No. 87-998

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CITY OF RICHMOND,

Appellant,

v.

J.A. CROSON COMPANY,

Appellee.

On Appeal from the United States Court of Appeals for the Fourth Circuit

---

BRIEF OF THE NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, NATIONAL ASSOCIATION OF COUNTIES, AND INTERNATIONAL CITY MANAGEMENT ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF APPELLANT

DAVID A. STRAUSS
University of Chicago
Law School
1111 East 60th Street
Chicago, IL 60637
(312) 702-9601

BENNA RUTH SOLOMON
Chief Counsel
STATE AND LOCAL
LEGAL CENTER
444 N. Capitol Street, N.W.
Suite 349
Washington, D.C. 20001
(202) 638-1445
Counsel of Record for the
Amici Curiae

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether the Equal Protection Clause prohibits the City of Richmond from remedying the effects of racial discrimination on minority participation in city construction contracts by enacting a temporary program that, subject to a waiver provision, requires contractors to subcontract a portion of their contracts to minority business enterprises.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-998

CITY OF RICHMOND,

Appellant,

v.

J.A. CROSON COMPANY,

Appellee.

On Appeal from the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, NATIONAL ASSOCIATION OF COUNTIES, AND INTERNATIONAL CITY MANAGEMENT ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF APPELLANT

INTEREST OF THE *AMICI CURIAE*

The *amici*, organizations whose members include municipal and county governments and officials throughout the United States, have a strong interest in legal issues that affect state and local governments. This case concerns the constitutionality of a temporary minority subcontracting program adopted by the City of Richmond, Virginia. The program provides that any firm awarded a construction contract by the City shall, unless it receives a waiver, subcontract 30% of the value of the contract to minority business enterprises.

This is a case of great importance to the *amici*. Programs comparable to Richmond's are very common among state and local governments. After the Court noted probable jurisdiction in this case, we undertook a survey of state, municipal, and county governments; the results are reproduced in the appendices to this brief.

The survey identifies 36 States and 190 local governments throughout the Nation that have adopted programs

that use a variety of devices, including numerical goals or targets, to expand minority access to government contracts. The vast majority of these programs were adopted after this Court's decision in *Fullilove v. Klutznick*, 448 U.S. 448 (1980), which upheld a similar program enacted by Congress. Many of the programs, including Richmond's, were modeled on the federal program upheld in *Fullilove*. As we explain below (pages 7-10), the decision of the court of appeals in this case imposes more stringent requirements on state and local governments than *Fullilove* imposed on the federal government. Many state and local programs, therefore, would be jeopardized by the approach taken by the court of appeals, if it were to prevail.

These efforts by state and local governments represent a practical and constructive attempt to deal with the effects of discrimination at the level of government where such problems are best addressed. Because *amici* believe that it is exceptionally important that those efforts not be jeopardized, we offer this brief to assist the Court in its resolution of this case.[1]

STATEMENT

1. In April 1983, the Richmond City Council adopted a Minority Business Utilization Plan. The Plan provides that a contractor who is awarded a construction contract by the City shall, unless granted a waiver, subcontract at least 30% of the value of the contract to minority business enterprises (MBEs).[2] J.S. App. 2a. The City will grant a waiver if a "sufficient [number of] . . .

---

[1] The parties' letters of consent to the filing of this brief have been lodged with the Clerk.

[2] The Plan contains a detailed definition of which businesses qualify as minority business enterprises. These provisions require that the firm be owned by members of minority groups and that it be either controlled or operated by minority group members. See J.S. Supp. App. 115-116, 251-252. A general contractor that is itself a minority business enterprise need not subcontract 30% of its contract to other MBEs. *Id.* at 247. The Plan requires the City to verify that an enterprise claiming to be an MBE is not a sham. See *id.* at 62.

qualified [MBEs] . . . are unavailable or are unwilling to participate in the contract." J.S. Supp. App. 67-68. The Plan is explicitly "remedial" (*id.* at 248) and temporary; it expires at the end of June 1988 (*ibid.*).

The City Council adopted the Plan after holding a hearing during which it received testimony and information about the history of public construction contracting in Richmond. The Council learned that during the preceding five years, only two-thirds of 1% of the dollar value of construction contracts awarded by Richmond was awarded to MBEs. J.S. Supp. App. 38, 115. The population of Richmond is approximately 50% minority. *Ibid.* The City Manager and a member of the City Council stated, on the basis of their experience, that there was widespread discrimination in the construction industry in general and in Richmond in particular; opponents of the Plan within the Council, and representatives of contracting associations who spoke at the hearing, did not dispute these statements. *Id.* at 38, 164-165.

2. In September 1983, the City invited bids on a project that involved the installation of certain plumbing fixtures in the City Jail. Appellee was the only bidder. After the bidding was closed, appellee sought a waiver of the requirement that it subcontract with an MBE. J.S. App. 2a-3a; J.S. Supp. App. 120-124. The City declined to grant the waiver and, when appellee sought to increase the price of its contract with the City, the City reopened the bidding on the contract. The City invited appellee to submit a new bid. J.S. App. 3a.

