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House of Representatives

The House was not in session today. Its next meeting will be held on Monday, March 9, 1998, at 2 p.m.

Senate

FRIDAY, MARCH 6, 1998

The Senate met at 9:30 a.m. and was called to order by the President pro tempore (Mr. THURMOND).

PRAYER

The Chaplain, Dr. Lloyd John Ogilvie, offered the following prayer:

Gracious God, in this time of quiet we rest in You; we lean on Your stability; and we draw on Your strength. We feel our tensions and anxieties melt away as we simply abide in Your presence. Your love dispels our fears, and the vision of what You are able to do in and through us today maximizes our hopes. When we abide in You, we are able to abound in the unsearchable riches of Your limitless power. Go before us to show the way and help us anticipate the amazing gifts of love, wisdom, discernment, and vision You have prepared for us. You know exactly what we will face today and will equip us to live at our full potential, multiplied by Your energizing power. You do all things well. Thank You for guiding us with Your perfectly prepared answers to the problems and potentials of this day. Through our Lord and Savior. Amen.

RECOGNITION OF THE ACTING MAJORITY LEADER

The PRESIDENT pro tempore. The able acting majority leader, the distinguished Senator from Rhode Island, is recognized.

SCHEDULE

Mr. CHAFEE. Mr. President, on behalf of the majority leader, I announce that today the Senate will resume consideration of S. 1173, the so-called ISTEA legislation. Under a previous agreement, the Senate will conclude 90 minutes of debate on the pending McConnell amendment regarding contract preferences, with debate equally divided between the proponents and opponents, with 40 minutes of that time equally divided between Senators CHAFEE and BAUCUS.

Also, as under the consent, at 11 a.m. the Senate will proceed to a vote on or in relation to the McConnell amendment. Following that vote, the Senate will continue to consider amendments to the ISTEA legislation.

In addition, the Senate may also consider any legislative or executive business cleared for floor action. Therefore, additional votes are possible during today's session. An effort will be made to announce additional votes as soon as it can be determined when and if additional votes will take place.

As a reminder to all Members, the first rollcall vote today will occur at 11 a.m.

ORDER OF PROCEDURE

Mr. CHAFEE. Mr. President, I ask unanimous consent that in any quorum calls the time be charged equally between the proponents and opponents.

The PRESIDING OFFICER (Mr. ALLARD). Without objection, it is so ordered.

RESERVATION OF LEADER TIME

The PRESIDING OFFICER. Under the previous order, leadership time is reserved.

INTERMODAL SURFACE TRANSPORTATION EFFICIENCY ACT OF 1997

The PRESIDING OFFICER. The Chair lays before the Senate S. 1173, which the clerk will report.

The assistant legislative clerk read as follows:

A bill (S. 1173) to authorize funds for construction of highways, for highway safety programs, and for mass transit programs, and for other purposes.

The Senate resumed consideration of the bill with a modified committee amendment in the nature of a substitute (Amendment No. 1676.)

Pending:

McConnell amendment No. 1708 (to amendment No. 1676), 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 race, color, national origin, or sex, with respect to use of those funds, in compliance with the equal protection provisions of the fifth and 14th amendments to the Constitution.

AMENDMENT NO. 1708

The PRESIDING OFFICER. Who yields time?

Mr. CHAFEE. Mr. President, I yield the Senator from Massachusetts 10 minutes.

The PRESIDING OFFICER. The Senator from Massachusetts is recognized.

Mr. KENNEDY. Mr. President, the Disadvantaged Business Enterprise program in ISTEA has given numerous women and minority-owned businesses the opportunity they deserve to compete for federal highway construction

● This "bullet" symbol identifies statements or insertions which are not spoken by a Member of the Senate on the floor.

contracts. Since it began in 1982 and was expanded to include women in 1987, the face of the construction industry has changed dramatically—we still have far to go, but because of this program, we have come a long way.

Today, however, we are faced with a choice. Do we continue to move forward or do we turn back, and return to the virtually all-male, all-white construction industry that we had in the 1970s? Members of the Senate must consider this question carefully, because we know what will happen if the program is eliminated.

In 1978—before implementation of the program—women and minorities received less than 2 percent of all federal contracting dollars. In 1979, the figure was 2.22 percent—and no federal dollars went to women-owned firms—zero. Clearly, America had to do better, and the need to give women and minorities a fair opportunity to bid for contracts led to the implementation and expansion of the program in 1982 and 1987, respectively.

Because of these state and federal initiatives, women and minority-owned firms made great strides in the construction industry. It wasn't until the Supreme Court's decision in Richmond versus Croson in 1989, that this progress began to slow. The Croson decision required application of the strict scrutiny test to state affirmative action programs, and, as a result, several states eliminated these measures.

But, contrary to what some have said, the Croson decision was not the death-knell for these state and local programs. Many of these easily met the strict scrutiny test—in Denver and King County, Washington, for example—and other programs were revised to meet the constitutional requirement.

One of the most important lessons in the wake of the Croson case is the evidence of what happens when these programs are eliminated. There has been a shocking disparity in participation levels by minorities and women in states setting goals under ISTEA for federal dollars, but not setting goals for state contracting dollars.

In Nebraska, 10.5 percent of federal dollars went to disadvantaged business enterprises because of ISTEA goals—but only 3.6 percent of state dollars went to these firms.

In Louisiana, 12.4 percent of federal dollars went to such firms because of ISTEA goals, but only 0.4 percent of state dollars went to the same firms.

In Missouri, 15.1 percent of federal dollars went to such firms, but only 1.7 percent of state dollars did. The trend is the same in every other state that does not have such a program.

This is not what we want for federal transportation contracts. It makes no sense to destroy women and minority-owned businesses and wipe out the 100,000 jobs that they create. That cannot possibly be the goal of this Republican Senate.

The disadvantaged business enterprise program is essential for the survival of these firms. Not because they aren't qualified. Not because they can't compete on merit. But, because too many in the construction industry are not willing to give qualified firms a chance if they are owned by women or minorities.

Ask the women and minorities who are certified for this program. Mary Aguillar-Lancome, president of Coast and Harbor Associates in Boston told me, ''If there is a goal, prime contractors will call DBEs; if not, they will not call.'' Other firms have made similar comments. Jack Bryant, President of Jack Bryant Associates in Massachusetts told me, ''Without goals, most in the construction industry would not make a good faith effort to work with women and minority-owned businesses. The elimination of this program would be disastrous.''

Of course, the program doesn't just help women and minorities. It extends a helping hand to firms owned by white males, as well. They can be certified to participation if they prove that they have been disadvantaged. Just ask Randy Pech—the owner of the Adarand Construction Firm—because he is currently seeking certification.

It is preposterous to argue that the Sultan of Brunei would be certified, but that an economically disadvantaged white man would not. That cannot happen, and the new regulations clarify the certification requirements.

Mr. President, I want to show this chart, which illustrates very clearly what happens when you have the Federal highway program with the DBE Program and no DBE Program for State-funded programs.

The red indicates the various States that do not have the DBE Program. And you can see what happens in terms of women and also minority construction firms versus those States that are part of the Federal system. The contrast is so dramatic that I think it makes a powerful case. What we are talking about is quality programs—those programs that are going to meet the price competition and also the other competitive forces.

But this illustrates what the principal problem is. I think it is incorporated in this statement by Elaine Martin, president of the MarCon Company in Nampa, ID.

Most companies can point to one or two jobs that made it possible for those companies to succeed. My essential job would not have been awarded to me without the DBE program. I was low bidder on a job in 1987 where the owner told the estimator to give the job to a larger male-owned firm that had a higher bid than mine. The estimator told the owner that the job had DBE, and as the low bidder I should be given the opportunity to perform.

We have instance after instance.

Dorinda Pounds, President of Midwest Contractors, Inc., in Cedar Falls, IA:

One of the major reasons that my investors and my banker was willing to take the risk with my new company was that I had the opportunity to become certified as a DBE contractor. Without the DBE program they felt the ''good old boy'' system would lock me out and would keep me from having a chance to become successful.

That case has been made hour after hour during the course of this debate. We know what the issue is. We are talking about simple fairness and justice for women and minorities in our country to participate in a program that is being paid for by American taxpayers. The American taxpayers, women and minorities, are contributing the tax dollars that go to this program. All we are saying is they shouldn't be excluded from being able to participate in the program.

Those who are trying to strike this program are effectively doing that. They may couch that in different kinds of language, but the record is very clear what the bottom line is going to be and what the results are going to be. The case couldn't be any clearer.

I urge my colleagues to support this program. A vote for this program is a vote for fair opportunity for women and minority-owned construction firms, as well as for many other small businesses around the country. All these business owners ask is a fair chance to compete. We cannot and we must not deny them that opportunity.

This is one of the most important civil rights votes of this Congress and one of the most important civil rights issues of the 1990s. It is time for the Senate to do the right thing, and stand up for civil rights and equal opportunities for all.

I yield the floor.

Several Senators addressed the Chair.

The PRESIDING OFFICER. The Senator from Kentucky.

Mr. MCCONNELL. Mr. President, under the time controlled by the Senator from Kentucky, I yield 5 minutes to my friend from Texas.

The PRESIDING OFFICER. The Senator from Texas.

Mr. GRAMM. Mr. President, I rise in support of equal rights and civil rights and in support of this amendment.

This program is not an issue about giving people an opportunity. It is a clear quota. It is a quota in the law that says not less than 10 percent of the $208 billion that will be spent under this bill has to be spent through contractors who are not necessarily small or disadvantaged economically. Many of them are quite large, quite successful. But, what they have to fulfill is a quota based on race and gender. This is a violation of everything for which America stands. It is in violation of the Constitution. This specific provision was struck down in the Adarand case by the Supreme Court of the United States.

I am strongly in support of this amendment.

I want to make a point of expressing my admiration for our colleague from Kentucky. I have found that on those tough issues when our constitutional rights are threatened, there is almost

always one Member of the U.S. Senate who rises in defense of our freedom, and that is MITCH MCCONNELL from Kentucky. Whether the issue is campaign finance reform, which is a cloaked effort to deny people freedom of speech, or whether it is quotas which violate the basic principle of equal opportunity, there is one man in the Senate who always stands up for our constitutional rights. I want him to know that his colleagues admire him and love him for that.

There are two issues I want to address. No. 1, this provision, which the amendment of the Senator from Kentucky would strike, has been declared unconstitutional in the Adarand decision and, in fact, the court has said that section 1003(b) of ISTEA, which is repeated in this bill, and the regulations promulgated thereunder, are unconstitutional.

I want to remind my colleagues that whether it was 6 years ago, 4 years ago or 2 years ago, we each stood right down there in the well of the Senate, put our hand on the Bible, and swore to uphold, protect, and defend the Constitution against all enemies, foreign and domestic. Sometimes we are the enemies. The issue here is, are we going to uphold the Constitution or are we not? When it comes to the Constitution, put me down on the side of the Constitution.

The second issue is fairness. We all want to help people compete. We all want Americans to have equality of opportunity, but you cannot have equality of opportunity through a program that clearly discriminates against people. There is only one fair way to decide who gets a contract and that is competition based on merit and price.

The General Accounting Office, in a 1994 study, concluded that ISTEA's racial preferences over the next 6 years will cost the Nation $1.1 billion in unnecessary construction costs. The GAO also concluded that the program in this bill is not an avenue for contractors to become competitive. Less than 1 percent of the contractors who get special privileges under this bill graduate to become competitive contractors in the marketplace.

Finally, let me note that the amendment by the Senator from Kentucky strikes down the unconstitutional provision on ''disadvantaged business enterprises''—which has nothing to do with disadvantaged business enterprises—and substitutes a new provision on emerging business enterprises, which is clearly constitutional. This provision includes outreach programs to help small businesses, no matter if the head of the business is a man or a woman, no matter what their ethnic background is. It helps people compete. It helps them find bonding. It helps them do the very complicated and expensive work of applying for a Federal contract. And, in fact, it is a better, more fair way because it is based on the American system.

I believe in merit. If there is one principle on which America is established, it is the principle of equal opportunity. It is not equality to exclude people from competing based on race, color, national origin or sex.

I yield the floor and thank the Chair.

The PRESIDING OFFICER (Mr. ENZI). The time of the Senator has expired. The Senator from Kentucky.

Mr. MCCONNELL. I thank my good friend from Texas for his overly kind observations about my work. I thank him for his support for this important amendment.

The PRESIDING OFFICER. The Senator from Rhode Island.

Mr. CHAFEE. Before the distinguished Senator from Texas leaves, I want to say I always appreciate the opportunity to hear him debate on the floor because he is very good. In his admiration for the efforts that the Senator from Kentucky is making to defend our Constitution, as he outlines, I hope we can enlist the support of the Senator from Texas against an amendment that is clearly against the Constitution and restricting efforts there, and that is the so-called ''burning of the flag'' amendment. We would be glad to have him sign up against that pernicious proposed addition—I hope it never passes here—in connection with the Constitution.

Mr. GRAMM. Will the Senator yield?

Mr. CHAFEE. Yes.

Mr. GRAMM. I do not think I will be attending any flag-burning parties. I think it is important to note that when you are dealing with a constitutional amendment, it is a question of whether you want to make that provision part of the Constitution, not whether or not it is constitutional now.

If Senator KENNEDY wanted to amend the Constitution to say that we have privileged Americans who are going to be treated differently than everybody else, and that we are going to discriminate against others in their favor, he would have a perfect right to do that. That provision, if it became part of the Constitution, would be the law of the land.

The point is he would be up against a much bigger opponent than he would like people to believe, and that opponent is the Constitution of the United States, Jefferson, Washington, Lincoln, and every serious thinker about economic and political freedom in the history of this country.

I yield the floor.

