DBE program is changing all that. The program was signed into law by President Reagan in 1983 to assist minority-owned firms.

It was expanded in 1987 to include women. President Reagan and Congress recognized that it was time to end the pervasive discrimination in the highway construction industry, that positive steps were needed to eliminate years of bias against women and minorities.

Under the DBE program, the Department of Transportation sets a national goal—10 percent of Federal contracting dollars—for participation by women and minorities. States then set their goals—not quotas or set-asides—based on the availability of DBEs and the kind of work that must be completed. Most States set a goal of 10 percent. But on occasion, States have set goals lower or higher than the national level. States have never been penalized for failing to meet their goal.

Once States set their goals, contracts are identified for DBE participation. Prime contractors must either meet the goal or show that they have made a good-faith effort to meet it. The new regulations proposed by the Department of Transportation clarify that States must accept valid showings of good-faith efforts, so that the goal will never become a quota.

The proposed regulations also ensure that only truly disadvantaged businesses can participate in the DBE program. Currently, although women and minorities are presumed to be DBEs, those who are not economically disadvantaged are excluded from the program. The new regulations will ensure the integrity of the program by requiring that women and minorities certify that they are disadvantaged and provide a summary of net worth. The presumption may be challenged at any time by the State or the local certifying agency, the Federal Government, or any third party.

Contracting firms owned by white males may also participate in the DBE program, and the proposed regulations clarify the existing requirements for certification. In fact, Randy Pech—the owner of the Adarand Construction Company involved in the Supreme Court case—is seeking DBE certification.

Discrimination by general contractors is a major obstacle faced by women and minorities. But there are many others. A white contractor with a background identical to that of an African American contractor can expect to receive over 50 times as many loan dollars per dollar of equity capital. A study of contractors in Atlanta found that 19 percent of nonminority firms had unlimited bonding capacity—a privilege granted to no minority firm, regardless of size.

Similarly, an African American owned company in Georgia found that if it sent white employees posing as owners of a white-owned company to purchase supplies, they could receive price quotations two-thirds lower than those quoted to the parent company.

Discrimination in the form of higher quotations from suppliers is commonplace. A recent survey reported that 56 percent of African American business owners, 30 percent of Latino business owners, and 11 percent of Asian owners had experienced this discrimination.

Yet, despite the exclusion, the mistreatment, and the prejudice that women and minority businesspeople experience every day—despite the clear and convincing evidence that the DBE program and others like it have given women and minorities a first, fair chance to succeed, there are those who want to eliminate this sensible program.

Some argue that the DBE program is unconstitutional. But, the Supreme Court's Adarand decision did not strike down the program, nor does it prevent Congress from supporting measures to respond to the pervasive discrimination that still exists in this country.

The Supreme Court, in reviewing this issue, has said only that Federal race-conscious programs must undergo ''strict scrutiny''—they must be narrowly tailored to meet a compelling governmental interest.

The Court did not say that affirmative action programs are unconstitutional. What the Court did say is that:

> [W]e wish to dispel the notion that strict scrutiny is ''strict in theory, but fatal in fact.'' The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it.

To ensure that the DBE program passes the strict scrutiny test, the Department of Transportation is currently completing new regulations that give priority to race-neutral measures. The regulations also emphasize that States must award contracts to bidders who document adequate good-faith efforts, even if the bidder doesn't meet

the DBE goal. In addition, the regulations clarify DBE certification standards, including the eligibility of white males who prove disadvantage.

We know that properly administered programs can meet the strict scrutiny test. State and local programs implemented after the Supreme Court's Croson decision prove this point completely.

I urge my colleagues to vote against the amendment offered by Senator MCCONNELL. I support education and outreach efforts to eliminate discrimination. But they are not enough alone to end the discrimination that clearly exists. Congress must remain committed to taking needed steps to guarantee equal opportunity for all Americans.

Mr. President, I yield back the remaining time.

The PRESIDING OFFICER. Who yields time?

Mr. MCCONNELL addressed the Chair.

The PRESIDING OFFICER. The Senator from Kentucky.