Instead, appellee brought this action, which was removed to the United States District Court for the Eastern District of Virginia. Appellee sought injunctive and declaratory relief and damages, claiming, among other things, that the Plan violated its rights under the Equal Protection Clause of the Fourteenth Amendment. The district court rejected appellee's claims (J.S. Supp. App. 110-232), and the court of appeals affirmed (*id.* at 1-109). This Court granted appellee's petition for a writ of certiorari, vacated the judgment of the court of ap-

peals, and remanded the case for reconsideration in light of *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986). See 106 S.Ct. 3327 (1986).

3. On remand, a divided court of appeals reversed the judgment of the district court and held the Plan unconstitutional. J.S. App. 1a-26a. The majority acknowledged that a City may use a r[illegible]l preference in order to "redress a practice of past [illegible]ngdoing" (J.S. App. 14a). But the majority rul[illegible]at the Richmond Plan was invalid because there was "no record of prior discrimination by the city" in this case. *Id.* at 6a. The majority explained that, for example, "[t]here has been no showing that qualified minority contractors who submitted low bids were passed over . . . [or] that minority firms were excluded from the bidding pool." *Id.* at 8a.

The majority further asserted that the statements made during the City Council hearing were not sufficient to support the Plan because they were "conclusory" and "highly general" (J.S. App. 6a). The majority also rejected as "spurious" (*id.* at 8a) the City's argume[illegible]t that an inference of discrimination was raised by the virtual absence of city contracts awarded to minorities, even though minorities constituted half the City's population. The majority stated that this disparity did not "demonstrate discrimination" because "[t]he appropriate comparison is between the number of minority contracts and the number of minority *contractors*" (*id.* at 7a; emphasis in original).

Finally, the majority concluded that even if the Plan were supported by the need to remedy past discrimination, it would be unconstitutional because "it is not narrowly tailored to that remedial goal." J.S. App. 11a. The majority asserted that the 30% figure was chosen "arbitrarily"; that the definition of an MBE was not narrowly tailored; that the provision for a waiver was too "restrictive"; and that the temporary nature of the plan was immaterial because "[w]hether the . . . [P]lan will be retired or renewed in 1988 is, at this point, nothing more than speculation." *Id.* at 11a-13a.

Judge Sprouse dissented. J.S. App. 14a-26a. The court of appeals denied rehearing en banc by a vote of 6-5. *Id.* at 27a-28a.

SUMMARY OF ARGUMENT

A. The decision of the court of appeals is inconsistent with *Fullilove v Klutznick*, 448 U.S. 448 (1980). *Fullilove* upheld a federal program that is indistinguishable from Richmond's Minority Business Utilization Plan in every relevant respect. Moreover, the evidence supporting the Richmond Plan is stronger than the evidence adduced in *Fullilove*.

Fullilove cannot be distinguished on the ground that it involved the exercise of congressional power under Section 5 of the Fourteenth Amendment. The basis of Congress's broad Section 5 power is the concern that the States might fail to act against discrimination. Here, Richmond has acted to remedy discrimination. It would be paradoxical to interpret the grant of power to Congress in the Fourteenth Amendment in a way that reduces the authority of state and local governments to remedy racial discrimination. In addition, state and local remedies for discrimination have many practical advantages over remedies imposed by the more remote and less knowledgeable federal government.

B. Although *Fullilove* is sufficient to dispose of this case, the Richmond Plan also satisfies the standards prescribed in this Court's other decisions concerning race-conscious measures.

1. Richmond has a strong basis for concluding that racial discrimination in the construction industry affected minorities' access to City contracting opportunities. The most compelling evidence is that minorities, who are half of Richmond's population, received less than one percent of public construction contracting funds. The court of appeals' dismissal of that evidence is manifestly erroneous. In addition, Richmond had nonstatistical evidence of discrimination from several sources.

The court of appeals ruled that this evidence was inadequate because the Richmond City Council did not

make a "finding" or "showing" that identified particular discriminatory acts. This Court's decisions, however, establish that such findings are not required. In addition, requiring a government to identify discriminatory acts will inject an unnecessarily divisive and adversarial element into the process of designing remedies for racial discrimination.

A race-conscious remedy was a fully appropriate response to the discrimination that Richmond identified in the construction industry. Simply requiring that firms in the industry not discriminate would not have been effective. Because of prior discrimination, minority firms now lack experience; they would accordingly be at a competitive disadvantage even if there were no longer any discrimination at all. An effective remedy for the vestiges of discrimination must provide a temporary way to overcome that competitive disadvantage.