Mr. CHAFEE. I am delighted that he has had a roll call of heroes of the country, but before he leaves I would point out one thing. It is not often that he is inaccurate, but I am afraid that he went overboard a little bit today when he suggested that the Supreme Court in the Adarand decision had struck down as unconstitutional the provisions of the affirmative action program. What the Supreme Court said in the 5 to 4 decision—I am talking about the Supreme Court. I like to deal with the Supreme Court. What it did is remanded that case. It did not say it was unconstitutional. Any talk of unconstitutionality came by the lower court which then examined whether the provisions in the Adarand situation conformed to the restrictions that the Supreme Court was applying.

I just want to say to the distinguished Senator from Massachusetts—and by the way, I am on my time now, Mr. President—I think he is exactly right when he points out the difference between what happens when you have a State program with no admonitions in it, or requirements as far as minority contractors go, and what happens when you have the Federal program when the efforts are made. I might say these, the goals, are voluntary in the States. In Kentucky—I was pleased to see that Kentucky is considerably above the 10 percent. Kentucky itself is at 11.5 percent. In my own State, when we have the State programs with none of the Federal requirements in them—with the Federal requirements we are at 12.1 percent to minority contractors; when we do it with the State's money, we are at zero. That is my State, at zero when we deal with the State handing out its money. But when we deal with the Federal Government's requirements, then we go up to 12.1 percent. So it shows the difference that the Federal Government's requirements make. Therefore, I am very much in favor of the language that is currently in the law and am in opposition to the McConnell amendment.

Again, I would point out to everybody, if those who are against these preferences want to come out with a bill that deals with it generically—as we pointed out before, there are some 60 different programs—bring it out on the floor and let's debate it. But let's not do it one by one in individual programs such as this, and particularly this one where we have, as I pointed out yesterday, a letter from the Secretary of Transportation saying that he could not recommend the President sign this measure if the McConnell amendment should pass.

Mr. KENNEDY. Will the Senator yield for a brief question?

Mr. CHAFEE. I will.

Mr. KENNEDY. Since the Senator has referred to Rhode Island, I am wondering, as the manager of this legislation dealing with the surface transportation, whether you have complaints from the contractors about the inefficiency or the poor quality of work, or the failure of being on time? Or the fact that here in Rhode Island, when they are using the Federal funds, it is 12.1 percent?

Generally speaking, I have not, in the course of this debate, heard complaints that the work that is being done with the DBE has been not of first-rate quality, on time, and effective work. I am just wondering if the Senator from Rhode Island is receiving a lot of complaints because the DBE Program is in effect in his State?

Mr. CHAFEE. No. I want to report that we have not received complaints. Indeed, as I pointed out, my State has

gone beyond the 10 percent. We are up to 12.1 percent. It is impressive how many States have gone considerably beyond. Our neighboring State, Connecticut, is at 15.7 percent. The suggestion that these are onerous restrictions that cause chaos amongst the States in dealing with these preferences just plain isn't true.

Mr. KENNEDY. I thank the Senator. I yield.

The PRESIDING OFFICER. The Senator from Kentucky.

Mr. MCCONNELL. I momentarily am going to yield 10 minutes to the Senator from Ohio. We had extensive discussion yesterday about what the Adarand case did and didn't do. What it did do was lay out a standard which this provision of the bill couldn't possibly meet and sent it back to the district court in Colorado, which found that this section of ISTEA was unconstitutional.

We could argue this round and round and round, and we have argued it round and round and round. But I don't think there are serious constitutional scholars who believe that the Adarand case didn't set up a standard that this section of the bill could not possibly meet.

I yield 10 minutes to the distinguished Senator from Ohio.

The PRESIDING OFFICER. The Senator from Ohio.

Mr. DEWINE. I thank my friend and colleague from Kentucky.

Mr. President, I would like to offer a few thoughts on the pending amendment offered by my good friend from Kentucky, Senator MCCONNELL.

I intend to vote for the Senator's amendment. A new approach from the current set-aside is clearly needed—a new approach is needed because the current system, the current law, violates the United States Constitution.

The United States Supreme Court, in *Adarand Constructors* v. *Pena*, 515 U.S. 200 (1995), ruled that racial classifications are unconstitutional unless narrowly tailored to further a compelling government interest. The federal district court in Colorado in the case of *Adarand Constructors, Inc.* v. *Pena*, 965 F. Supp. 1556 (1997)—following the guidelines set by the Supreme Court—found that the current racial set-aside for federal highway contracts is unconstitutional. The district court found that the 10% set-aside for federal highway contracts and the race-based presumptions contained in the implementing regulations were not narrowly tailored—they excluded certain unlisted minority groups who may very well have been socially and economically disadvantaged, while presuming that all minorities in the listed groups were economically disadvantaged, and in some cases, socially disadvantaged.

Other federal courts, in applying the same strict scrutiny test to other federal, state, and local race-based laws and regulations, have consistently found that these racial preferences are not constitutional. In Ohio, a case is pending before the Ohio Supreme Court (*Ritchey Produce Company* v. *Ohio Department Of Administrative Services*, Supreme Court of Ohio, 1998 Ohio LEXIS 495). A Lebanese-American did not fall within the listed minority groups who received preferential treatment under the Ohio set-aside program, so he was denied certification as a minority contractor. Even if the majority of his workforce consisted of the listed minority groups—that company would still not be eligible to receive minority certification under the current standards.

Thus, given the constitutional guidelines that have been clearly established by the Supreme Court, we in the Congress face a fundamental choice—we can stand aside and watch federal courts dismantle race-based set aside programs one-by-one, or we can exercise leadership and meet the challenge head on—by initiating a new approach that targets our resources to economically disadvantaged individuals in depressed areas who want a shot at the American dream. To his credit, the Senator from Kentucky has shown leadership by offering such an innovative, constitutional approach. His ideas are not totally new.

In 1980, New York Mayor Ed Koch inaugurated a race-neutral affirmative action program targeted at the economically disadvantaged—providing a 10% set-aside for small firms that did at least 25% of their business in disadvantaged neighborhoods, or employed disadvantaged workers as at least 25% of their workforce. This program has served as a model for other cities nationwide.

In several respects, the Senator from Kentucky's amendment borrows from the Koch program. His amendment would target opportunity assistance programs toward businesses based not on the owner of the business exclusively, but on who's working for the business and just as important, who the business is serving. Specifically, the McConnell amendment targets assistance toward new businesses located in economically disadvantaged areas, or has a workforce half of which are employees from economically disadvantaged areas.

This direction—to reach out to the economically disadvantaged, including minorities and women—will do much to promote the interests of minorities and the country as a whole. By reaching out to businesses that employ the disadvantaged or that are located in depressed areas, we are doing more than just helping disadvantaged businesses, we're uplifting entire communities.

It's more than affirmative action—it's community empowerment.

I would also like to point out that my friend from Michigan, Senator ABRAHAM, was instrumental in the drafting of this specific provision. I commend him for working with the Senator from Kentucky—it reflects their strong interest and support for innovative approaches to community renewal.

I also commend the Senator from Kentucky for placing a time limit on assistance. Assistance under this program would be offered to firms that have been in existence for less than nine years. That just makes sense. The best business development programs are those that help new, disadvantaged businesses stand on their feet and compete.

That's exactly what the McConnell amendment would do. Specifically, the McConnell amendment provides a host of services for eligible businesses—services ranging from financial counseling, business management, and technical assistance for eligible businesses seeking contracts under federal transportation programs.

Taken together, these provisions in the McConnell amendment represent a positive approach that is consistent with the Constitution and with the wisdom and intent of those who first championed the idea of affirmative action—action to provide equality of opportunity for individuals.

Now Mr. President, let me be candid—if given the opportunity, I would have taken the McConnell amendment one step further. I would have maintained the set-aside program—one that would have been acceptable under our Constitution. I believe we can and should have race-neutral set-aside programs for new, economically disadvantaged businesses. The fundamental problem with the existing program is not the set-aside itself—but who receives it and how they are defined. The current program gives an advantage to those who may not need it—individuals who were given a chance based solely on race or racial goals. That's why the federal courts have found this and other set-aside programs to be unconstitutional. Therefore, I would support a set-aside program that provides time-limited business opportunities to businesses who employ or serve the truly disadvantaged—a program that goes beyond outreach and recruitment, and gives disadvantaged businesses a chance to do business—much like Mayor Koch did in New York a decade ago.

Unfortunately, such a program is not before us today. We do not have that option. The choice today is between an unconstitutional law or a new constitutional plan that will provide hope and opportunity for the disadvantaged. While the McConnell amendment does not go as far as I would like or as far as I would go, it is clearly constitutional and it is clearly an effective way to help the disadvantaged. It is a significant improvement over the status quo.

This amendment represents a positive, imaginative step in the right direction—one that is true to our Constitution and to our commitment to equal opportunity. I therefore urge my colleagues to vote in favor of this amendment.

Mr. MCCONNELL addressed the Chair.

The PRESIDING OFFICER. The Chair recognizes the Senator from Kentucky.

Mr. MCCONNELL. Mr. President, I thank the distinguished Senator from Ohio for his contribution to this important and sensitive debate. I thank him very, very much for his support.

Mr. President, how much time do I have remaining?

The PRESIDING OFFICER. The Senator has 26 minutes 15 seconds.

Mr. MCCONNELL. I reserve the remainder of my time.

The PRESIDING OFFICER. Who yields time?

Mr. BAUCUS. How much time do we have left, Mr. President?

The PRESIDING OFFICER. Twenty-six minutes 49 seconds.

Mr. CHAFEE. I yield 12 minutes to the Senator from Pennsylvania.

The PRESIDING OFFICER. The Chair recognizes the Senator from Pennsylvania.

Mr. SPECTER. Mr. President, I thank my distinguished colleague from Rhode Island for yielding me 12 minutes. Perhaps I shall not need it all.

I have sought recognition to speak in opposition to the pending amendment, because I think the statute, as it is presently drawn, is constitutional.

The most recent articulation of the guiding legal principles were set forth in Adarand, and Justice O'Connor for the Court said that strict scrutiny does not require the elimination of a program designed to protect those who have been discriminated against as long as there is the requisite narrow tailoring.

She noted the underlying factual basis which does persist to this day:

> 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.

That is precisely what is being done in the statute at hand.

Justice O'Connor noted that as recently as 1987, every Justice on the Supreme Court of the United States agreed that the Alabama Department of Public Safety's ''pervasive, systematic and obstinate discriminatory conduct'' justified a remedy, and it was upheld in the case of United States v. Paradise.

Even Justice Scalia, in his concurrence in the City of Richmond v. Croson, noted that there was at least one circumstance where the State may act to ''undo the effects of past discrimination.''

When we deal with this area, it is an extraordinarily complicated matter and it is very fact-sensitive. I think it is important to note that the statute in question here does not involve the same underlying law which was at issue in Adarand.

In Adarand, the issue involved the Department of Transportation's use in its own direct contracts of Federal compensation to encourage Federal prime contractors. This issue involves the constitutionality of section 1003(b)(3) of ISTEA, which sets a 10-percent goal for expenditures of authorized funds for disadvantaged business enterprises.

The effort has been made in a very strenuous and, I think, successful way to accomplish the kind of narrow tailoring which was called for in Adarand and which is constitutionally mandated.

I ask unanimous consent, Mr. President, to have printed in the RECORD at the conclusion of my remarks the specification as to how the new Department of Transportation regulations are narrowly tailored.

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

(See Exhibit 1.)

Mr. SPECTER. Mr. President, the cases in this area have been very complicated, very fact-sensitive, customarily decided, or frequently decided, on a 5–4 basis. There are very, very important objectives in the pending statute. There is a general agreement that quotas are wrong for America, and I believe, beyond that, it is inappropriate to give an applicant a position where the applicant is less well-qualified than some other applicant.

I am convinced that if we take the applications for Yale or Harvard or Duke or Cornell or any other fine educational institution, that if there was to be sufficient outreach, we would find minorities who would be well-qualified to take positions in those institutions and that they would not, in fact, be displacing someone who was better qualified. It is a matter of outreach. What the legislation at hand seeks to do is to implement that concept of outreach.

There has been a glass ceiling as to women, which is very well known. The glass ceiling is at ground zero. It is very hard to break into the kind of construction trades which are at issue in this ISTEA legislation. There is no doubt about the problems that other minorities have had. This is a plan to provide that outreach and that opportunity without displacing better qualified individuals or better qualified firms.

For the argument to be made that this act is unconstitutional and that Members of the Senate are sworn to uphold the Constitution, drawing the suggested inference that we are violating our oaths of office in supporting the legislation as is currently written, I think is far, far beyond the mark, to put it in a very, very diplomatic context.

This is an important provision. I believe that it is constitutional as applied with the narrow tailoring of the Department of Transportation regulations and that it meets the obligations of strict scrutiny under the U.S. Constitution. As a matter of public policy, it moves in the right direction.

This is only one of many efforts by the Government to open the door on outreach, and I believe that is a very, very sound proposition.

In my own personal experience as district attorney of Philadelphia, when I had hiring of a great many people as my responsibility, I got the list of all the African American lawyers in the city when I took office and made a systematic effort to call them on a matter of outreach and found that I could locate very well-qualified people to take the positions, not giving them any preference, not giving them any affirmative action in the sense of having people take those jobs who are less well-qualified than others who apply for them.

The same thing followed in the detective branch where the detectives, men and women, were selected from the Philadelphia Police Department. It was a matter of outreach. It did take a little more effort to interview more people to find those in the minority who were well-qualified and that they did not displace better qualified people to accomplish that result.

As long as we have a system which does not discriminate against the better qualified, I think we have a system which is sound and is a matter of outreach, which is very important in this country today.

I intend to oppose the pending amendment, and I urge my colleagues to oppose the pending amendment.

I thank my colleague from Rhode Island. I yield back the remainder of my time.