Mr. MCCONNELL. The Senator from Indiana is around. Someone can check the cloakroom. He is, as far as I know, the last speaker on this side for the evening. He is on his way, I am told.

The PRESIDING OFFICER. Does the Senator suggest the absence of a quorum?

Mr. MCCONNELL. I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. MCCONNELL. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. MCCONNELL. Mr. President, I yield to the distinguished Senator from Indiana such time as he may need.

The PRESIDING OFFICER. The Senator from Indiana is recognized.

Mr. COATS. Mr. President, we are considering an amendment offered by the Senator from Kentucky, which is designed to address one part of the increasingly contentious debate over affirmative action. The Supreme Court's ruling in the Adarand decision most probably makes the existing Disadvantaged Business Enterprise Program unconstitutional; and, therefore, I think the Senator's amendment is appropriate.

There is a growing sense, however, that as well-intentioned as affirmative action and set-aside programs are, whether they are constitutional or not, really in any way can be reconciled to the American commitment to equal justice under law. At the same time, I think it is important to point out that Americans do remain deeply troubled by the persistent poverty and lack of opportunity that quotas and affirmative action were originally meant to remedy. As unemployment approaches zero in much of the country, the inner cities are still overwhelmed by double-digit joblessness, social breakdown, and education failure.

I want to be clear here this evening: Quotas and set-asides are not the answer to these problems. We have tried that. It has not worked. It does, I believe, violate constitutional principles of equal justice under law. Set-asides and quota programs have been largely a non sequitur to the social and economic questions faced by the urban poor.

Quotas and set-asides do not strengthen civil society and do not strengthen our neighborhoods. It is the churches and charities and volunteer groups and community associations that bind neighborhoods together, along with strong families. That is what makes progress possible in these areas, not a statute written by the Congress that attempts to force a solution that cannot be forced.

Quotas and set-asides do not foster the kind of spirit of entrepreneurship, that is necessary and needed in these communities, by encouraging the creation of the kinds of small businesses that provide employment and help anchor community life. And they do nothing at all for millions of children who are trapped primarily in urban public schools serving primarily low-income families—schools which, by any measure, are failing to provide adequate education for children who are trapped in this school system.

When it comes to the real concerns of urban America, the national debate over set-asides and quotas is just off the mark, Not just off the mark; it is irrelevant. An unfortunate side effect of this debate, however, is that it gives the impression that those who support the amendment of the Senator from Kentucky have nothing else to say about the real concerns of poor Americans living in inner cities, all they want to do is eliminate the one advantage that individuals have.

Now, in the warp and woof of this quota debate, these supporters—Republicans, conservatives, and the others—are painted as largely unknowing and uncaring and uninterested in the real concerns of the poor. Now, if this charge was warranted, it would be a tragedy—a tragedy for our party, a tragedy for conservatives, a tragedy for Republicans. But such a charge is not warranted.

Those who would support the amendment from the Senator from Kentucky, those who would acknowledge that the quota set-aside program has not addressed the real problems, are not those without alternative proposals. They are not those who don't share the concerns of the poor. We, as a group, have put considerable time and energy and thought into new approaches to helping restore our cities, renewing the hopes and dreams of those who live on some of America's meanest streets and meanest neighborhoods, addressing their concerns for the need for community empowerment, for strengthening families.

Several years ago, I introduced a package of proposals under the title of ''Projects for American Renewal.'' It attempted, through a series of initiatives of Federal seeding and Federal support, demonstration programs, and grants, to accomplish a number of things, but primarily falling in three areas: Strengthen families, because families are so key to the strength and stability of communities, but recognizing that not all families are intact; and promoting the role of mentors, organizations and individuals that can provide support for children who don't have fathers at home to help them. It addressed the need for strengthening those community institutions—institutions of charities and nonprofits, churches, synagogues, and other institutions within the community that can reach out and address some of these most fundamental social programs in ways that government programs never have and never will.

It sought to provide for community renewal through a series of empowerment measures and economic empowerment measures designed to gather capital, build businesses, and provide job opportunity and job growth for businesses within communities that needed the help the most.