2. Contrary to the court of appeals, Richmond was entitled to adopt a race-conscious remedy for discrimination in the construction industry even if the City itself did not discriminate. As this Court has often held, state and local governments have a compelling interest of the highest order in remedying private discrimination. That interest is even greater when the City is attempting to ensure that its own funds will not be spent in a way that supports, or perpetuates the effects of, private discrimination. A race-conscious measure will sometimes be the only effective means of promoting these exceptionally important government interests.

3. Richmond's Plan does not unfairly burden nonminority contractors. To a large extent, the burdens imposed by the Richmond Plan fall on the taxpayers. In that respect, the Plan is superior to nearly every other affirmative action measure that this Court has considered. The burden on nonminority subcontractors who compete with minority firms is limited and diffuse. Moreover, the Richmond Plan does not uproot settled expectations but only denies, at most, the contingent possibility of future economic gain.

ARGUMENT

RICHMOND'S MINORITY BUSINESS UTILIZATION PLAN DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE.

A. The Court Of Appeals' Decision Is Inconsistent With *Fullilove v. Klutznick.*

1. In *Fullilove v. Klutznick,* 448 U.S. 448 (1980), this Court held that Section 103(f)(2) of the Public Works Employment Act of 1977, 42 U.S.C. 6705(f)(2), does not violate the equal protection component of the Fifth Amendment's Due Process Clause. Section 103(f)(2) provided that 10% of the funds granted under the Act was to be used to procure services and supplies from MBEs. The Richmond Minority Business Utilization Plan was modeled on Section 103(f)(2), and it is indistinguishable from Section 103(f)(2) in every relevant respect. Indeed, the arguments supporting the Richmond Plan are significantly stronger than those advanced in support of Section 103(f)(2).

a. Section 103(f)(2) was supported by the same kind of statistical disparity as the Richmond Plan—a disparity between the percentage of minorities in the general population and the percentage of government contract funds received by minorities. The court below, without referring to *Fullilove*, condemned as "spurious" and "not . . . meaningful" the overwhelming disparity between the percentage of minorities in Richmond's population and the percentage of Richmond's public construction contract funds that had been awarded to minorities. J.S. App. 8a, 10a. But in *Fullilove*, a majority of the Members of this Court relied on precisely the same statistical comparison to support their conclusion that Section 103(f)(2) was a permissible remedy for past discrimination.[3]

---

[3] See 448 U.S. at 459 (opinion of Burger, C.J.) ("in fiscal year 1976 less than 1% of all federal procurement was concluded with minority business enterprises, although minorities comprised 15-

Indeed, in *Fullilove* the statistical disparity—minorities were 15% to 18% of the population and received less than 1% of public contracting funds—was far less dramatic than the 0.67% to 50% disparity that Richmond faced. The conclusion that Richmond had an adequate statistical basis for enacting a subcontracting requirement therefore follows *a fortiori* from *Fullilove*.

b. The court of appeals ruled that the Richmond Plan was not narrowly tailored to its remedial objective because the City's waivable 30% goal was an "arbitrar[y] . . . figure [that] simply emerged from the mists." J.S. App. 11a. *Fullilove* rejected just such an attack on the 10% figure used by Congress. See, *e.g.*, Brief for Petitioner General Building Contractors, *Fullilove v. Klutznick*, No. 78-1007, at 22 ("Congress made a purely arbitrary selection" of a 10% requirement).

Justice Powell explained in *Fullilove* why Congress's choice of a 10% requirement was reasonable, and his explanation fully justifies the waivable 30% figure chosen by Richmond. Justice Powell explained that the 10% requirement of Section 103(f)(2) was warranted because that figure fell approximately "halfway between the present percentage of minority contractors and the percentage of minority group members in the Nation." 448 U.S. at 513-514 (Powell, J., concurring). See also *id.* at 488-489 (opinion of Burger, C.J.). There were almost no minority contractors in Richmond (see J.S. Supp. App. 164), which has a minority population of 50%. The City's choice of a waivable 30% goal is therefore firmly supported by Justice Powell's reasoning.

18% of the population"); *id.* at 562-563 ("[The] 10% MBE participation requirement . . . was thought [by Congress] to be required to [avoid] . . . repetition of the prior experience . . . [in which] participation by minority business account[ed] for an inordinately small percentage of government contracting."); *id.* at 511 (Powell, J., concurring) ("By the time Congress enacted § 103(f)(2) in 1977, it knew that other remedies had failed . . . [because] the fact remained that minority contractors were receiving less than 1% of federal contracts."); *id.* at 520 (Marshall, J., concurring in the judgment).

c. The court of appeals' approach to the nonstatistical bases of the Richmond Plan is similarly irreconcilable with *Fullilove*. The court of appeals discounted the statements, made during the Richmond City Council's hearing, that the construction industry in Richmond had been marked by discrimination, on the ground that these statements were "conclusory," "general," and often made by supporters of the Plan. J.S. App. 6a. But in *Fullilove*, a majority of the Members of this Court relied extensively on statements of comparable generality made by supporters of Section 103(f)(2). Indeed, the statements on which the Court relied in *Fullilove* were, for the most part, made in connection not with Section 103(f)(2) but with other federal programs to aid minority enterprises. See 448 U.S. at 458-463 (opinion of Burger, C.J.); *id.* at 504 (Powell, J., concurring); *id.* at 520 (Marshall, J., concurring in the judgment).