EXHIBIT 1

THE NEW DOT REGULATIONS—HOW ARE THEY NARROWLY TAILORED?

CALCULATION OF OVERALL GOALS

Old rules: State recipients take into account the maximum amount of work they can obtain from DBEs available to them, and their past performance in meeting their overall goals.

New rules: States must ask themselves: absent discrimination, how much would DBEs participate in DOT-assisted contracts? and then look for that level of participation as the goal. DOT has asked for comment on three specific means of estimating this participation and setting the goal, based on this concept.

MEETING OF OVERALL GOALS

Old rules: States believed they should put goals on every contract.

New rules: No requirement of setting a goal for each contract. State's first effort should be race/gender neutral efforts, such as outreach and technical assistance. If that is insufficient, then states may consider race/gender conscious measures, such as contract goals. More intrusive mechanisms, such as set-asides, may only be used if the state has legal authority outside of the DOT regulations, and has made a finding that the other means had not worked. Finally, once a state finds that the effects of discrimination had been addressed effectively, the use of race/gender measures must be reassessed.

GOOD FAITH EFFORTS

Old rules: There was general guidance from DOT on the granting of good faith waivers, but enforcement was not strong.

New rules: DOT emphasizes to states that they must take seriously their obligation to award a contract to a bidder who has made a good faith effort, and that doing otherwise

would be a de facto quota. In addition, states must provide a mechanism for reconsideration to bidders who are denied contracts on the basis of lack of good faith. The mechanism must allow contractors to make oral/written submissions about the denial, and must provide for a review of the decision by a neutral body before the contract is awarded.

DBE DIVERSIFICATION

Old rules: No provision.

New rules: DOT requested comment on how to diversify the types of work in which DBEs are involved, and reduce concentration of DBEs in certain areas. The intent to promote competition in non-traditional DBE areas, as well as reduce pressure for non-DBEs in areas of typically heavily DBE involvement. After receiving comments, DOT is now looking at new ways to achieve that diversification goal, focusing on the reasons for that concentration.

ADDED FLEXIBILITY FOR RECIPIENTS

Old rules: There were some waivers granted, and some flexibility in the program.

New rules: States with goal setting programs different than the DOT program can submit to their program to DOT for review; and if their program appears to be more effective than the DOT program, the state can implement it. DOT will grant broad program waivers for states who think they can do it better their way.

Mr. CHAFEE addressed the Chair.

The PRESIDING OFFICER. The Senator from Rhode Island.

Mr. CHAFEE. I thank the distinguished Senator from Pennsylvania for those very fine comments. We certainly appreciate his support in this effort.

Mr. MCCONNELL addressed the Chair.

The PRESIDING OFFICER. The Chair recognizes the Senator from Kentucky.

Mr. MCCONNELL. Mr. President, I rise today to speak on behalf of my amendment to bring the federal highway bill into compliance with the equal protection clause of the Constitution and with various federal court rulings, including two landmark Supreme Court cases.

The question for the Senate this morning is this: Is it fair, prudent and constitutional for the Federal Government to set-aside a fixed percentage of public highway contracts for a preferred group of citizens—until the year 2004, mind you—based on the immutable traits of race and gender?

Or let me phrase it another way: Should U.S. Senators, all of whom have sworn an oath to uphold the Constitution, reauthorize a law that has been reviewed by the United States Supreme Court and subsequently struck down by a Federal court in Colorado?

Mr. President, I say the answer to this question must be a firm and resounding ''no.''

We must stand up for the Constitution. We must guarantee the equal protection of the laws to every citizen of our country, without regard to race and gender.

We must follow the clear decisions of the Supreme Court, including Adarand and Croson, and the decisions of the court of appeals for the third circuit, the fourth circuit, the fifth circuit, the sixth circuit, the seventh circuit, the ninth circuit, the eleventh circuit and the DC circuit. All of them have struck down race-based programs in the past few years—all of them.

We must take heed of unambiguous rulings of lower courts in Georgia, Connecticut, Ohio, Louisiana, Michigan, and, most importantly, in Colorado.

Let me remind my colleagues that less than 9 months ago the Federal district court in Colorado followed the Supreme Court's lead in Adarand and Croson and ruled—and I quote:

Section 1003(b) of ISTEA and the regulations promulgated thereunder are unconstitutional.

I do not know when this body will ever have a clearer decision than this one. The administration and the Department of Transportation have tried to obscure this clarity with three or four predictable diversionary tactics.

Diversionary tactic No. 1: Ignore the court decisions. The first diversionary tactic is simply to ignore all the cases I have just cited, claim that Adarand never happened or simply claim that Adarand was wrongly decided or that it is just one decision by one court.

Well, I have quoted Adarand directly and pointed out, with great detail, that Adarand is not an aberration—not an aberration, Mr. President. Again, I quote the Congressional Research Service. The Adarand decision—this is from CRS—''largely conforms to a pattern of federal rulings which have invalidated state and local governmental programs to promote minority contracting—in: Richmond, San Francisco, San Diego, Dade County, Fla., Atlanta, New Orleans, Columbus, Ohio, [the State of] Louisiana, and Michigan, among others—and new challenges continue to be filed [probably as we speak].''

For those who say that Adarand is just not enough for us to go on, let me cite yet another Supreme Court case, Richmond v. Croson from 1989. In that case, the Government decided that minorities were underrepresented in the public construction arena. So the Government enacted a law like ISTEA that said: not less than 30 percent of construction dollars must be allocated to officially preferred—this is officially preferred—minority groups.

And you know what the Supreme Court said about the so-called ''30 percent goal''? The Supreme Court said that this ''goal'' was ''an unyielding racial quota.'' It was a quota, even though the Government plan had a waiver process to supposedly let you out of the quota in certain circumstances.

Let me quote the United States Supreme Court when it applied the ''strict scrutiny'' test to a set-aside that is virtually identical to the DBE that we have been talking about the last 2 days, the DBE set-aside in ISTEA. 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 the city'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. . . . We think such a result would be contrary to both the letter and spirit of a constitutional provision whose central command is equality.

Diversionary tactic No. 2: ''We've changed the law,'' they say, ''by tinkering with the regulations.''

When ignoring the Court fails, then someone suggests and the administration claims that they have simply changed an unconstitutional statute by simply tinkering with the regulations. But let me point out that the DOT has no new regulations. All we have from DOT is a promise to do better. And the Senate is apparently going to turn a blind eye to the equal protection clause of the Constitution and authorize a $17 billion quota on the mere promise—the mere promise—of cleaning up the program.

Does that fact not strike any other Member of this Senate as being a bit odd? I hope it does.

These new regulations are only in the ''proposal'' stage. We do not know what they will end up looking like. We do not know if they will make the program better or worse, constitutional or unconstitutional. Even DOT does not know what the new regs will look like.

For example, my colleagues argued yesterday that the proposed regulations would narrowly tailor the program because they would include an economic cap on DBEs. My colleague from Montana argued yesterday that our problems are solved because the new regulations will exclude the Sultan of Brunei—the wealthiest monarch in the world—from the Disadvantaged Business Program. The sultan will not be anywhere near the DBE program, my good friends argue.

Well, last night I took a close look at the proposed regulations to see what the economic cap would be. And you know what I found? Let me read to you word for word the exact language of the so-called narrowly tailoring economic cap.

You may require the individual whose disadvantage is being questioned to provide information about his or her personal net worth.

But the proposed rule goes on to say:

You may require only such information as is necessary to establish whether the individual's personal worth exceeds [blank].

They have not decided yet how poor you have to be.

So what is the economic cap? We have no idea. Will there be an economic cap at all? We are told there will be, but it has not been provided yet. DOT apparently does not know. So let me say, I do not know whether the Sultan of Brunei will be excluded or not.

The proposed regs do not tell where this narrowly tailored economic cutoff is.

But, Mr. President, even if the cap excludes the sultan—and this is what I hope everybody will remember—even if the cap excludes the sultan, it still will not solve the narrowly tailored problem. You know why? Because even if you solve the ''economic'' problem, you have still not solved the ''race'' problem. The Supreme Court and the district court did not focus on the ''economic,'' but rather the ''race'' issue.

Changing the economic guidelines does not change the fact that the DOT will still presume that all members of certain races are ''socially disadvantaged'' and need preferences. In other words, the proposed regulations do nothing to solve the most serious problem, which is that ISTEA will continue to make presumptions and decisions based on race, without any particular findings of discrimination against particular individuals or even particular groups in the highway contracting area.

So even if the new regs exclude the sultan economically, everyone will be relieved to know that other persons from Brunei will still be ''presumed'' to be socially disadvantaged and get preferences, even though no State DOT agency has ever engaged in a pervasive pattern of discrimination against persons from Brunei or from Tonga or Micronesia or the Maldive Islands. Never heard of such a case, but these people are all, by Government fiat, put into the class for preferential treatment.

In the words of the district court in Adarand:

> It [is] 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.''

Mr. President, let me conclude this particular point by reminding every Senator that Adarand and Croson are landmark Supreme Court decisions that are now the law of the land. The administration's attempt to comply with the law of the land has been to merely do a little DOT song-and-dance by playing with transportation regulations, not changing any regulations, mind you, but simply proposing them—proposing them.

Mr. President, complying with a landmark Supreme Court case requires much more than a mere ''tinkering'' with the regs.

Professor George LaNoue is a constitutional law expert who has testified in numerous minority contracting cases. Professor LaNoue has explained in great detail how the DOT's proposed regulations fail to bring the DBE program into compliance with the constitution. I ask unanimous consent that a letter from Professor George LaNoue that details the substantial shortcomings of the proposed regulations be printed in the RECORD.

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

UNIVERSITY OF CALIFORNIA, BERKELEY INSTITUTE OF GOVERNMENTAL STUDIES,

Berkeley, CA, October 17, 1997.

Hon. MITCH MCCONNELL,
U.S. Senate,
Washington, DC.

DEAR SENATOR MCCONNELL: It is being asserted that various alterations in proposed regulations for Intermodel Surface Transportation Efficiency Act (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 alterations go only to the issue of 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 either by the administration or by Congress.

For example,

1. There has been no determination about whether there has been any discrimination by any federal agency in the contemporary procurement process.

2. There has been no determination about whether any state DOT agency or any other state agency has discriminated in the award of federal contract dollars.

3. There has been no determination 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. There has been no determination about whether, when MBEs bid on contracts, they are proportionately successful. No study of who bids on federal contracts has been released.

As the Eleventh Circuit said unanimously on September 2, 1997 in striking down a preferential procurement program: . . . if a [race conscious] program is not grounded on a proper evidentiary basis, than all of the contract measures go down with the ship, irrespective of any narrow tailoring or substantial relationship analysis.'' (Engineering Contractors Association of South Florida v. Metropolitan Dade County, 1997 WL 535626, *7, (11th Cir. (Fla.))).

Second, even if a compelling interest has been established, the proposed regulations do not meet narrowly tailoring requirements.

1. There has been no statistical analysis of whether the particular racial and ethnic groups granted presumptive eligibility are in fact economically or socially disadvantaged because of patterns of discrimination in recent years. The current list of presumptive eligible groups is a polyglot of designations by racial group (African Americans), culture (Hispanic), country of origin (Asian Americans) and lineage (Native Americans). 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 very low. Some have well-documented histories of discrimination; some are virtually invisible. These groups have nothing in common at all.

The district court in the remand of Adarand v. Pena found that the use of race and ethnic based presumptive eligibility was unconstitutional because:

''. . . it [is] difficult to envisage a race based classification that is narrowly tailored. By it's very nature, such a program is both underinclusive and overinclusive. This seemingly contradictory results suggests that the criteria are lacking in substance as well as in reason.'' (at 59–60).

2. There has been no post-Adarand evaluation of the effectiveness of existing federal race neutral programs or the possibility of creating new ones. The utility of race neutral programs must be established before race conscious remedies are employed. The Eleventh Circuit citing Croson recently said:

''. . . we flatly reject the County's assertion that ''given a strong basis in evidence of a race-based problem, a race-based remedy is necessary.'' That is simply not the law. If a race-neutral remedy is sufficient to cure a race-based problem, then a race conscious remedy can never be narrowly tailored to the problem.'' See, Croson, 488 U.S. at 509). (Engineering Contractors Association of South Florida v. Metropolitan Dade County, 1997 WL 535626, *34, (11th Cir. (Fla.))).

Race conscious measures can only be used as narrowly tailored remedies for identified discrimination. Race based means can not be used, as the DOT regulations provide, whenever an arbitrary set-aside or goal percentage is not reached in a particular state during a particular period.

3. There has been no fulfillment of the Administration's promise to create goals specific to various industries. On May 23, 1996, the Justice Department proposed ''benchmark limits'' for each industry 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.

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 strongly suggests federal goals in ISTEA are not narrowly tailored.

In short, the record does not support the conclusion that a compelling basis for the use of Race conscious remedies exists with regard to the ISTEA program. The 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.

Sincerely,

GEORGE R. LA NOUE,

Professor of Political Science, Policy Sciences Graduate Program, University of Maryland Graduate School Baltimore, Visiting Scholar, IGS, University of California, Berkeley.

Mr. MCCONNELL. Diversionary tactic No. 3, Mr. President: It is said that ''10 percent is a goal, not a quota.''

When all else fails, the final diversionary tactic is to argue that the DBE program is a program with goals, not quotas. In fact, some of my colleagues have gone to great lengths to point out that the 10 percent set-aside is merely a goal with no sanctions whatsoever.

Well, let us look at the DBE manual—right out of the manual. This manual is the DBE law of the land for States that receive ISTEA money. The DBE manual explains that failure to comply with the requirements will result in sanctions. Let me quote:

If the [Federal Highway] Administrator determines that a State has violated or failed to comply with the Federal laws or the regulations . . . with respect to a project, he may withhold payment to the State of Federal funds on account of such project, withhold approval of further projects in the State, and take such other action that he deems appropriate under the circumstances, until compliance or remedial action has been accomplished by the State to the satisfaction of the Administrator.