For the past 18 months, a group of us have been meeting under the title of ''Renewal Alliance,'' a group of roughly 30 Republican Members of the House and Senate seeking to craft a new program of outreach and empowerment to our Nation's urban areas and to our Nation's poor. We have rejected the failed model of the past, the top-down Federal programs that have brought devastation in inner-city communities. We have also, however, rejected a ''hands off'' approach that believes the best Federal urban policy is no policy at all.

Instead, we have attempted, through the Renewal Alliance, to provide an opportunity agenda for urban America. We acknowledge that there is at least a startup role that the Federal Government can play, primarily through the Tax Code changes and through some seed money, but we also want to make sure that the role of the Government is that of a supporter and an encourager and a partner to local leaders and institutions who know firsthand what America's urban problems are and are already well on their way to finding solutions.

It is clear to us that from the range and complexity of problems plaguing our inner cities, that capital development—social, human, and economic capital—is the key to the long-term renewal of urban communities.

Our plan addresses this problem at three levels. First, through a charity tax credit and an expanded charitable choice program, we shift authority and resources away from government and toward those private charitable, religious, and voluntary organizations

that undergird the life of local communities. We support private economic development through targeted tax incentives and regulatory relief. And we address the dramatic educational defects of urban schools by providing publicly funded scholarships for poor children to attend schools of their choice.

I will take a few minutes—with the indulgence of the proponent of this amendment, my good friend, the Senator from Kentucky—to in more detail describe the Renewal Alliance agenda and its vision for urban America.

First let me talk about community empowerment. Community activist Bob Woodson said there is no social program in America today that is not being solved somewhere by someone. The most intractable problems we face—drug addiction, teen pregnancy, homelessness, youth violence—are being conquered by community leaders most of us have never heard of. Pastor Freddie Garcia of San Antonio has a drug treatment program that has an 80 percent success rate, compared to the single-digit performance of government programs. An independent study of Big Brothers-Big Sisters found among at-risk youth, adult mentoring cut first-time drug use by 46 percent, school absenteeism by 52 percent, and violent behavior by a third.

These are just two of hundreds of examples of programs and individuals involved in leading those programs that are making a difference in dealing with these difficult social problems that plague different communities, neighborhoods, and families in America.

We propose a package of reforms that will strengthen these institutions, these charities, these volunteer groups, that bind communities together and actually heal individual lives. We want to continue the work of the 1996 welfare reform by encouraging States to transfer more authority and resources to the private nonprofit groups and religious groups through State-based charity tax credits.

Our bill also expands and strengthens the charitable provisions contained in the 1996 welfare bill to permit faith-based institutions to compete for all types of Federal human services contracts. The Community Empowerment Initiative also builds on last year's Volunteer Protection Act by limiting the liability of businesses that provide equipment or facilities for use by charitable organizations.

The second component of our Renewal Alliance program is economic empowerment. One of the great under-reported stories of America's booming economy is the fact that tight labor markets are increasingly forcing businesses to look to inner cities for labor. In Wisconsin, Allen-Edmonds Shoes last year moved a major facility from Port Washington to inner-city Milwaukee to take advantage of the untapped labor pool there. The city of Indianapolis has engaged in an aggressive program to bring businesses into poor neighborhoods by reducing regulations and promoting the relative lack of economic competition in inner-city communities.

Our legislation wants to build on these trends. We target the 100 poorest communities in our Nation with tax and regulatory relief designed to spur economic growth on a long-term basis. Our plan reduces to zero the capital gains tax for investments in troubled areas, increases the expensive plants and equipment purchases by small businesses in the zones, and allows businesses in these zones to receive a 20 percent wage credit for hiring qualified low-income workers. To qualify for these benefits, States and localities must agree to reduce local tax rates and fees within the renewal community and to waive local and State occupational licensing regulations. The proposal would also create family development accounts that encourage low-income families to save a portion of their income or of their EITC refunds, to be matched by private contributions which would be available for the purchase of a home, education expenses, or creation of a small business.