d. The court of appeals ruled that the City's plan was invalid because the City had not made "showing[s]" (J.S. App. 8a) or "particularized findings" of prior discrimination (*id.* at 5a). But Chief Justice Burger explicitly noted in *Fullilove* that Section 103(f)(2) "recites no preambulary 'findings'" (448 U.S. at 478). Indeed, a majority of the Members of the Court emphasized that it is *inappropriate* to require a legislative body to produce specific findings to support the actions it takes.[4]

In *Fullilove*, of course, the question was whether Congress should be required to make specific findings. But

---

[4] See 448 U.S. at 478 ("Congress, of course, may legislate without compiling the kind of 'record' appropriate with respect to judicial or administrative proceedings."); *id.* at 502-503 (Powell, J., concurring) ("Congress is not expected to act as though it were duty bound to find facts and make conclusions of law. . . . [F]orc[ing] Congress to make specific factual findings with respect to each legislative action . . . would mark an unprecedented imposition of adjudicatory procedures upon . . . the legislative process."); *id.* at 520 n.4 (Marshall, J., concurring in the judgment) (The "view [that] Congress must make particularized findings . . . is fundamentally misguided.").

imposing such requirements on a state or local legislative body is at least as intrusive and unjustifiable. Cf. *FERC v. Mississippi*, 456 U.S. 742, 777-778 (1982) (O'Connor, J., dissenting). The inappropriateness of the requirement of specific findings stems from the nature of the legislative process itself. When elected representatives act, they bring to bear knowledge that they have gathered from a wide range of sources, including their general experience in public life and their contacts with constituents. This collective knowledge cannot be cabined in "findings" or "showings" about specific acts of discrimination.

e. The court below appears to have concluded that the Richmond Plan was invalid because it was not based on evidence of discrimination by the City itself. J.S. App. 5a, 6a, 8a, 9a. But there was no suggestion in *Fullilove* that Section 103(f)(2) was justified because of discrimination by the federal government, as a dissent in that case pointed out. 448 U.S. at 528 (Stewart, J., dissenting). Section 103(f)(2), like the Richmond Plan, was directed to discrimination in the construction industry and among the recipients of federal grants. See, *e.g.*, *id.* at 475, 478 (opinion of Burger, C.J.); *id.* at 505-506 (Powell, J., concurring).

2. The court of appeals did not attempt to reconcile its decision with *Fullilove* or to explain why state and local subcontracting requirements must meet standards that are stricter than those specified in *Fullilove*. Other courts of appeals, however, have asserted that Congress has greater power to remedy racial discrimination than state and local governments have. See, *e.g.*, *Associated General Contractors v. City and County of San Francisco*, 813 F.2d 922, 928-934 (9th Cir. 1987) (petition for rehearing pending).

a. The notion that Congress's authority to remedy discrimination is greater than that of state and local governments is unfounded in the law, and represents an unwarranted inversion of important values of federalism. It is true, of course, that Section 5 of the Four-

teenth Amendment greatly expanded the power of Congress to remedy racial discrimination. See *Katzenbach v. Morgan*, 384 U.S. 641, 650-651 (1966); *Ex Parte Virginia*, 100 U.S. (10 Otto) 339, 345-346 (1880). But the reason for this expansion was not to occupy the field or to preempt state and local action designed to remedy discrimination. Rather, the drafters of the Fourteenth Amendment expanded the power of Congress because they doubted that the States would adequately enforce the rights of the newly freed slaves to be free from unlawful discrimination.[5]

Against this background, it would be highly paradoxical to construe the Fourteenth Amendment to *reduce* the authority of state and local governments to deal with the problem of discrimination. The determination that racial discrimination was a national problem did not mean that it ceased to be a local problem. On the contrary, there is every reason to believe that the Framers of the Fourteenth Amendment would have welcomed state and local efforts to eradicate the effects of discrimination, where such efforts were forthcoming. Cf. *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 77-78 (1872) ("[T]he Fourteenth Amendment [did not] . . . transfer the security and protection of all the civil rights . . . from the States to the Federal Government"); see *Regents of the University of California v. Bakke*, 438 U.S. 265, 368 (1978) (opinion of Brennan, White, Marshall, and Blackmun, JJ.).