In other words, there are sanctions. These same threats appear in the actual ISTEA contracts and in the Federal transportation regulations.

Now that I have spelled out that the threat of DBE sanctions are serious and real, I am sure my colleagues will respond by saying, ''OK, sure we list sanctions, but we never use them. So 10 percent is still just a goal. It's not a quota.'' The reasoning here is that the Government must punish someone before the ''goal'' becomes a ''quota'' or a ''requirement.''

Well, first, let me say that the threat of losing millions of Federal highway dollars is plenty of incentive for the States to enforce the quota requirement. When the Federal Government is wielding that kind of weapon from on high, it does not have to punish them. A 10 percent quota is still a quota, even if States always comply and no one is formally punished.

Second, if you think the quota is never enforced, just ask two cities in New Mexico. The Senator from New Mexico and I were having a discussion about this issue on the floor just yesterday. Both the city of Rio Rancho and the City of Albuquerque were sued in Federal court over the use of ISTEA's racial quotas. What did the Federal Department of Transportation do? Did it simply call Rio Rancho and Albuquerque and say, ''Hey, don't worry about the whole 10 percent thing. It's just a goal''?

That is not what happened, Mr. President. Both Rio Rancho and Albuquerque had to sue the Department of Transportation and Secretary Slater in Federal court to stop the quota enforcement. In the complaint that the cities filed they said:

The [Department of Transportation] is placing facially unconstitutional conditions upon the receipt of discretionary federal funds to which the City would otherwise be entitled to, and has caused or is likely to cause irreparable injury for which the City has no adequate remedy at law.

So both Rio Rancho and Albuquerque sought a court judgment that would require the Department of Transportation to justify or eliminate the quotas and pay any and all damages and attorney fees to the cities.

And the Federal judge was perfectly clear in declaring that the race-based programs were unconstitutional. In the words of the judge:

It doesn't really take a first-year law student to say, City of Rio Rancho, don't do this again. I mean, you're going to get sued again.

This is from the court case.

Unfortunately, the city of Rio Rancho, like every other city that receives any ISTEA funds, has little choice in the matter. ISTEA requires racial preferences. And if you are going to get out of the quota requirement, you had better be prepared to go through hell, high water, and the Federal courts.

Surely, my colleagues would agree that a true ''goal'' would not require State and local governments to sue the Federal Department of Transportation in Federal court just to get the ''goal'' fixed.

Let's turn to Houston. If Albuquerque and Rio Rancho don't prove that 10 percent is more than just a goal, then let's go from New Mexico over to Houston, TX. Let me share with you some comments included in the ISTEA committee report on the 6-month authorization bill in the House. These comments were part of a very detailed and astute statement made by several Republican House Members.

In April 1996, a Federal court in Texas temporarily enjoined Houston's METRO transit authority from utilizing race or gender-based preferences in the selection or award of construction contracts—making it impossible for Houston to comply with the federally-approved DBE program.

So, in response to the court's ruling, Houston designed a race-neutral program to provide assistance to economically disadvantaged small businesses.

Very similar to what the McConnell amendment would provide, an opportunity for emerging business enterprises.

The US Department of Transportation refused to recognize this alternative [race-neutral] program and withheld federal funding from METRO for nearly seventeen months.

Seventeen months without Federal funds, all because Houston was complying with a court order, Mr. President—Houston was complying with a court order prohibiting preferences. I don't know about you, Mr. President, but that sounds like a sanction to me. It sounds like a lot more than mere goals. It sounds like quota enforcement to any rational person listening to what happened.

The point here, Mr. President, is simple arithmetic: Goals plus requirements equal quotas—goals plus requirements equal quotas. The goals in ISTEA are not merely aspirational. The goals have requirements and the real threat of sanctions.

Let me spell out a few human examples about how goals in theory are actually quotas in practice. The first example was mentioned by Senator GORTON yesterday here on the floor, the insightful story about a man named Frank Gurney from Spokane, WA.

We have talked a lot about victims over the course of the last 2 days. Let's talk about some of the victims of this program. Just a couple of months ago, the head of Frank Gurney, Inc. mailed me a copy of yet another letter explaining how he lost yet another job because of the 10 percent quota. The rejection letter stated:

I regret to inform you that although yours was the lowest guardrail quote that I received for the . . . project . . . I found it necessary to use the third lowest guardrail quote [the third lowest guardrail quote] in order to meet the DOT requirement of 10 percent DBE.

Sorry, you are out of luck, even though you had the lowest bid.

The rejection letter was dated October 27, 1997. So this is still going on. The letters started in 1981, about the time we first authorized the DBE Program, and are still continuing up to and including last year. We know these letters will continue being sent until at least 2004 under this bill, unless my amendment passes, which will be the next time we will have a chance to revisit this law, Mr. President.

I will say a word about Michael Cornelius. If you think the ISTEA quota is only a goal, just ask Michael Cornelius. Mr. Cornelius' firm was denied a Government contract under ISTEA even though his bid was $3 million lower than the nearest competitor. Mr. Cornelius' bid was rejected because the Government felt the bid did not use enough minority- or women-owned contractors. In fact, the Cornelius bid proposed to subcontract 26.5 percent of the work to firms owned by minorities and women. Yet 26.5 percent was not enough in the world of goals.

I listened yesterday to Senator KENNEDY's example of women and minorities who, like Frank Gurney and Michael Cornelius, have been the victims of discrimination. I was moved by Senator KENNEDY's stories, and with each of the two or three stories of discrimination that Senator KENNEDY told, my instinct and my gut response was, ''That's discrimination, and it is wrong.''

But, Mr. President, do you know the difference between my stories and Senator KENNEDY's stories? There is a critical difference. In Senator KENNEDY's examples, the discrimination was wrong and the discrimination is prohibited by title VII and the Civil Rights Act of 1964.

So the examples of discrimination that were being cited are against the law—now, a law not being contested by

anyone, a law supported by virtually everyone I know back in the mid-1960s.

In my examples, the discrimination was wrong but the discrimination is required. In my examples, the discrimination is wrong but the discrimination is required, Mr. President—required by Federal law, not just any Federal law, but the very Federal law that we are about to reauthorize right here in the U.S. Senate.

How can anyone hear these examples and not conclude that what we are doing in ISTEA is dead wrong? It is wrong for the Cornelius family, it is wrong for the Gurney family, it is wrong for the preferred businesses who get the contracts, and, most importantly, it is wrong for our country.

I don't care how many times you tinker with the regulations or how many times you say 10 percent is only a goal, you can't change the fact, Mr. President, that the Federal Government is requiring States and prime contractors to pick and choose subcontractors based on the immutable traits of race and of gender. There is no lawyer in the Senate and no lawyer anywhere in the United States that will ever convince me that this racial program is fair, prudent, or—most importantly—constitutional.

In closing, let me say, regardless of the outcome of this morning's vote, I firmly believe that the principle underlying the 5th and 14th amendments will ultimately carry the day. It obviously will take a while. The principle is the simple yet powerful idea that every American should be seen as equal in the eyes of the law. I firmly believe, as Justice Scalia explained in Adarand, ''Individuals who have been wronged by unlawful racial discrimination should be made whole; but under our Constitution there can be no such thing as either a creditor or debtor race. . . . In the eyes of the government, we are just one race here. It is American.''

The courts and the American people understand this principle. Unfortunately, the Congress may be a bit behind.

Mr. President, I'm greatly appreciative of my colleagues participating in this important debate on both sides. They are well meaning Senators who look at the same set of facts and reach a different conclusion, but the debate has come and gone, the sky has not fallen, the Capitol dome has not caved in. In fact, it is the opposite. I think this debate has been very positive and constructive.

I end this debate as I began by asking one simple question: Should we place the Senate's seal of approval on a law that the Supreme Court has declared presumptively unconstitutional and the lower court has specifically struck down, without the Senate or House holding even one hearing after Adarand to determine if the law is narrowly tailored to remedy specific and persuasive discrimination?

As a Member of this body, my duty and obligation to the Constitution, the courts, and individual citizens compels me to declare no, we should not reauthorize this law. We have had no hearings since Adarand to determine that this program or any of the 160 Federal programs of racial preference that have been identified by CRS have met the strict scrutiny standard. The tactic of the Clinton administration has been to delay, deny, divert, and obfuscate. The American people deserve better.

Mr. President, I close with the words of the Weekly Standard:

> It won't do for a democratic country to lurch its way to colorblindness courtroom by courtroom, without the clear and resounding public debate an issue of such moment and principle demands. It won't do . . . to delay the prize of colorblindness, even for a moment, by silently ignoring the battle while it's waged. And, most basically, it won't do . . . to pretend that we don't understand what the Constitution says.

Mr. President, How much time remains?

The PRESIDING OFFICER. Forty-five seconds.

Mr. MCCONNELL. I reserve the remainder of my time.

Mr. CHAFEE. Mr. President, I ask unanimous consent that calculators be permitted on the floor during consideration of S. 1173.

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

Mr. CHAFEE. I yield to the Senator from Arizona.

Mr. MCCAIN. I thank the Senator from Rhode Island.

Mr. President, I rise in opposition to the amendment to eliminate the Disadvantaged Business Enterprise Program and establish a new Emerging Business Enterprise Program.

Mr. President, I'm not a supporter of race-based or gender-based set-aside programs. This amendment goes too far. It eliminates a program that, while seriously flawed in its current focus, was designed to provide opportunities for historically disadvantaged businesses to compete for Federal highway construction dollars. It establishes a new program that merely shifts the focus of Government intention and funding to businesses based on size and length of time in business.

Ironically, Mr. President, if the Emerging Business Enterprise Program proposed in this amendment had existed in 1975, software industry giant Microsoft would have qualified. In its first 3 years of business, Microsoft took in only $420,000, putting it well under the $25.2 million limit of the new program. Clearly, this business did not need any Government help nor interference.

I'm a member of the Renewal Alliance, and I listened with interest to comments made by my colleagues who are also working with this important project. As I stated earlier, I have serious concerns about the racial and gender bias of the DBE Program. However, to eliminate it without a suitable Government-wide replacement program focused on equal opportunity would be counterproductive and shortsighted.

Mr. President, all Americans—regardless of who they are, where they live, or their gender or skin color—all Americans deserve the opportunity to provide for their families, to pursue their aspirations, and to share fully in the American dream. Our efforts to assist the truly needy in our Nation should be focused on providing that opportunity equally. The American dream is based upon equality. History teaches us that there is no panacea for artificial barriers to opportunity, but no matter how intractable the problem, it is the essence of the American character to constantly advance our society so that social and economic progress of each generation exceeds that of its predecessor. No American is unimportant, and as a Nation we have an obligation to help those in need to help themselves.

Our success in that endeavor is bound only by the limits of our energy and our imagination. We must recognize that poverty and economic disadvantage do not confine themselves within a certain race, gender, or ethnic group. Economically disadvantaged people reside in practically every community. We have an obligation to help these Americans even if they do not happen to live within areas of the most severe poverty.

I suggest we target the root of the problem—lack of economic opportunity, not race, gender, ethnicity, and the like. Current programs focus on providing Federal assistance in contract preferences to businesses based on race or ethnicity of a business owner. We should reorient these programs to provide preferences to economically disadvantaged Americans, regardless of their race, creed, or color.

A needy American is a needy American, no matter their race, creed, color, or gender. Certainly the Supreme Court's decision in the Adarand case emphasizes the reality that, by and large, race-based set-asides do not comport with the fundamental tenets of equality and equal protection.

Let me add a few thoughts of my own to the suggestions of other Members as to a possible focus for solving these problems. In the last Congress, I introduced a bill which included a section designed to retarget our efforts and redirect Federal spending goals to assist economically disadvantaged individuals and businesses regardless of race, ethnicity, skin color, or gender. There are a number of other areas where we can, as a Nation, assist our citizens who are less well-off, particularly providing high-quality educational opportunities and accessible and affordable health care. Together, these are the kinds of parameters and programs that I believe would help provide important economic opportunity.

The fundamental question is, shall our Government as a matter of policy prefer certain Americans because of their race or ethnicity or gender over other Americans, regardless of merit or need?

An answer in the affirmative seems to contradict our aspirations for a color-blind society dedicated to the rights of the individual. An answer in the negative appears indifferent to the gross injustices that have been inflicted on various racial and ethnic groups who make up the American tapestry.

The debate over contracting set-asides has focused too narrowly on either maintaining the status quo, with its inherent unfairness, or simply abolishing economic opportunity programs despite their potential to justly assist needy Americans. Fortunately, our options are neither so stark nor so limited. Rather, we can find the answer in reform.

Reforming federal programs so that they are color-blind and gender-neutral and focused on assisting needy Americans rather than wealthy business owners, will help us to address the economic needs of Americans without pitting one group against another, thereby violating the dictates of fairness and equality.

Mr. President, we cannot write a bill that will solve the problem of joblessness and poverty in our nation today. But I believe we can make significant gains by employing the kinds of incentives I and others of the Renewal Alliance have described today. I look forward to a future debate on these ideas to ensure that we craft incentives that will be as appropriate and cost-effective as possible in ending the cycle of poverty and dependence.

Mr. President, let me make one suggestion to my colleagues. I believe the relevant committees should hold field hearings and engage the Americans who live in the poorest communities in the debate over how best we can help them to meet the needs of their families and their neighborhoods. Perhaps it's time we more diligently consult and work with real people and address their realities as we endeavor to address the needs of our great nation.

Mr. President, let me close by saying to my fellow Republicans that our party has much at stake in this debate. As the party of Lincoln, our heritage and destiny is to be a party of all Americans dedicated to the principles of democracy, limited but efficient government, individual freedom and opportunity.