The third part of our program is educational choice for low-income families. The recent survey on urban education by Education Week reemphasized the alarming state of our urban schools. Nationwide, just 43 percent of students attending urban schools meet the most minimal standards for reading comprehension. In schools in high poverty areas, only 23 percent meet the basic standard. This pattern held true in math and science, as well as reading.

Urban parents whose children are trapped in schools in which failure is virtually guaranteed are increasingly demanding real change and real alternatives. Publicly and privately financed scholarship programs are now operating at over 30 cities. Early studies of these programs show substantial academic improvement among participating students and a sharp jump in parental satisfaction with the education their children are receiving are the results and consequences of these initiatives.

Our legislation tackles the education problems faced by inner-city children from two different angles. First, we call for a large-scale test of publicly funded scholarships for poor children. We believe these scholarships would provide some immediate relief for families and inject badly needed competition in the public school system. The scholarships would also put real pressure on the public system for real reform as families begin shopping for schools that work. I am pleased to offer these initiatives here on the Senate floor with Senator LIEBERMAN on a bipartisan basis in the past several years, and we want to continue to do that.

The second part of the renewal education reform plan is targeted at relieving the regulatory burden faced by urban schools. Administrators routinely complain that although the Federal Government provides only a fraction of overall education funding, it imposes an overwhelming majority of the paperwork. Our bill would provide an education flex waiver for urban school districts that will permit them to devote more of their dollars to the classroom and less time filling out forms.

This is the Renewal Alliance plan in brief: To restore urban America, community empowerment, economic renewal, educational choice, and reform. We do so not by putting the Federal Government in charge, but by bringing it alongside as a supporter of those individuals and those civic institutions, nonprofits, churches and charities, synagogues and parishes, that are already at work rebuilding lives and rebuilding neighborhoods.

Mr. President, I will vote for the McConnell amendment. I believe the constitutional case for it is compelling. The Senator from Kentucky has crafted a measure that I believe addresses the issue of encouraging participation by the underprivileged of taking advantage of the highway funding that will result from passage of this bill. But I don't want this vote to be interpreted as the answer to the problems that affect the underprivileged, the answer to the problem that affects our communities. We need to do much more. We need a much more comprehensive effort.

The Renewal Alliance has proposed such an effort. It is not written in stone. It is open to amendment. It is open to suggestion. It doesn't answer the whole problem, but it moves us in a substantial direction toward solving that problem. I'm going to discuss this in greater detail. We will be offering this legislative package. We will be exploring opportunities throughout this legislative session to debate and vote on all or some of this package of proposals.

I am joined by a number of my colleagues here in the Senate. I hate to start naming names, but key among them are Senator SANTORUM and Senator ABRAHAM. We are working with an expanded group of Senators who have real concerns and want to propose real solutions to some of the most difficult problems we face as a Nation.

So with that, Mr. President, we will be saying more and doing more on this initiative in the future, but I wanted to take this opportunity to at least inform our colleagues that this vote is simply the opening foray into an area that I think the Senate needs to seriously address and give serious debate and initiatives toward solving. I look forward to the opportunity to continue this effort.

I yield the floor.

Mr. SESSIONS. Will the Senator yield?

Mr. COATS. I am happy to yield to the Senator.

Mr. SESSIONS. First, I congratulate the Senator very much on this renewal idea and community empowerment. I had the opportunity to serve as a U.S.

attorney and be a coordinator of a communities-based revitalization program known as Read and See in Mobile and Martin Luther King Jr. neighborhoods—a great neighborhood that declined dramatically over the years.

What we did first was we had a big town meeting, a community meeting of the leaders and the people who live there. We broke up into discussion groups and we listed priorities. All 10 groups listed priorities that they thought their community needed most. First, I remember distinctly that every group listed crime. They wanted a safer neighborhood for their children and their families to live in. They listed programs where they wanted their churches to be stronger in helping kids. As I recall, I can't think of a single one that listed a preferential contract for businesspeople as a need for that community.

Is that what the Senator was saying and suggesting, that we really need to deal with deeper problems than the kind we may be so politically engaged in now?