From a practical standpoint, local remedies for discrimination are likely to be far preferable to federal remedies. Congress lacks familiarity with local condi-

---

[5] See, *e.g.*, *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 70-71 (1872); Cong. Globe, 39th Cong., 1st Sess. 2768 (1866) (statement of Sen. Howard) (Section 5 "enables Congress, in case the States shall enact laws in conflict with the principles of the amendment, to correct that legislation"); R. Harris, The Quest for Equality 53 (1960); J. tenBroek, The Antislavery Origins of the Fourteenth Amendment 204-207 (1951); H. Flack, The Adoption of the Fourteenth Amendment 138 (1965).

tions; it acts on the basis of nationwide generalizations that will necessarily be over- and under-inclusive. For example, while some industries have a record of racial discrimination throughout the Nation, it is also sometimes the case that the firms in a particular locality have engaged in discrimination even though the industry has an excellent national record. Under the court of appeals' approach, the local government's power to act in such a situation will be sharply limited. Congress will be forced to choose between imposing a national solution, which may be excessive, and allowing the problem to go without remedy.

Similarly, a local government will be able to tailor its remedy to local conditions. For example, any nationwide numerical goal or target will be unrealistically high for areas of the country with a low minority population, and too low to be a fully effective remedy in areas with a high minority population. Local programs will not encounter this difficulty. Of course, a national goal may contain a waiver provision, as the Section 103(f)(2) program did. But if variations are to be made to accommodate local conditions, it is far better that they be adopted through local political processes than by the discretionary judgments of a federal administrator.

b. Nothing in the opinions in *Fullilove* suggests that the Fourteenth Amendment's expansion of Congress's authority restricts the power of state and local governments to remedy discrimination. Members of the Court did, of course, emphasize the scope of Congress's power to enforce the Fourteenth Amendment. See, *e.g.*, 448 U.S. at 483 (opinion of Burger, C.J.); *id.* at 499-502 (opinion of Powell, J). But they did so only to answer arguments that Congress might lack the power to act in this area. See, *e.g.*, *id.* at 476 (opinion of Burger, C.J.). State and local governments have always had the authority—under the police power and, as here, by virtue of their power to control public expenditures—to act against racial discrimination. The opinions in *Fullilove* do not suggest that the existence of Congress's power

under Section 5 somehow derogates from that traditional state and local authority.[6]

c. Perhaps most important, local solutions to the problems of racial discrimination have crucial political and social advantages over federal measures. When a decision is made at the local level, the officials responsible for it can be held directly politically accountable. Consequently, a decision by the elected officials of a state or local government reflects a decision by the people most directly affected to address the problem of racial discrimination in a certain way. The process of considering and enacting a remedy like Richmond's can help build a consensus. If circumstances change, the remedy can be modified. A federal requirement, by contrast, is imposed coercively from above. Ultimately the problems stemming from racial discrimination will be solved not by such coercive measures but by the development of a consensus and an understanding at the local level.

As we have noted (pages 1-2, *supra*), state and local governments throughout the Nation have determined, through their elected representatives, that public contracting requirements comparable to Richmond's will help to remedy the effects of racial discrimination. In these ways, *Fullilove* has become "an important part of the fabric of our law" (*Johnson v. Transportation Agency*, 107 S. Ct. 1442, 1459 (1987) (Stevens, J., concurring); see *id.* at 1461 (O'Connor, J., concurring in the judgment)). It has become the basis for political and economic accommodation of the various interests that are affected when the government attempts to remedy the effects of discrimination—an accommodation that has

---

[6] Thus Chief Justice Burger's statement that "in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees" (448 U.S. at 483) must be taken to mean what it says: Congress's authority is *as broad as* that of state and local governments. The opinion does not say—and, in our view, it would be paradoxical and incorrect to say—that congressional power is broader.

taken place on the local level, in scores of localities and more than two-thirds of the States, throughout the Nation. There is no sufficient reason for upsetting these accommodations and precluding state and local governments from addressing the problem of discrimination in this way.

B. The Richmond Plan Promotes Compelling Government Interests And Does Not Impose Unfair Burdens On Nonminority Contractors.

Fullilove is, in our view, sufficient to dispose of this case. But there is no inconsistency between *Fullilove* and the standards established in the other decisions of this Court that have considered the constitutionality of race-conscious measures. Although the Court does not appear to have agreed on a specific formulation of these standards, it is clear that such a measure is constitutional if it is designed to achieve a sufficiently important government objective and if it is tailored so as not to impose undue burdens on individuals who are not members of minority groups.[7]

The Richmond Plan satisfies these standards. Indeed, although we do not believe that a state or local government must show a "compelling" interest in order to sustain a race-conscious remedy, the objectives that the Richmond Plan promotes are in fact compelling, and the burdens it imposes on nonminorities are minimal.