Unfortunately, in discussing the inherent contradictions and shortcomings of affirmative action programs, the danger exists that our aspirations and intentions will be misperceived, dividing our country and harming our party. We must not allow that to happen.

Mr. President, I yield the floor.

The PRESIDING OFFICER. Who yields time?

Mr. CHAFEE. Mr. President, I thank the Senator for those thoughtful comments.

Mr. BAUCUS. Mr. President, I see the Senator from New Jersey on the floor. I yield 4 minutes to the Senator from New Jersey, Mr. LAUTENBERG.

The PRESIDING OFFICER. The Chair recognizes the Senator from New Jersey for 4 minutes.

Mr. LAUTENBERG. I thank the Senator from Montana.

Mr. President, I stand here in opposition to the amendment that is being offered. I hope that the Senate will reject this amendment because, despite the best intentions of so many, we still do not have a level playing field when it comes to Government contracting. There is still discrimination. Sometimes it's overt, sometimes it's subtle; but it definitely still exists, and the facts bear this out.

Consider the following: for transportation construction contracts, minority-owned firms get only 61 cents for every dollar of work that a white male-owned business receives. Unfortunately, it's even worse for women-owned businesses—they only receive 48 cents. This amendment will only exacerbate these numbers.

I have to take 1 minute, Mr. President, to describe a personal situation. My mother was widowed early in the war. I had already joined the Army, and she went to work for an insurance company, a large insurance company, and she did a good job for 3 years. At the end of that time, they said to her, ''Molly, thank you very much, but Joe is back from the Army.'' She said, ''Well, give me another territory.'' They worked in territories at the time. They said, ''Well, you know we don't hire women for these jobs.'' It was shocking. My mother was shocked, my sister was shocked, and I was shocked, because she did her job and did it perfectly. They said, ''We don't hire women for these jobs.'' We are past that stage, thank goodness. But the fact is that women, whether it is in salaries or in business, are always operating at a different level than white men.

Mr. President, there are a few more figures I would like to give. Few are aware that white-owned construction companies receive 50 times as many loan dollars—and I know this having served for a short time on the Small Business Committee—as minority-owned construction firms with the same equity. And women-owned businesses have a lower rate of loan delinquency, yet still have far greater difficulty in obtaining loans. The majority of women business owners have to resort to personal resources, such as maxing out their credit cards, to finance their business.

Mr. President, we all know what the problems are with the traditional affirmative action programs. But we ought to work to correct them because people who don't have the same advantage, whether it's education or family exposure or a job opportunity, deserve to be able to come into the mainstream of America's economic and cultural life. And if they don't, we know what the problems are.

Mr. President, Jim Crow laws were wiped off the books over 30 years ago. However, their pernicious effects on the construction industry remain. Transportation construction has historically relied on the old boy network, which until the last decade, was almost exclusively a white, old boy network.

I do not imply that the individuals running these white-owned companies were racist, rather, I blame the discriminatory laws and practices that shut minorities out of this industry for so many years.

This is an industry that relies heavily on business friendships and relationships established decades, sometimes generations, ago—years before minority-owned firms were even permitted to compete. In 1982, President Reagan signed into law legislation attempting to put an end to the old boy network.

That legislation, creating the Disadvantaged Business Enterprise program, or DBE program, has been a success.

Mr. President, let me explain briefly what the DBE program does. The Secretary of Transportation sets a nationwide goal for participation by socially and economically disadvantaged businesses in transportation construction contracts. The program does not contain a quota or create a set-aside, but merely sets a goal for states to follow as they wish.

To their credit, the overwhelming majority of states have chosen to follow or exceed the recommended goal of ten percent. Those states that have opted out of this goal have neither been the recipient of any retaliation nor have otherwise suffered from any adverse consequence.

Furthermore, states and municipalities are given the flexibility to adjust their goals to reflect the availability of minority and women-owned businesses in their area.

Who are the participants in the DBE program? They are hungry small businesses that are just trying to get a chance at a Federal contract. These are competitive firms.

As one of my constituents who participates in the DBE program told me, if a pie is sliced ten times and nine pieces are eaten by a ''big guy'' and one piece is thrown to ten hungry little guys, you can be certain that those ten hungry little guys are going scramble, shove, kick, and scuffle to get that one piece.

Congress and President Reagan were right back in 1982 and the Chairmen of both the transportation subcommittee and the full committee were right to continue this program in ISTEA.

Why do we still need an affirmative action program for federal construction contracts?

Because we know that the private sector looks to the public sector for leadership on this issue. And we also know that once affirmative action programs stop, the inclusion of qualified minorities, be it in education or in business, drops. We have seen this with law school admissions in California and Texas. We have seen it in state contracting in Michigan and Louisiana.

I fear this would occur at the federal level and that it would spill over into lower levels of government and into the private sector.

Mr. President, it would be a shame to allow this to occur. I urge my colleagues to oppose the junior Senator from Kentucky's amendment and I yield the floor.

The PRESIDING OFFICER. The time of the Senator has expired.

Mr. MCCONNELL. Mr. President, I understand that I have 45 seconds left, and I yield that to the Senator from Pennsylvania.

The PRESIDING OFFICER. The Senator from Pennsylvania, Mr. SANTORUM, is recognized.

Mr. SANTORUM. Mr. President, I support the McConnell amendment. I believe the constitutional arguments are persuasive. As a member of the Renewal Alliance, I must say that the substitute or the replacement program Senator McConnell put forward is a step in the right direction. I disagree with Senator MCCAIN, who said it is not sufficient. I believe it is. It is, in fact, a good step.

Also, if we are able to not table the MCCONNELL amendment, I will be working with Senators ABRAHAM and COATS to see if we can do more, in fact, to put an agenda in place that really will do something for economically disadvantaged areas, and particularly urban areas in this country, so we can in fact create more hope and opportunity in those neighborhoods. That is really the ultimate goal, and I think the MCCONNELL amendment begins to go in that direction.

Mr. BOND. Mr. President—I will reluctantly vote against the McConnell amendment. I am concerned that if this provision is included in this bill the President will veto the bill or it will cause delay in enactment of this important legislation that is imperative to saving lives in this country.

This ISTEA legislation is a matter of life and death to Missourians. Highway fatalities in the state of Missouri increased 13 percent from 1992–95; 77 percent of the fatal crashes during this time frame occurred on two-lane roads. In Missouri, 62 percent of the roads on the National Highway System, excluding the Interstate, are two lanes. I have had too many friends die on Missouri's highways. We need to make certain that this legislation is enacted at the earliest possible date!

I want to make clear that since I became chairman of the Senate Committee on Small Business I have strived to make certain that government contracting opportunities are available to ALL small businesses. I know that the engine driving the economic growth of this country is small businesses. Small businesses and the entrepreneurs of this country, regardless of race or gender, should be given every opportunity to succeed.

For example, last year this body passed the HUBZones legislation which I authored. It passed unanimously and has been signed into law. The law provides government contract set asides to small businesses that are located in HUBZones, which are economically distressed metropolitan areas and poor rural counties. To be eligible for a contract set aside, 35 percent of a small business' workforce must be residents of HUBZones. This program is designed to help small businesses grow, while creating jobs and investment in urban and rural communities that are suffering from economic neglect.

I do have some concerns that the McConnell amendment could inadvertently eliminate the HUBZone program.

It is my hope that I can work with my friend and distinguished colleague, Senator MCCONNELL, on this issue in the future. But, I will not hold up $3.6 billion for my State of Missouri.

Mr. DURBIN. Mr. President, I rise today to express my support for the Disadvantaged Business Enterprise (DBE) program and my opposition to any attempt to weaken or eliminate the program. Under the DBE program federal transportation trust funds from user fees are distributed by the Department of Transportation (DoT) through state DoTs and state and local mass transit agencies. These agencies are required to establish a 10 percent goal for the trust funds they receive, but are afforded tremendous flexibility in reaching those goals. If a state agency or prime contractor is unable to find enough qualified subcontractors to perform the work, they are allowed to apply for a waiver or lower goal. In short, the DBE program does not establish a quota nor a set-aside program.

The opponents of the DBE program argue that this sort of flexible, constitutional affirmative action flies in the face of the American people's disagreement with affirmative action. This is simply not true. A Wall Street Journal poll published in November of last year found that 48 percent of Americans favor affirmative action and only 43 percent oppose. In addition, the voters in Houston last year rejected a Proposition 209-like initiative by 55 to 45 percent, thus, demonstrating the people's commitment to affirmative action.

Moreover, since the opponents of affirmative action often offer no alternative other than the promise of a society free from all prejudice against women and minorities, they must implicitly believe that discrimination no longer exists in this country. Either that, or they are not concerned that there are still very real disparities between the races and genders. Both alternatives are troubling.

The reality of these disparities is still disturbing. In a recent Urban Institute study identical black and white college students posed as test subjects in an experiment designed to measure the extent of racial discrimination in employment. The subjects were identical in dress, had the same resumes, and had scripted presentations. The only variable was race. Whites received job offers 41 percent more often than blacks. For those who received job offers, the wages whites were offered were 17 percent higher than the wages offered to blacks.

Another recent study conducted by the Glass Ceiling Commission found that 96 percent of the senior managers of the Fortune 1000 Industrials and the Fortune 500 Companies are male; 97 percent are white; 0.6 percent (that is, less than one percent) are black; 0.4 percent are Latino; and 0.3 percent are Asian.

Sadly, I am concerned that the arguments waged against the DBE program are not truly criticisms of the program but are merely thinly veiled attacks on civil rights itself. Although I respect the DBE program opponents' right to disagree on these issues, I find it disturbing that the underlying theme of their arguments against the program boil down to this: ''Minorities and women may have been discriminated against in the past—they may even still be discriminated against today—but we, the majority, are no longer going to provide remedial efforts to counteract this discrimination. Enough is enough.''

This sentiment runs counter to this country's dedication to civil rights and humanitarianism. To preserve our civil rights and to earn equal rights for all we must acknowledge the disappointing reality that we have not yet achieved a color or gender blind society. By attacking the DBE program, the opponents of the program are also dismantling the steps of progress we have made toward a nation we all want—a nation where there will be no reason to debate civil rights and where color and gender are not determinative of opportunity.

Mr. DOMENICI. I wonder if I might have the attention of the distinguished chairman and banking member of the Environment and Public Works Committee, as well as the chairman of the Subcommittee on Transportation. I want to address a program that is authorized under Section 1111 of S. 1173, namely, the Disadvantaged Business Enterprise (DBE) program.

As my colleagues know, in the wake of the Supreme Court's 1995 decision in Adarand v. Pena, all federal agencies undertook a review of their affirmative action programs with an eye toward ensuring that those programs met ''strict scrutiny''—the new standard of review set by the Court.

Toward that end, the Department of Transportation proposed a revamping of its regulations for the DBE program. D.O.T.'s intent was to ensure that the DBE program satisfied the two requirements of strict scrutiny—that the program met a ''compelling government interest,'' and that it was ''narrowly tailored.''

It is my understanding that last May, the Department published proposed new regulations in the Federal Register for comment. That comment period closed last September. Since that

time, Department officials have been poring through the 300-plus comments received. They hope to have the new regulations finalized within the next two months.

I believe the DBE program must be implemented in a manner that is constitutional. I believe that that is critical to the integrity of the program, and to the Senate's support of that program. Therefore, I would like to ask the chairman and ranking member—whose committee has oversight over the DBE program—if it is their intention to press the Department to ensure that the new regulations pass constitutional muster.

Mr. CHAFEE. Yes: it is. We have made it clear to the Secretary that while one can never predict with 100 percent certainty what language may pass constitutional muster, the Committee expects the Secretary and his legal staff to do their utmost to make sure that the new regulations closely follow the guidance set forth by the Court in Adarand.

Mr. BAUCUS. I concur. It is the committee's intention that his program be carried out in a manner that is consistent with the Constitution. We expect no less. Secretary Slater is aware of, and I am assured agrees with, our views on this matter.

Mr. WARNER. As chair of the subcommittee that sponsored this bill, I have a particular interest in this matter, and I want to assure the Senator that adherence to Adarand is our intent.

Mr. DOMENICI. I appreciate the Senators' confirmation on this point. Let me ask further: Will the committee continue to be in touch with Department officials as the regulations are readied for release? And will the Committee scrutinize the new regulations to ensure that the Department did in fact follow the Court's guidance under Adarand?

Mr. CHAFEE. Yes: we will.

Mr. BAUCUS. I can assure the Senator, and the Senate, that we will indeed.

Mr. WARNER. We certainly intend to.

Mr. DOMENICI. I am pleased to hear it, and I want to thank the Senators for taking the time to respond to my concerns.

Mr. ABRAHAM. Mr. President, I rise today to comment briefly on some remarks made earlier during debate on the McConnell amendment. In this debate, several of my colleagues noted that the percentage of state-awarded highway contract dollars realized by minority and woman-owned firms dropped dramatically in states that abolished their set-aside programs. Several speakers pointed to what happened in my own state of Michigan as an example of this phenomenon.

What the speakers did not explain is how Michigan ended its program. In 1989, the Sixth Circuit Court of Appeals struck Michigan's state DBE program as being unconstitutional, as a result of which Michigan was forced to abandon it. What this proves, though, is the opposite of what my colleagues supporting the tabling motion are claiming. We need to devise methods that will pass constitutional muster for reaching out to minority and women-owned firms, rather than reenacting a program that the courts surely will strike down, leaving us with no mechanism for aiding disadvantaged businesses.