Mr. COATS. That is precisely what I was saying. I appreciate the Senator's experience and involvement with programs that are locally based and really make a difference in people's lives. What I was trying to say here is that we are faced with a situation where we have a statute on the books that appears to be unconstitutional. I think it goes against the grain of equal treatment under the law—something that is the foundation for what this country believes in. But I didn't want to misinterpret it as the attempt, this year, by the U.S. Senate or U.S. Congress in addressing problems that affect people that are called ''underprivileged'' or ''low-income'' or ''minorities'' or people who live in targeted urban areas. There are deeper problems. There are problems that have defied the Federal solution and have defied the legislative solution but have lent themselves to local solutions, often faith-based solutions, or nonprofit, charitable solutions that we can't write statutes for. Can we assist in the transition of moving the Government from a ''one-size-fits-all, let Washington solve the problem,'' to an aspect of greater involvement of these organizations in dealing with these problems? I think we can. What we are trying to do here is outline some steps that we believe we should take in order to accomplish that.

I appreciate the continued support of the Senator from Alabama and his interest in this and his experience in this. I welcome his participation, as he has offered in the past and I know he will in the future, in terms of our Renewal Alliance efforts.

Mr. SESSIONS. Mr. President, I agree with that. Every group that listed ideas for that neighborhood—all of their ideas were good and all of those ideas would work. I think you are correct, Senator COATS, in how you are approaching this idea. I believe that we need to allow the people in our communities to develop plans for their own neighborhoods, to make them work, and we will get a lot better ideas than some of the programs that have been conjured up in this Congress.

Mr. COATS. Mr. President, I thank the Senator and yield the floor.

UNANIMOUS CONSENT AGREEMENT—S. 1173

Mr. CHAFEE. The majority leader has informed me that there will be no more rollcall votes tonight. Second, I ask unanimous consent at 9:30 a.m. on Friday, March 6, the Senate resume the pending McConnell amendment regarding contract preferences and there be 90 minutes remaining for debate, equally divided between opponents and proponents, with 45 minutes of that time equally divided between Senators BAUCUS and CHAFEE, and at 11 a.m. on Friday, the Senate proceed to a vote on or in relation to the amendment, and no other amendments be in order prior to that vote. I further ask consent that if the amendment is not tabled, it be open to further amendment and debate.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. CHAFEE. In light of the agreement, as I previously announced, there will be no further rollcall votes this evening. The next rollcall vote will occur tomorrow morning at 11 a.m.

Mr. BAUCUS. Mr. President, I see the distinguished Senator from California on the floor. She would like to address the McConnell amendment.

I yield 5 minutes to the distinguished Senator from California.

The PRESIDING OFFICER. The Senator from California is recognized.

Mrs. BOXER. Mr. President, it is indeed an honor to participate in this debate, a very important debate.

Mr. President, I will be voting against the McConnell amendment, which would eliminate the Department of Transportation's highly successful Disadvantaged Business Enterprise Program. The main reason I am doing it—and there are many reasons—is because this program is of great benefit to small businesses in my State.

Now, opponents of this program have attempted to label it a quota system. I oppose quotas because quotas are bad policy and quotas are unconstitutional. The people of California feel very strongly against quotas. But what is important to note, as so many of my colleagues have pointed out, the DBE Program is far from a quota program. It is, in fact, a flexible outreach program with goals that bring into the highway contracting industry many small businesses which might otherwise be overlooked or left out.

Now, this program is so flexible, Mr. President, that no State has ever been fined, no State has ever been reprimanded for not meeting the goal, because there is no quota; there is a goal.

Now, we know that small business growth has been the most incredible dynamic in California's economic recovery. There is no way—no way—that a Senator from California, in my opinion, should vote against anything that would put a damper on this extraordinary growth.

What is interesting to me—because I have listened to the debate and I have heard Senator MCCONNELL use the term ''race-based'' several times—is that white males have always been eligible for the DBE Program. They can participate, as well as, of course, minorities and women. Now, under the new regulations, everyone who participates will have to be certified that they are in fact disadvantaged. In other words, wealthy individuals, whether they are white, whether they are black, whether they are brown, whether they are women—none of them can participate in this program if, in fact, they are not disadvantaged.