1. *The Richmond Plan promotes the compelling interest of remedying racial discrimination in the construction industry.*

The Richmond City Council explicitly stated that it was adopting the Minority Business Utilization Plan for the purpose of remedying prior racial discrimination. The court of appeals did not deny that the Plan would

---

[7] See, *e.g.*, *United States v. Paradise*, 107 S. Ct. 1053, 1064 & n.17 (1987) (plurality opinion); *Wygant*, 476 U.S. at 274 (plurality opinion); *id.* at 286-287 (O'Connor, J., concurring); *id.* at 301-302 (Marshall, J., dissenting); *id.* at 313 (Stevens, J., dissenting).

be an effective means of remedying the effects of discrimination in the construction industry. Instead, the court ruled that Richmond did not have an adequate basis for concluding that such discrimination exists. In this section we address that aspect of the court of appeals' decision. In addition, we will explain why a race-conscious subcontracting requirement like Richmond's is an especially useful means—indeed, an indispensable means—of remedying discrimination in the construction industry.

The court of appeals also suggested that Richmond was entitled to remedy only its own discrimination, and that remedying discrimination in the construction industry did not constitute a sufficient government interest to uphold the Richmond Plan. We address that aspect of the court of appeals' reasoning in Part B2 below.

a. *i.* In *Wygant*, Members of this Court stated that a government may adopt a race-conscious remedy for past discrimination when it "ha[s] a strong basis in evidence for its conclusion that remedial action [is] necessary." 476 U.S. at 277 (plurality opinion). See also *id.* at 293 (O'Connor, J., concurring) ("a firm basis for concluding that remedial action [is] appropriate"). The Richmond City Council had more than a "strong basis" for concluding that there was discrimination in the construction industry. Perhaps the clearest evidence was the stark statistical disparity: minorities constitute half of Richmond's population, but have received only two-thirds of 1% of public construction contract funds.

The court of appeals dismissed this statistical demonstration as "spurious" (*id.* at 8a) and "not . . . meaningful" (*id.* at 10a). "The appropriate comparison," the court asserted, "is between the number of minority contracts and the number of minority *contractors*" (*id.* at 7a; emphasis in original). The court of appeals stated that the City's "[s]howing that a small fraction of city contracts went to minority firms," did not "demonstrate discrimination" because "the number of minority-owned contractors in Richmond was also quite small." *Ibid.*

This ruling is manifestly incorrect. The error in the court of appeals' approach is clear from numerous decisions of this Court, and it was recently explained by Justice O'Connor: when discrimination prevents minorities from "obtaining th[e] experience" that they need to qualify for a position, the "relevant comparison" is not with the percentage of minorities in the pool of qualified candidates but with "the total percentage of [minorities] in the labor force." *Johnson v. Transportation Agency*, 107 S. Ct. 1442, 1462 (1987) (opinion concurring in the judgment). See also *id.* at 1462-1463; *Steelworkers v. Weber*, 443 U.S. 193, 198-199 (1979); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 339 n.20 (1977). Discrimination does not merely prevent established minority contractors from obtaining contracts; it discourages and prevents minorities from entering the pool of contractors in the first place. The absence of the disparity on which the court of appeals insisted may simply be evidence that minorities, faced with widespread discrimination, did not quixotically enter a business in which they knew they would not be allowed to succeed.

An individual who wishes to take advantage of subcontracting opportunities must expend considerable resources. Such an individual ordinarily must incorporate, obtain bonding, hire managerial employees, buy or lease equipment, establish contacts with union hiring halls or other sources of labor, arrange credit, investigate bidding opportunities, and determine the bid that the newly formed firm can enter. These are costly operations. If there is discrimination at any stage—in the discretionary decisions of general contractors, in the practices of bonding companies, in the judgments banks or equipment leasing companies make about creditworthiness, in the willingness of skilled or unskilled laborers to work for a minority business—the minority group member is immediately placed at a competitive disadvantage. In these circumstances, few minority entrepreneurs will be willing to invest the necessary resources to establish a contracting

firm. They will pursue opportunities in a different field, where discrimination may be less of an obstacle to success.[8]

Significantly, these barriers continue to exist after acts of intentional discrimination have ceased. "[B]arriers to competitive access ha[ve] their roots in racial and ethnic discrimination, and . . . continue today, even absent any intentional discrimination or other unlawful conduct." *Fullilove*, 448 U.S. at 478 (opinion of Burger, C.J.). Experience—a "track record"—is highly important to any firm seeking contracting opportunities. *Id.* at 467. A network of contacts and a prior working relationship can be crucial in obtaining credit, bonding, or high-quality employees. See *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 570, 572 (1978) (describing hiring by construction "job superintendent" who "hired only persons whom he knew to be experienced and competent in th[e] type of work or persons who had been recommended to him as similarly skilled").