Mr. DASCHLE. Mr. President, we all believe that America is the land of opportunity. But the road to opportunity is not always an equal access road. The highway construction industry in particular has kept newcomers, like women and minority-business owners, in the slow lane. There's no reason equal opportunity should be sacrificed when it comes to road building

That's why I support the Disadvantaged Business Enterprise, or DBE, program and oppose the McConnell amendment. The DBE program was signed into law by President Reagan and reaffirmed by President Bush; it has always enjoyed bipartisan support. Designed to enhance opportunity for all, and not limit it for any—it's a true equal opportunity program.

Contrary to arguments made by opponents of the DBE program, the Supreme Court in the Adarand case did not find the DBE program unconstitutional. The Court held only that strict scrutiny should apply to federal affirmative action programs as it does to those implemented by the states. Strict scrutiny requires that there be a compelling government interest in addressing discrimination and that the means chosen to address the discrimination be ''narrowly tailored.'' The DBE program meets both tests.

There is clearly a compelling interest in addressing the pervasive discrimination that has characterized the highway construction industry. According to the Supreme Court, ''[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups is an unfortunate reality, and the government is not disqualified from acting in response to it.''

The DBE program is also narrowly tailored, meeting the second prong of the Adarand test. The DBE program does not include quotas or set asides—it is a ''goals'' program. The individual States set their own goals that can be above or below the national goal of 10 percent. The DBE program does not set rigid numerical targets that must be met to avoid a penalty nor does it set aside contracts or dollars for certain businesses. Demonstrating conclusively that it is not a quota, the DBE program has no sanctions for failure to meet a goal.

Working to make the program even stronger, the Department of Transportation is issuing new regulations that ensure that it is as narrowly tailored as possible. For example, the new regulations provide that the program must give priority to race-neutral measures to reach out to women and minority-owned businesses; must ensure that good faith efforts are enough, even if the bidder has not achieved the goal; must ensure that the goal-setting is based on number of qualified DBEs in the state; and tighten up the certification process so that only qualified DBEs are in the program.

The DBE program is not only constitutional, but also is effective and necessary. The program creates jobs—the Department of Transportation estimates that the program directly or indirectly results in more than 100,000 jobs each year. It also serves as a motor for economic development in disadvantaged communities, with more than two billion dollars in construction contracts going to small businesses under the program. Women too have benefited greatly from the program. Since women were included as DBEs, their procurement dollars have grown by approximately 175 percent.

But we should not rest on our laurels. The time has not come to end the program, since women and minority-owned businesses are still greatly underrepresented in the highway construction industry. Minorities make up over twenty percent of the population, but minority businesses are only nine percent of all construction firms and those businesses get only five percent of construction receipts. Women own a third of all small businesses but receive less than three percent of federal procurement contract dollars.

In my state of South Dakota, there are seven DBEs qualified as prime contractors and 75 DBE subcontractors. Their contribution to South Dakota's economy and to their own communities goes beyond just the jobs they create and the business they generate. They are inspiring a new generation of small business owners to believe that they, too, will be able to drive on the road to opportunity.

That's why we need to keep this program—because we need to ensure that that road to opportunity is the wide open road that America is known for.

Mr. LIEBERMAN, Mr. President, I rise to express my views on the Disadvantaged Business Enterprise program, and to explain why I have decided to vote against Senator MCCONNELL's amendment, which would eliminate that program. This was not an easy decision for me to make. In attempting to analyze the constitutionality of the DBE program, we are dealing with a complicated area of the law, where many issues remain unsettled. But just as importantly, the outcome of this vote will affect hundreds of thousands of hard working Americans, of all races and of both sexes.

I have always opposed laws that establish quotas. I am going to vote against this amendment because I am convinced that the DBE program does not create quotas. There is substantial flexibility built into the program for states to set their own goals based on

local conditions. If they fail to meet their own goals, there is no federal sanction or enforcement mechanism. The Secretary of Transportation may waive the national goal of 10% for any reason, and presumably would do so if the collective efforts of the states did not add up to 10% of all ISTEA funds expended. All that convinces me that the percentage stated, while troubling is a goal not a quota.

But I am still troubled by the fact that this law establishes goals based on gender and racial classifications. Any law that confers some benefit based on gender or race can cause unfair results; those who are not members of the enumerated categories, the non-beneficiaries of the program, are being denied absolutely equal treatment. We should all hesitate before enacting such a provision. Indeed, the Supreme Court's Adarand decision now requires us to engage in a careful analysis before enacting such a provision. In Adarand the Supreme Court held that Congress may only enact racial classifications that are narrowly tailored to further a compelling interest. This standard of review, known as ''strict scrutiny'', is difficult to meet, but in her opinion for the Court Justice Sandra Day O'Connor emphasized that federal affirmative action programs could and would be upheld where Congress was acting in response to the practice and lingering effects of discrimination.

I am voting against the McConnell amendment in spite of my reservations because I am convinced that discrimination persists in the transportation construction industry and in related industries, and because I believe that the DBE program is narrowly tailored to attack the ongoing practice of that discrimination. The program therefore is both justifiable as sound policy and in compliance with the Supreme Court's Adarand decision.

We have before us ample evidence of historic and more importantly ongoing discrimination in the relevant industries, not just the transportation construction industry but also in the surrounding economic structure of lenders, suppliers, surety companies, and trade unions. Much of this evidence appears in the record before Congress; Congressional committees have received testimony describing this discrimination, and on many occasions committees of the House and the Senate have concluded that barriers still remain to equal participation by women and minorities.

In May of 1996, the Department of Justice published in the Federal Register an extensive survey of evidence showing how discrimination works to preclude minorities from obtaining the experience and capital needed to form and develop a business, and how discriminatory barriers deprive existing minority firms of full and fair contracting opportunities. That report found ''powerful and persuasive [evidence] that the discriminatory barriers facing minority-owned businesses are not vague and amorphous manifestations of historical and social discrimination. Rather, they are real and concrete, and reflect ongoing patterns and practices of exclusion, as well as the tangible, lingering effects of prior discriminatory conduct.'' Discrimination by trade unions and private employers has prevented minorities from getting the requisite experience and opportunity to move on to self-employment. Dozens of studies and lawsuits cited in the report demonstrate gross disparities over the years in these sectors of the economy, often caused by proven racial discrimination. Similarly, minorities have often been shut out of lending and bonding markets: a recent study in Denver found that African-Americans were 3 times more likely to be rejected for business loans than whites, and Hispanics were 1.5 times as high. Contracting itself too often remains a ''closed network''; prime contractors maintain their long-standing relationships with their subcontractors, and the new entrant minority or women-owned firms are excluded.

In my view, this evidence of discrimination is sufficient to establish the compelling interest required by the Adarand decision. But let's move beyond dry statistics for a moment and consider the people behind these numbers. Earlier I referred to the burdens that gender and racial classifications can impose on innocent parties. Our decision today is so difficult because we must compare that inequity to the harm caused to other, equally innocent people, by discriminatory business practices. The companies now benefitting from the DBE program are not inferior; we have heard no complaints about the quality of their work. Yet without the program many of them never would have received an opportunity to win contracts. I have met with these small-business owners, and they are rightfully proud of their accomplishments, and grateful for the opportunity this program gives them.

Just as I am satisfied that ISTEA's DBE program serves a compelling interest, so too am I convinced that the program is narrowly tailored to further that interest, as required by the Adarand decision. My belief that the DBE program will survive court scrutiny is bolstered by the new regulations that the Department of Transportation will be finalizing in several months. From my discussions with the Transportation Secretary and my staff's discussions with Transportation Department attorneys, it appears to me that the staff at that agency have been doing an excellent job poring over court decisions as well as comments from interested parties. The new regulations will adhere very strictly to the narrowly tailored test, and the result will be a DBE program that considers gender and racial characteristics without becoming quotas.

For example, states will be given a great deal more flexibility in determining how to calculate their goals, based on the availability of qualified DBEs in the relevant industries. These formulae are designed to focus on the extent to which discrimination in the contracting industry has actually reduced opportunities for DBEs, and to determine how much DBE participation there would be in the absence of discrimination.

Under the rules someone who is not himself financially disadvantaged will not be able to qualify for the DBE program, regardless of how small his company is. Anyone will be able to start a proceeding to prove that an individual owning a DBE is not actually socially and economically disadvantaged. On the other hand, anyone not presumed to be socially or economically disadvantaged would be able to apply for DBE status based on special circumstances. Finally, the DBE program makes extensive use of gender and race-neutral alternatives, as well as waivers.

I have listed only some of the more important regulations that have helped convince me that the DBE program will be narrowly tailored to further a compelling interest when it is implemented. Although I am satisfied that the DBE program can survive the courts' scrutiny, I still recognize that innocent people may be burdened by the program's effect on their livelihoods. Our obligation, and the obligation of the Executive Branch, is to minimize these unfair results in the design and implementation of the DBE program, and to strive for a day when we will not feel the need to incorporate even gender or racial goals into our laws at all.

Mr. KEMPTHORNE. Mr. President. I rise today to address the issue of the Disadvantaged Business Enterprise (DBE) program in the Intermodel Surface Transportation Efficiency Act (ISTEA). This DBE program is a narrowly tailored program that establishes the goal for states to have prime contractors use DBE's to do some portion of their federally assisted construction projects. While the federal goal is 10% of all projects, states are free to develop their own goal for their level of participation.

There is much confusion about what the ISTEA DBE program is and what it is not. It is not a program of federally mandated quotas that requires states to participate with the threat of financial sanctions for noncompliance. It is however, a program that allows states to set their own goals and targeted levels participation and permits annual renegotiation of these goals. Additionally, states are permitted to waive their self established goals in a particular contract or for an entire year if compliance is not possible. In fact in both 1996 and 1997 two states did not meet their goals and no sanctions were imposed.

Mr. President, the national goal for participation is 10% and while each state can vary from this my state of Idaho has adopted 10% as their target.

The Idaho Department of Transportation informs me that this program is very popular, it is easy to administer and participation is high. In fact, the state of Idaho has exceeded their 10% goal every year including the last three where participation was 11%, 12.4% and 10.7%. In Idaho the majority of the recipients of these construction contracts have been women owned businesses. Interestingly enough since the inclusion of women owned business as an eligible class under the ISTEA DBE program in 1987 women owned business in my state have increased 104%. While this growth figure includes all types of businesses, I am confident that the positive impact of this program on the construction trades cannot be over emphasized.

Mr. President, put quite simply the ISTEA Disadvantaged Business Enterprise program works. Without federal threats and financial sanctions this program has encouraged states to set goals that provide increased opportunities for women and minority owned businesses to participate in the ISTEA program. This is an excellent example of an incentive-based program that benefits our nation as a whole. I am committed to retaining this important program during the reauthorization of ISTEA.

Mr. BINGAMAN. Mr. President, I want to join my Senate colleagues in opposition to Senator MCCONNELL's amendment to eliminate the Department of Transportation's Disadvantaged Businesses Enterprise program. This program, known as the DBE program, for years has been very successful in bringing equity and fairness into construction contracting, and I believe it should be maintained as it is. Most of all, I agree that this program does not violate the equal protections guaranteed by our Constitution, and I question the Senator from Kentucky's interpretation that it does.

In fact, if Senator MCCONNELL is basing his reasons for eliminating this program on our Supreme Court's decision in Adarand v. Pena, then I am confused. My reading of Adarand suggests nothing of that sort.

While it is true that the underlying issue in Adarand was whether the Department of Transportation has infringed on Adarand's constitutional right to due process and equal protection, the issue the Court actually addressed and decided in this case was by what standard is an infringement in this context determined. In other words, how do we figure out what constitutes a violation of equal protection? Indeed, the Court reversed longstanding law, and raised the standard for justifying this program. Typically, the burden to justify the necessity and the implementation of a program that affects equal protection lays with the government.

The Court, for the first time, determined that the standard of ''strict scrutiny'' should be applied in a case of this sort. Specifically, the standard of strict scrutiny requires that if the government determines to implement a program such as the DBE program, which ultimately effects an individual's constitutional right to equal protection, the government first must show a ''compelling interest.'' Basically, the government must have more than a very good reason for the program. Second, even if the government can show a compelling interest, the standard requires that the government show that the program is ''narrowly tailored'' to serve that interest. So the issue before the Supreme Court in Adarand was which standard to apply, and the Court held that the standard must be ''strict scrutiny.'' This is a landmark decision, because it places on the government a very tough test, a test that often is very difficult to overcome. Of critical importance here, is that the Court recognized that the standard, although very tough to meet, is not fatal in fact, it is not impossible to overcome. And I believe that is where my colleague from Kentucky has erred.

What I understand Senator MCCONNELL to be saying is that the Court, in holding that strict scrutiny is the standard to apply in this context, ultimately held that the DBE was unconstitutional. To the contrary. The Court simply expounded the standard for making this determination, nothing more, nothing less.

What does this standard mean to the DBE program? It means that the Department of Transportation must show that its governmental ''interest,'' its important reason for having this program, is ''compelling.'' In this context, it requires that the government must show that there is a history of discrimination in the construction contracting industry, such that minority and women-owned businesses, although qualified for a contract, continuously are not awarded contract simply because they are minority- or woman-owned.

Clearly, there long has been a history of discrimination in this country, and the effects of discrimination still linger. Department of Transportation can show that although minority-owned businesses are 9 percent of construction firms, they get only 5 percent of construction receipts. Additionally, DoT can show that women own one-third of all small businesses, but in 1994, for example, received only 3 percent of federal procurement contract dollars. Moreover, Department of Transportation can show that, in the wake of City of Richmond v. Croson, disadvantaged businesses have been squeezed out from contracting opportunities. Put simply, in those areas where there is no DBE program in place, minority-owned businesses received no contracts at all. So it's clear there is a wide gap in the availability of qualified minority- and women-owned contractors and the number of contracts they are in fact awarded. The government's compelling interest is to remedy discrimination, and I don't think anyone in this Congress can dispute the government has a compelling interest.