So, Mr. President, it is very clear to me—and it is as clear as it can be—that this program is about assuring every American, regardless of their background, wherever they are from, that they will have a fair chance as small businessowners to participate in this very important highway program. I want to say, as a member of the Environment and Public Works Committee, it really makes me proud to see the leadership from my chairman, Senator CHAFEE, and the ranking member, Senator BAUCUS. I think that the two of them have really shown the way.

I want to also point out that Senator WARNER, by adding his strong voice to this debate, is also making a point that in this great Nation the last thing we want to do is put a damper on the growth of small business. In fact, people talk about being colorblind. This program is colorblind. This program is open to all who need to have an opportunity.

I am very proud to stand with Senators CHAFEE, BAUCUS, WARNER, and DOMENICI in casting a vote that will, in fact, allow this program to continue. And, indeed, after I have read the new guidelines that will be coming out, I think this is going to be a program that all of us can be proud of.

Thank you very much, Mr. President.

Mr. SMITH of New Hampshire. Mr. President, I want to join my colleague from Kentucky in supporting his amendment to end one of the many costly, unfair, and unconstitutional minority set-aside programs in our federal government. As the Senator has already stated, the Intermodal Surface Transportation Efficiency Act (ISTEA) mandates that ''not less than 10 percent'' of federal highway and transit funds be allocated to ''disadvantaged business enterprises''—firms owned by officially designated minority groups presumed to be ''socially and economically disadvantaged.''

In 1995, the Supreme Court spoke on this issue in its Adarand versus Peña decision. While I will not go into detail on this decision since it has already been explained by the Senator from Kentucky, suffice it to say that both the Supreme Court and a U.S. district court have ruled that this minority

set-aside program is unconstitutional. Plain and simple, this is an affirmative action program for contractors. And, the Administration's attempt to comply with the court's decision by tinkering with DOT regulations does not meet the constitutional litmus test. Therefore, it is now incumbent on the Congress to bring ISTEA into compliance with our Constitution.

It is one thing for the Federal Government to carry out unfair, quota-based programs, which I oppose, but it is even more egregious that the Federal Government mandate that our states carry out such programs. This is a time-consuming and costly burden on some states, like New Hampshire, that simply do not have a significant racial minority population. It forces the state into situations where it is either awarding contracts to less qualified contractors or jumping through bureaucratic hoops trying to prove that it cannot meet the 10 percent DBE goal. Both of which are not good public policy.

By continuing this and the other 150-plus preferential treatment programs, we are encouraging businesses to tie their business strategy to unconstitutional programs that will eventually be eliminated by the courts. This is sending the wrong message to minority start-up businesses.

A better way to encourage minority entrepreneurs is with a small business out-reach program as outlined in the McConnell amendment. This alternative program would still provide assistance to smaller, minority-owned businesses without the heavy-handed mandate on our states.

Most Americans do not support preferential treatment programs. We now have an opportunity to end one of the many race and gender-based programs in our federal contracting system. I urge my colleagues to uphold the principles of our Constitution and support the McConnell amendment.

AMENDMENT NO. 1687

Mr. INHOFE. Mr. President, I rise today to discuss an amendment that I offered yesterday, amendment number 1687, to S. 1173, the ISTEA Reauthorization Act. This amendment was agreed to by voice vote. This amendment was cosponsored by Senator BREAUX, Senator BYRD and Senator SESSIONS.

The purpose of my amendment was to provide the necessary flexibility and funding to the States that was promised by President Clinton and EPA Administrator Browner for the new National Ambient Air Quality Standards for ozone and particulate matter. These standards were promulgated last July. My amendment in no way ratifies or affirms the underlying standards. These standards are the subject of various lawsuits and pending legislation which seeks to overturn the standards in part or in whole. This amendment simply relieves the uncertainty for the States during the implementation phase over the next few years.

The President and Administrator Browner promised a flexible implementation time frame for the standards which was not based in the Clean Air Act. This amendment ensures that the implementation of the standards would not occur at a faster rate than the President promised.