Indeed, it is often rational, and not an act of racial discrimination, for general contractors, banks, and others to give preferential treatment to firms that have an established record of reliability. This case furnishes an example: the district court found that a minority subcontractor interested in obtaining part of appellee's contract could not obtain a timely price quotation from a supplier because the minority entrepreneur "was unknown to" the supplier, and the supplier's agent "was not allowed to quote to unknown [firms] until they had undergone a credit investigation." J.S. Supp. App. 123. Because discrimination has prevented minorities from entering the field in the past, minority firms will continue to suffer the competitive disadvantages caused by relative lack of experience even if there is no longer any

---

[8] On several occasions, this Court has recognized that entrenched hiring discrimination will deter minorities from applying for jobs. See, *e.g.*, *Local 28 of Sheet Metal Workers v. EEOC*, 106 S. Ct. 3019, 3036-3037 (1986); *Teamsters*, 431 U.S. at 365-367. It follows *a fortiori* that discrimination will discourage minorities from forming contracting firms, a much more expensive and difficult task.

intentional discrimination at all. Minority group members will, accordingly, be unwilling to establish firms, and the disparity on which the court of appeals insisted will not appear.

Of course, it is theoretically possible that these barriers were not the source of the virtual exclusion of minorities from Richmond's public contracting business. But it is extremely unlikely. See *Teamsters*, 431 U.S. at 342 n.23; *Johnson*, 107 S. Ct. at 1465 (O'Connor, J., concurring in the judgment). Faced with the undisputed fact that there were essentially no minority contractors in a City that was half minority, the Richmond City Council could have concluded either that virtually no minorities were willing and able to become contractors, or that some appreciable percentage had been excluded by discrimination. The Council, with its intimate knowledge of the City's history, thought the latter hypothesis was more plausible. There is no justification for denying the City the right to reach this conclusion.

ii. In addition to the statistical evidence, the Richmond City Council had other reasons to believe that discriminatory practices had denied minorities opportunities in the construction industry. For example, a member of the City Council, as well as the City Manager, speaking from experience, stated their judgment that there had been widespread discrimination in the construction industry. J.S. Supp. App. 38, 164-165. In addition, the discriminatory exclusion of minorities from craft unions is so notorious that this Court has held it a proper subject for judicial notice. *Weber*, 443 U.S. at 198 & n.1. Craft unions supply employees to construction firms, and often new construction firms are formed by craft workers.[9] Thus the historic discrimination against minorities by the craft unions is likely to have had a severe effect on minorities' opportunities in the construction industry. Finally, as the district court noted (J.S. Supp. App.

[9] See, *e.g.*, J. Gillies & F. Mittelbach, Management in the Light Construction Industry 27, 28 (1962); see generally R. Glover, Minority Enterprise in Construction (1977).

165), the City had before it the same evidence that Congress had when it enacted the *Fullilove* program—"abundant evidence from which [a legislature] could conclude that minority businesses have been denied effective participation in public contracting opportunities by procurement practices that perpetuated the effects of prior discrimination," and "direct evidence" that a "pattern of disadvantage and discrimination existed with respect to state and local construction contracting" (*Fullilove*, 448 U.S. at 477-478 (opinion of Burger, C.J.)).

The court of appeals considered this nonstatistical evidence insufficient because it was not captured in adequately "particularized findings" (J.S. App. 5a). As we noted above, this conclusion is inconsistent with *Fullilove*, and it ignores the realities of the legislative process. The court of appeals relied exclusively on *Wygant* for its contrary conclusion, but one Members of the five-Justice majority in *Wygant* fully explained why specific findings of prior discrimination should not be required. 476 U.S. at 289-293 (O'Connor, J., concurring). And it appears that a majority of the Court in *Wygant* rejected a requirement that a government must make formal findings of discrimination before adopting a race-conscious remedy. See *id.* at 312 n.7 (Marshall, J., dissenting).

The court of appeals rejected the City's reliance on the data developed by Congress with the statement that "[n]ational findings do not alone establish the need for action in a particular locality." J.S. App. 9a. But in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), a case involving an ordinance that arguably affected First Amendment rights, this Court squarely rejected—as "unnecessarily rigid"—the contention that because the City had not presented "studies specifically relating to 'the particular problems or needs of Renton,' the city's justifications for the ordinance were 'conclusory and speculative.'" *Id.* at 50 (citations omitted). This is

almost precisely the contention that the court below accepted.

Renton held that a City is "entitled to rely on the experiences of . . . other cities" even when it is regulating in an area involving constitutional rights. *Id.* at 51. A City is not required "to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." *Id.* at 51-52. The statistical evidence of discrimination in Richmond gave the City ample reason to believe that the congressional findings were relevant to its situation.

Finally, the court of appeals' approach is insensitive to important practical considerations that affect state and local governments. First, as a practical matter, a requirement that a City compile a "record" or make specific "findings" with an eye toward judicial review will place all but the largest localities at an unwarranted disadvantage. Translating the insights, experience, and judgment of an elected official into a "record" or "particularized findings" suitable for judicial review is a task for a professional staff, preferably a staff with an extensive legal background. Congress and the Executive Branch of the federal government employ staffs that are adept at compiling a record that will withstand the kind of review that the court of appeals' opinion contemplates. But many medium-size and small localities—whose deliberations may be every bit as careful and thoughtful—do not employ, and cannot afford to employ, that kind of professional staff.