The real issue here, however, is how the government sets out to remedy that discrimination. The Court explained that strict scrutiny requires the government must ''narrowly tailor'' whatever is crafted to address this problem. In other words, the program cannot be too broad, but must be designed specifically enough to remedy the discrimination without infringing on anyone else's Constitutional rights.

That is exactly what the Department of Transportation has in the DBE program. The DBE is designed only to provide a ''goal'' that ten percent of contracts be awarded to disadvantaged businesses. You may ask, what is the difference between a ''goal'' and a ''quota'' or a ''set-aside''? I see a clear distinction.

A quota requires that a minimum number of construction contracts be awarded to disadvantaged business, regardless of the amount or history of discrimination that has taken place. Right or wrong, it allows no flexibility. Same is true with a set-aside.

The Department's ''goal'' program, on the other hand, provides broad flexibility. I read the program to encourage contracting with disadvantaged businesses up to 10 percent of contracts. That is a very significant difference, particularly when you consider the strict considerations that DoT has built into the program.

For instance, the program requires that the goal correspond to the availability of qualified DBE's in a given market area; it requires the goal be ''race neutral''; the program cannot be for an unlimited period of time but only for as long as it takes to address any measured inequities in contracting; the goal of 10 percent is not required; and it also provides the flexibility to tailor a program to the circumstances of the locality.

Mr. President, I am confident that the DoT's DBE program is not unconstitutional and in full accord with Adarand. But nobody has to take my word for it. I suggest they examine Adarand for its real effect. That precisely is what many very esteemed constitutional law professors did, and they conclude that this program is within constitutional parameters. Any other conclusion we should leave to our Supreme Court.

Mr. President, I appreciate Senator MCCONNELL's concern for all the emerging small businesses in our country, and I agree there should be fairness, equality for all. I am certain he has only the most genuine interests in mind for everyone. I have to disagree, however, that fairness and equality will prevail if the DBE program is eliminated. Given our history as a nation and the lingering effects of discrimination, I believe the DBE program is necessary. Moreover, I believe it is constitutional and should remain

intact. Therefore, I will oppose the amendment.

Mrs. MURRAY. Mr President, I rise in strong support of the Disadvantaged Business Enterprise program and in opposition to the McConnell amendment. This program is the right way for our nation to provide business opportunities for all Americans.

I believe in the goals of the DBE program: To improve economic opportunities for qualified, but disadvantaged, business owners, who most frequently are women and people of color. This program counters the effects of past discrimination with a flexible and goal-oriented program that has worked. We have a much more diverse federal contracting base than we have ever had before. Since 1978, where women- and minority-owned businesses won only 1.9 percent of the federal highway construction contracts, they have 14.8 percent. That demonstrates the tremendous success of this program.

The DBE program does an excellent job of providing sufficient flexibility to target true disadvantaged businesses. If an African female-owned business truly is not disadvantaged, it will qualify under this program. Likewise, if a Caucasian male owns a disadvantaged business, he has an opportunity to qualify under the DBE program. That flexibility is why so many of us believe it offers us the best path forward toward true equality for all business people. It focuses our attempts to strengthen our economy on those who need our help most; it forces us to look at economics, not race or gender.

Mr. President, in 1995, the Senate debated this issue as part of the legislative branch appropriations bill. At that time, members of this body recognized this type of proposal simply goes too far. I led the fight to defeat that amendment with bipartisan support, 61–36. As ranking member of the legislative branch appropriations bill at the time, I offered a compromise amendment in an attempt to reach middle ground and deal with this issue in a constructive manner. That amendment passed 84–13.

I pledge to continue to fight economic, gender and race discrimination throughout this country. The Disadvantaged Business Enterprise program is one proven path toward that goal. This is not about special preferences or arbitrary set asides; this is about expanding opportunities for business people. I intend to oppose the McConnell amendment and urge my colleagues to do the same.

Mr. DORGAN. Mr. President, I rise to comment on the debate over the Disadvantaged Business Enterprise (DBE) program and the McConnell amendment. First, I want to say that I have some concerns about the DBE program, at least in its previous structure. I do not doubt the presence of racial, ethnic, and gender discrimination in this country and I would be the first to say that we ought to have strong national policies that are designed to rectify discrimination and provide assistance to businesses that are disadvantaged because of discrimination. However, a strict mandate on states to establish quotas and set asides is not the appropriate means to end discrimination.

Unfortunately, much of the debate over the McConnell amendment has inaccurately characterized the question in polemic terms. The advocates of the McConnell amendment would suggest that a vote against his amendment is a vote for quotas and set asides. That is simply not true.

While I have some concerns about the DBE program, I do not intend to vote for the McConnell amendment. The Department of Transportation has made significant changes in the DBE program under the directive of the President's review of all affirmative action programs. The new regulations no longer require states to adopt a 10% goal of DBE contracts for highway projects. The old regulations had that requirement. I would not support that approach. However, under the new regulations, the DOT provides states with several specific formula options with which they can utilize to establish the appropriate goal for DBE contracts for each particular state. Section 26.41 of the regulations—which specifies how each state sets their overall DBE goals—does not contain any specific percentage requirement.

The 10% goal specified in the underlying legislation is a nation-wide goal. Under the Department's regulations, each state will utilize one of several formula options specified in the regulations to determine the appropriate goal for that state. There is no quota mandate. The only requirement is that states make a good faith effort to determine how to set an appropriate goal for DBE contracts.

I am not persuaded by the agreements that the DBE program is unconstitutional. The Adarand decision did not declare the program unconstitutional. Rather, it required that the program be narrowly tailored. It appears to me that the Department's new regulations have been developed in a manner to comply with that requirement. I am confident that when these new regulations are implemented that the Department will be flexible and work cooperatively with states to establish appropriate goals. If the Department had not taken steps to revise this program, I would be advocating changes with respect to the ISTEA legislation. However, anyone who has reviewed the proposed new regulations (49 CFR Parts 23 and 26, May 30, 1997) would conclude that significant changes have been made and I believe that it is reasonable to allow the Department to implement those changes, which provide a great deal more flexibility to the states and will not impose a specific percentage requirement for DBE contracts.

Notwithstanding the questions about the constitutionality of the DBE program and whether or not it is a quota program, I am very concerned about the McConnell amendment because of the new requirements it imposes on states. The McConnell amendment expands the definition of what constitutes a ''disadvantaged business,'' duplicating many small business development programs which are currently administered by the Small Business Administration (SBA). In addition, the McConnell amendment imposes a significant financial burden on states to develop new outreach programs without providing any federal assistance to pay for these new requirements. Even if one were to conclude that the DBE program ought to either be changed or eliminated, the McConnell amendment is certainly not the correct response.

Therefore, Mr. President, I am opposing the McConnell amendment. However, I urge the Department to implement new regulations that give the states the flexibility to establish their own goal—as has been promised.

Mr. BAUCUS. Mr. President, I yield myself such time as I consume. Mr. President, we had a good debate yesterday. I want to emphasize a couple of points.

First, with all due respect, the argument that the Supreme Court has ruled that this program is unconstitutional and that we now have a duty to expunge the program from the statute books is a red herring. It is a bogus argument, a diversion, a smokescreen, as was so ably stated by the Senator from Pennsylvania, Mr. SPECTER.

If there was any doubt, it should have been dispelled by the letter that Senator DOMENICI received yesterday from Attorney General Reno and Secretary Slater.

I urge my colleagues to read that letter.

In Adarand, the Supreme Court did not hold that the DBE program is unconstitutional. It held that the program is subject to strict scrutiny. And it emphasized that this is not equivalent to holding that the program is unconstitutional.

The case was remanded to the district court. Judge Kane held that the program furthers a compelling governmental interest. But he also held that the program was not narrowly tailored.

So we have one district court judge, holding that the program is unconstitutional. Not the Supreme Court. Not an appeals court. But one federal district court judge, out of the 647 federal district court judges in the country.

The Justice Department disagrees with the decision. So do many others. And the federal government has appealed the decision.

There are, moreover, strong arguments that the program passes the strict scrutiny standard.

The district court itself held that the DBE program furthers a compelling governmental interest in overcoming discrimination in the construction industry.

With respect to narrow tailoring, as the letter to Senator DOMENICI explains, the DBE program is not a mandatory set aside or rigid quota. It's

flexible. It's negotiated with each state. It can be adjusted, lower or higher. It can be satisfied by good faith efforts. No penalty has ever been imposed on a state that has not met it's goal.

And the proposed rules would make the program even more flexible and narrowly tailored.

So I believe that it is very clear that this program is constitutional.

But there's another question.

What's right? What's the right thing to do here?

We all wish we lived in a world that was free from discrimination based on gender or race.

We don't. Discrimination is still with us. I think we all know that.

Women earn about 75 percent of what men earn for comparable work.

Women own 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 population, but own only 9 percent of the construction businesses, and those businesses receive only 4 percent of construction receipts.

So what do we do about it?

Sometimes, Mr. President, equal opportunity means more than outreach. It means more than mailing out brochures and holding seminars.

It means giving people an opportunity to prove themselves.

It means giving them a seat at the table.

That's what the DBE program is designed to do.

And, as I said yesterday, it works.

In 1978, 1.9 percent of federal highway construction dollars were going to firms owned by women or minorities.

Today, under the DBE program, it's 14.8 percent.

That's progress.

I, for one, am proud that the percentage of women and minorities participating in the federal highway program in Montana has risen to 20 percent. That's good news. Not only for women and members of minority groups. But for all of us. For our communities.

The program has worked. And because it has worked, people are still counting on it.

About 20,000 companies have qualified as DBEs. They've grown their companies, taken out loans, hired more employees, in the expectation that the program would continue.

If we look at the experience of Michigan, Louisiana, and other states that have repealed their state DBE programs, repeal of the federal DBE program will result in a sharp drop in the percentage of contracts going to businesses owned by women and minorities. By half, or more.

If that happens, all across this country, small businesses women and minority entrepreneurs will be left high and dry.

I, for one, will not vote to let that happen.

Mr. President, the DBE program is constitutional.

It's fair.

It works.

And it builds more inclusive communities and a stronger economy.

It's good for America, and it brings us together. That is what America is all about.

Again, I urge that the McConnell amendment be defeated.

I reserve the remainder of my time.

The PRESIDING OFFICER. There are 3 minutes remaining.

Who yields time?

Mr. CHAFEE. Mr. President, I have previously made clear my thoughts on this.

I think the arguments have been very well made in connection with the opposition to this amendment. I strongly believe that the Congress should not interfere with the Disadvantaged Business Enterprise Program at this point. I don't think this is the appropriate time.

As I have also pointed out several times, we have a letter from the Secretary of Transportation indicating that if this amendment should prevail, he would not be able to recommend that the President approve this legislation. What all that means, Mr. President, is that is a gentle way of saying he would recommend a veto. I suspect there would be a veto of this legislation. We have come a long way to try to get this legislation passed. I very much hope that it will not be subject to any kind of a veto threat, which would result if this amendment should pass.

Mr. President, we are going to vote at 11 o'clock. We must be very close.

The PRESIDING OFFICER. All time has expired.

Mr. CHAFEE. Mr. President, I move to table the amendment and ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second?

There is a sufficient second.

The yeas and nays were ordered.

The PRESIDING OFFICER. The question is on agreeing to the motion to table the amendment. The yeas and nays are ordered.

The clerk will call the roll.

The legislative clerk called the roll.

Mr. NICKLES. I announce that the Senator from Vermont (Mr. BENNETT), the Senator from Indiana (Mr. COATS), the Senator from North Carolina (Mr. HELMS), and the Senator from Texas (Mrs. HUTCHISON) are necessarily absent.

Mr. FORD. I announce that the Senator from Ohio (Mr. GLENN) is necessarily absent.

The PRESIDING OFFICER (Mr. SMITH of Oregon). Are there any other Senators in the Chamber desiring to vote?

The result was announced—yeas 58, nays 37, as follows:

[Rollcall Vote No. 23 Leg.]

YEAS—58

Akaka	Biden	Bond
Baucus	Bingaman	Boxer
Breaux	Graham	Moynihan
Bryan	Harkin	Murkowski
Bumpers	Inouye	Murray
Byrd	Jeffords	Reed
Campbell	Johnson	Reid
Chafee	Kempthorne	Robb
Cleland	Kennedy	Rockefeller
Collins	Kerrey	Roth
Conrad	Kerry	Sarbanes
D'Amato	Kohl	Snowe
Daschle	Landrieu	Specter
Dodd	Lautenberg	Stevens
Domenici	Leahy	Torricelli
Dorgan	Levin	Warner
Durbin	Lieberman	Wellstone
Feingold	McCain	Wyden
Feinstein	Mikulski	
Ford	Moseley-Braun	

NAYS—37

Abraham	Gramm	McConnell
Allard	Grams	Nickles
Ashcroft	Grassley	Roberts
Brownback	Gregg	Santorum
Burns	Hagel	Sessions
Cochran	Hatch	Shelby
Coverdell	Hollings	Smith (NH)
Craig	Hutchinson	Smith (OR)
DeWine	Inhofe	Thomas
Enzi	Kyl	Thompson
Faircloth	Lott	Thurmond
Frist	Lugar	
Gorton	Mack	

NOT VOTING—5

Bennett	Glenn	Hutchison
Coats	Helms	

The motion to lay on the table the amendment (No. 1708) was agreed to.

Mr. CHAFEE. Mr. President, I move to reconsider the vote.

Mr. LOTT. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. LOTT. Mr. President, first of all, it has already been announced informally that that is the last vote of the day. I thank the managers of the very important surface transportation legislation for their efforts this week. I think some good progress has been made. Several amendments have been disposed of. This was one that required some 8 hours, I believe, of debate.