The first section of the amendment, Section 2(a) provides that the EPA will fund all of the costs for the PM monitoring network with new program dollars and just doesn't take money from other State grants. The States claim that the EPA has reprogrammed fiscal year 1998 dollars from existing State Grant authorities, the amendment requires that these funds be repaid to the States. This provides the assurance to the States that this will not be another unfunded mandate. It also restores the grant funds to the States that the EPA diverted to the monitoring program in 1998.

Section 2(b) ensures that the national network (designated in section 2(a)) which consists of the PM2.5 monitors necessary to implement the national ambient air quality standards will be established by December 31, 1999. EPA will have received the funding from Congress and they will be responsible for ensuring that the network will be in place. If they fail, they will be subject to legal action and must explain the cause of any delay.

Section 2(c) requires that the PM monitoring network be in place and that the States have three years of monitoring data before the Governors are required to submit their recommendations to the EPA. Under the Clean Air Act the Governors must examine the data and notify EPA when an area in their State violates the standards. This will stop the possibility of the EPA being sued by a citizens group demanding that an area be classified before the data has been collected. The Clean Air Act does not require the monitoring data to be collected first. But the President and the EPA promised they would wait for the three years of data. This provision provides the legal authority to wait for the data.

Section 2(d) follows the Clean Air Act and the EPA's implementation schedule, it is the EPA's official review of the Governor's recommendations. It ensures that the Governor's data and information is correct and allows EPA the time to publish the decision in the Federal Register.

Section 2(e) addresses the concerns of the farmers who believe that they will be targeted for PM 2.5 even though their emissions are larger than 2.5. The study will examine the monitoring devices to ensure that they do not capture larger particles. This section is endorsed by the American Farm Bureau who wrote, ''The agriculture community continues to be concerned over the accuracy of EPA's fine particulate measurements, especially in regard to agriculture emissions. Testimony has been given in both the Senate and House Agriculture Committees indicating concern that agriculture would be 'misregulated' due to inaccurate fine particulate measurements. This amendment will allow a comparison of EPA's approved method used to measure fine particulate and the new monitors to find if both adequately eliminate those particles that are larger than 2.5 micrograms in diameter.''

Section 3(a) follows the EPA's and the President's timeline for allowing the Governors two years to review the current ozone programs before they have to designate nonattainment areas. It allows the Governors to review the other ozone programs such as the new regional ozone transport program before they make new decisions about the new ozone standard.

Section 3(b) follows the Clean Air Act and the EPA's implementation schedule, it is the EPA's official review of the Governor's recommendations. It ensures that the Governor's data and information is correct and allows EPA the time to publish the decision in the Federal Register.

Finally, Section 4 protects the pending lawsuits so that others can raise the issues of Unfunded Mandates, Small Business Review, the validity of the standards, and other issues without having this amendment impede their legal rights. It affirmatively states that this amendment is not a ratification of the new standards and any and all legal challenges to the standards are still valid and real.

The PRESIDING OFFICER. Who yields time?

Mr. CHAFEE. Mr. President, we have completed on this side.

MORNING BUSINESS

Mr. CHAFEE. Mr. President, I ask unanimous consent that there now be a period for morning business with Senators permitted to speak therein for up to 5 minutes each.

The PRESIDING OFFICER. Without objection, it is so ordered.

THE VERY BAD DEBT BOXSCORE

Mr. HELMS. Mr. President, at the close of business yesterday, Wednesday, March 4, 1998, the federal debt stood at $5,529,409,747,928.18 (Five trillion, five hundred twenty-nine billion, four hundred nine million, seven hundred forty-seven thousand, nine hundred twenty-eight dollars and eighteen cents).

One year ago, March 4, 1997, the federal debt stood at $5,363,583,000,000 (Five trillion, three hundred sixty-three billion, five hundred eighty-three million).

Five years ago, March 4, 1993, the federal debt stood at $4,199,533,000,000 (Four trillion, one hundred ninety-nine billion, five hundred thirty-three million).

Ten years ago, March 4, 1988, the federal debt stood at $2,491,607,000,000 (Two trillion, four hundred ninety-one billion, six hundred seven million).

Fifteen years ago, March 4, 1983, the federal debt stood at $1,219,934,000,000