Now that we have voted on that, we want to continue to make progress to complete this legislation. I think Senators on both sides believe that good progress has been made. I really appreciate, once again, the effort of Senator CHAFEE, Senator BAUCUS, Senator BYRD, Senator DOMENICI, Senator GRAMM and others, in coming up with the formula change that I think generally is agreed to on both sides of the aisle. But we need to begin to think now about how we conclude this so we can deal with the other very important issues that are awaiting, including the NATO enlargement issue and the Coverdell A-plus education issue. We have a couple other bills we are looking at considering on Monday, including possibly a resolution with regard to Saddam Hussein being a war criminal, and an intelligence bill.

But at the request of the chairman and the ranking member of the Environment Committee, our respective hotlines have asked that all Senators come forward with their amendments.

We are developing a list and we need to know the ones that are serious. I know there are a lot of them out there still that Senators are contemplating

offering, but we need to begin identifying the ones that really are serious. For instance, the list we have from the hot line is 250 amendments, with two Members on one side of the aisle having 100 amendments; just two Senators have 100 amendments. I must say, on our side of the aisle, there are 75 amendments. That is ridiculous. We need to identify the ones that we really are going to offer. We need cooperation in order to get that done.

We have been considering the bill really since the last session. Everybody has had a chance in the committee. Last year, we spent about 2 weeks talking about it. We had four cloture votes. We have had a total of 14 days on it.

There are several other issues that are important that we are going to have come up and will vote on, but I think now we need to get serious about bringing this to a conclusion. After looking at the list of amendments and consulting with the Democratic leader, I think we do need to go ahead and get a cloture vote so that we can eliminate the amendments that are not related directly to this bill and then begin to narrow the list.

CLOTURE MOTION

Mr. LOTT. Mr. President, I send a cloture motion to the desk to the committee amendment.

The PRESIDING OFFICER. The cloture motion having been presented under rule XXII, the Chair directs the clerk to read the motion.

The assistant legislative clerk read as follows:

CLOTURE MOTION

We the undersigned Senators, in accordance with the provision of rule XXII of the Standing Rules of the Senate, do hereby move to bring to a close debate on the modified committee amendment to S. 1173, the Intermodal Surface transportation Efficiency Act:

Trent Lott, John H. Chafee, John Ashcroft, Larry E. Craig, D. Nickles, Mike DeWine, Frank Murkowski, Richard Shelby, Gordon Smith, R.F. Bennett, Craig Thomas, Pat Roberts, Mitch McConnell, Conrad Burns, Spencer Abraham, Jesse Helms.

Mr. LOTT. Mr. President, the cloture vote will occur on Monday, March 9, probably around 5:15 or 5:30. Again, we will check with the Members' schedules and with the Democratic leader, but it will be around that time. We indicated there would not be a vote before 5. It may be a little after 5, depending on when planes arrive and when we can get agreement to have this vote scheduled.

CALL OF THE ROLL

Mr. LOTT. Mr. President, I ask unanimous consent that the mandatory quorum under rule XXII be waived.

Mr. DASCHLE. Mr. President, reserving the right to object, and I do so to comment on a couple matters raised by the distinguished majority leader.

First of all, he noted we have spent at least 3 weeks on this bill already, 2 last fall and 1 last week. He also noted that this has been a productive week, and I share that view; it has been productive. I will encourage my colleagues to vote in favor of cloture Monday night simply because we have to come to closure. There are a lot of good amendments to be offered yet. We will have that debate, but we can do that under the strictures which cloture provides, and I am very supportive of resolving the outstanding questions so we can move on.

I also compliment, as the majority leader did, our two managers. They have done an outstanding job, to date, in working with Members on both sides. I hope that we can continue to be responsive to the concerns, both with the schedule as well as with the legislation. I am sure that will be the case.

Finally, I thank all of those who voted in favor of tabling the previous amendment. I commend the leadership on both sides who took the active interest in enlightening us all about the importance of the Disadvantaged Business Enterprise Program. I appreciate very much the overwhelming vote we just had and, hopefully, at long last, it will put this issue to rest.

Again, Mr. President, I share the sentiment expressed by the leader. This is the time to move this legislation forward. This cloture vote will allow us to do that. I am hopeful that we can have a good debate on other amendments on Monday and have that vote Monday night so we can complete our work sometime by the middle of next week. I have no objection.

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

Mr. LOTT. I will note, Mr. President, that the chairman and the ranking member have asked me to advise Members they are going to be here for more time today, into the afternoon. They are open for business. If Senators have amendments, particularly if they think they will not be controversial and would like to get them considered, perhaps accepted or get them in line to be considered, I hope Senators will contact the chairman or the ranking member in the next hour. They will be off the floor in a meeting for the next few minutes, but they plan to stay here for several more hours to work on this bill.

I ask unanimous consent now that all first-degree amendments under rule XXII be filed up to 1 p.m. on Monday and all second-degree amendments by 5 p.m. on Monday.

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

Mr. LOTT. I understand that at 12 noon, approximately, Senator BROWNBACK will be ready to offer an amendment regarding rail banks. I hope other Senators will come and be prepared to offer amendments and have them considered one way or the other this afternoon. Would the Senator from Iowa like me to yield?

Mr. HARKIN. If the leader will yield for a question. On the highway bill, I am concerned the Banking Committee has to offer its amendment on transit. I am concerned about the cloture vote on Monday night. Does that cover the Banking Committee's provisions on transit, because some of us who are concerned about rural transit may have an amendment on rural transit depending on what the Banking Committee's amendment looks like?

Mr. LOTT. I understand that amendment is being drafted, and we hope to have that offered Monday. The Senator will have a chance to take a look at it and be involved in it.

Mr. HARKIN. If the leader will yield further, but if they offer it on Monday and the cloture vote is at, what time, 5?

Mr. LOTT. At 5:15, 5:30, and it could be even a little later, depending on what is going on.

Mr. HARKIN. That would cover the Banking Committee provision.

Mr. LOTT. I think what we are saying is we hope to have the banking issue done before we get to cloture. But if we can't get it worked out, then we will try to work out an arrangement so the Senator's concerns will be addressed. We would not want to foreclose that, let's put it that way.

Mr. HARKIN. I appreciate that. I haven't had any amendments to the underlying bill. Some of us from rural States may have an amendment depending on what the Banking Committee comes out with. We won't have a chance to look at it until Monday. I am concerned about having the cloture vote without time to look at it and consider it with Members on both sides of the aisle. That was my only concern on that.

Mr. LOTT. I will just say, again, I think the Senator has legitimate concerns, and we will have to get an agreement to accommodate those concerns, and we intend to do that.

Mr. HARKIN. I appreciate that.

AMENDMENT NO. 1708

Mr. BYRD. Mr. President, I would like to briefly explain my vote on the motion to table the amendment offered by my distinguished colleague, Senator MCCONNELL, to S. 1173, the Intermodal Surface Transportation Efficiency Act. Despite my sympathy with the position of Mr. MCCONNELL, and despite my reservations about the Disadvantaged Business Enterprise (DBE) Program, I voted in favor of tabling the amendment.

Like many of my colleagues, I encourage small businesses—including those owned by socially and culturally disadvantaged individuals—to take an active role in bidding for federally funded highway construction contracts. But, while I understand the goals of the DBE program, as set forth in Section 1111 of ISTEA, I do not support preferential treatment for certain businesses on the basis of the race, ethnicity, or gender of their owners.

I believe that the Constitution, as amended by the 5th, 13th, and 14th Amendments, does not permit the government to discriminate or differentiate on the basis of race, ethnicity, or

gender—regardless of whether the government's motive is malicious or benign. If the precepts of ''equal protection'' and ''due process'' are to mean anything, then they must ensure that no one in this country is granted favorable or unfavorable treatment on the basis of some single differentiating characteristic.

My reading of the Constitution is supported by the Supreme Court's 1995 decision in Adarand versus Pena. In that decision, the Court rules that the DBE and other race-based affirmative action programs can only be upheld if they are narrowly tailored to meet a compelling governmental interest. This test, commonly referred to as ''strict scrutiny,'' makes it exceedingly difficult for any affirmative action program to pass constitutional muster. It should come as no surprise, then, that after the Court remanded the Adarand case, a federal district court judge found that the DBE program fails strict scrutiny, and thus is unconstitutional. Indeed, it is worth pointing out that the last time that the Supreme Court upheld a statute based on a racial- or national-origin classification under the strict scrutiny test was in 1944.

In my opinion, the correct course of action is to award highway contracts on the basis of cost, performance, and the most efficient use of taxpayer's money. This merit-based approach is both fair and constitutionally appropriate.

Despite these reservations about DBE, I also recognize that the courts have not yet definitively ruled on the constitutionality of affirmative action programs. The Adarand district court decision is currently on appeal, and I look forward to further clarification of the constitutionality of programs such as DBE.

Furthermore, while I support the McConnell amendment in principle, I believe that further debate and scrutiny is necessary. This amendment has not yet been subjected to the committee process, which is so essential to determining the true merits and flaws of a proposal. Before we replace the DBE program with an Emerging Business Enterprise Program, we need to ensure that the replacement does exactly what we want it to do. Otherwise, we risk hurting some small businesses through rash, ill-considered action. For these reasons, I voted to table the McConnell amendment.

MORNING BUSINESS

Mr. LOTT. Mr. President, I ask unanimous consent that there be a period for the transaction of morning business until 12 noon, with Members allowed to speak for up to 10 minutes each.

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

Mr. LOTT. Mr. President, I would like to be recognized for a statement now.

The PRESIDING OFFICER. The majority leader is recognized.

Mr. LOTT. I thank the Chair.

(The remarks of Mr. FRIST, Mr. LOTT, Mr. JEFFORDS, Mr. KENNEDY, Mr. HARKIN, and Mr. BINGAMAN pertaining to the introduction of S. 1722 are located in today's RECORD under ''Statements on Introduced Bills and Joint Resolutions.'')

Mr. TORRICELLI address the Chair.

The PRESIDING OFFICER. The Senator from New Jersey.

Mr. TORRICELLI. Thank you, Mr. President.

STATUS OF PUERTO RICO

Mr. TORRICELLI. Mr. President, inscribed on the corridors of this Capitol are the words of William Henry Harrison, spoken at his Presidential inauguration in 1841. He said: ''The only legitimate right to govern is an express grant of power from the governed.''

Indeed, the very principle of the consent of the governed is the foundation of this democratic society. That issue was at question in the House of Representatives this week when the Congress considered the issue of the political status of Puerto Rico.

I believe it is clear that it is not in the interest of these United States to leave the 20th century, with it being claimed in any quarter of this globe, that the United States is in an involuntary political arrangement with any peoples. The unfinished business of American democracy is the political status of Puerto Rico.

The history of the 20th century for the United States have been the constant expansion of enfranchisement of the governed. Within this century, we have either guaranteed or attempted to assure the right to participate in our democracy to women and, through the struggle of civil rights, for African Americans.

In 1913, we changed the U.S. Constitution to ensure that all citizens of the United States could participate in choosing Members of this Senate. In 1971, we extended the right to vote for those who are 18 years old. And, indeed, also in this century, we ensured this enfranchisement was expanded geographically to include the citizens of Hawaii and Alaska.

But this only begs the question of the unanswered issue since 1898, at the end of the Spanish-American War, of what is to be done with the arrangement of the people of Puerto Rico and the Government of the United States. It is an issue that has come before this Congress continuously. In 1917, Congress granted citizenship to the people of Puerto Rico. In 1952, Congress revisited the issue to provide commonwealth under American jurisdiction.

And yet, the issue continues, because the full rights of citizenship granted to those of the 50 States remain withheld to the people of Puerto Rico. The people of Puerto Rico are subject to laws and regulations passed by this legislative body, yet they have no voting representation. The people of Puerto Rico are led by a President and Vice President exercising full executive authority, but they cannot vote to choose that executive leadership.

The people of Puerto Rico hold citizenship in a country whose legislature can take away or compromise their rights of citizenship at any moment. The legislation passed by the House of Representatives, legislation which I was proud to cosponsor—indeed, originally authored when I was a Member of that body—redresses this injustice.

This legislation does not mandate a political choice for the people of Puerto Rico. Whether or not Puerto Rico ultimately becomes a State of this Union is a question for the people of Puerto Rico, and only for the people of Puerto Rico, to decide. Whether or not the people of Puerto Rico are able to exercise that choice is a responsibility of this Congress.

I do not believe that this Congress should express itself on that issue. Whether or not the choice is statehood, independence, or commonwealth is only a matter for the people of Puerto Rico. But as certainly as it is our responsibility that the people of Puerto Rico have a right to exercise that choice, it is our responsibility in the United States to ensure they exercise it honestly, with legitimate choices.

The bill authorizes Puerto Rico to hold a referendum by the end of 1998 as to whether or not to remain a commonwealth, seek independence, or choose statehood. If a majority of citizens were to decide to seek independence or statehood, then the President would submit legislation to the Congress outlining a transition plan that would culminate in 10 years.

Then, the people of Puerto Rico would take to the polls once again to approve or reject the plan. If it were passed by a majority of the people of Puerto Rico, then the President would submit legislation to the Congress recommending a date to end the transition period. Then, for a third time the people of Puerto Rico would vote again on the issue of self-governance.

This is an extensive and a complicated plan for final political status. It is important that these three votes be held over an extensive transition period, because as history has made clear, any judgment to join this Union is irreversible and it is final. A decision on statehood is made once and never made again.

Mr. President, I understand that there are some Members of the Senate who are concerned about this legislation because of its impact on our Union. I believe that a decision by the Puerto Rican people, if they make it in their own judgment, is in the interests of this Union.

The United States would be enriched culturally. Indeed, it would make clear that the bridge that the United States has enjoyed for so long culturally to Europe is equally as strong with the peoples of Latin America. Indeed, I believe all Americans would be proud and enriched by this judgment.

Mr. President, that, of course, is a decision for the people of Puerto Rico to make. But if they make it, I hope