Second, and more important, the court of appeals' approach ignores the nature—and the special advantages—of the political process. The court of appeals appears to have required that state and local governments identify particular occasions on which identifiable acts of discrimination occurred. See, *e.g.*, J.S. App. 8a ("There has been no showing that qualified minority contractors who submitted low bids were passed over. There has

been no showing that minority firms were excluded from the bidding pool.").

Such a procedure—in which specific discriminatory acts or actors are identified—would benefit no one. It would require state and local governments to engage in a destructive process of recrimination and accusation if they wished to address the effects of racial discrimination through a race-conscious remedy. The genius of the political process is that it can often find a solution, even to problems as difficult as those implicated in this case, without reopening old wounds and setting individuals against each other. See *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 221 n. 10 (1974) ("The legislative function is inherently general rather than particular and is not intended to be responsive to adversaries asserting specific claims or interests peculiar to themselves."). The divisive process envisioned by the court of appeals would forfeit these advantages.

b. A race-conscious subcontracting requirement is a fully appropriate remedy for the discrimination that Richmond found to exist in the construction industry. A measure that simply required the firms involved in the construction industry not to discriminate would not have been effective. Indeed, we do not understand the court of appeals to have suggested otherwise.

As we noted above, and as Members of the Court explained in detail in *Fullilove*, discrimination in the construction industry creates a variety of subtle but severe barriers to competitive success. Intentional discrimination can handicap a construction firm in ways that a mere prohibition against discrimination cannot prevent, no matter how diligently it is enforced. More important, even after intentional discrimination has ceased, minority firms will continue to suffer from its effects. A simple prohibition against discrimination will do nothing to remedy those effects. See pages 16-18, *supra*; *Fullilove*, 448 U.S. at 461-467, 477-478 (opinion of Burger, C.J.).

For example, as we have noted, a rational, nondiscriminatory general contractor will often prefer to

give work to a subcontractor with which it has worked on previous projects and which it knows to be reliable. A bank or a bonding company will have nondiscriminatory reasons for giving better terms to firms with a long record of reliable performance. Informal networks, developed over years of working together, will often be the best means of hiring good employees. See pages 17-18, *supra*.

In each of these areas, minority firms are at a competitive disadvantage because they lack experience and contacts; and they lack experience and contacts because of past discrimination. This disadvantage cannot be overcome simply by banning discrimination. It can be overcome only by a compensatory remedy that improves the competitive position of minority firms.

Richmond's subcontracting requirement accomplishes this task in a measured, tailored fashion. It is a temporary device; the City will reassess the need for a race-conscious remedy before extending it. It does not guarantee any particular contract to any minority firm. Because of the waiver provision, minority firms have an incentive to be as efficient as possible; if their costs are too high, a general contractor may obtain a waiver. Moreover, as the district court explained (J.S. Supp. App. 145-146):

> [U]nder the Plan, there remains every incentive for both MBEs and non-MBEs to compete against one another. . . . The Plan simply changes the structure of the competition, by requiring non-MBEs to team up, insofar as possible, with MBEs, to compete for contracts against other teams of non-MBEs and MBEs.

The Richmond Plan does, however, ensure that a general contractor will not lose a job because it has subcontracted with a minority firm that has higher costs as a result of past discrimination. And, of course, the Richmond Plan requires general contractors to make real efforts to seek out minority firms; it does not permit a general contractor to make a merely perfunctory effort before returning to the traditional ways of doing business.

2. *Richmond may enact a race-conscious remedy for prior discrimination in the local construction industry without admitting complicity in racial discrimination.*

As we have explained, the Richmond City Council had more than sufficient basis for concluding that racial discrimination in the construction industry blocked minority access to city construction contracts, and the Richmond Plan was well designed to remedy this situation. But passages in the opinion below suggest that the court imposed an additional requirement on Richmond: the City, the court of appeals suggested, could enact a race-conscious plan only to remedy its own prior discrimination. The Richmond Plan, according to the court of appeals, could not be justified as a remedy for discrimination in the construction industry, no matter how conclusively Richmond demonstrated the existence of that discrimination, unless the City itself was in some sense guilty of discrimination. See J.S. App. 5a, 6a, 8a, 9a.

This conclusion is erroneous. In some circumstances, a local government is obligated to use race-conscious means to remedy its own discrimination. *North Carolina State Board of Education v. Swann*, 402 U.S. 43, 46 (1971); see also *Green v. County School Board*, 391 U.S. 430 (1968). The question in this case, however, is not what a state or local government is obligated to do but what it *may* do. It is well established that a state or local government not only may act to remedy private discrimination but has the most compelling interest in doing so. Moreover, both logic and this Court's decisions support the conclusion that a state or local government may use race-conscious measures to remedy private discrimination and its effects.

a. This Court has repeatedly recognized that governments have an interest of the highest order in eliminating private discrimination and its effects. See, *e.g.*, *Board of Directors v. Rotary Club*, 107 S. Ct. 1940, 1947 (1987) ("the State's compelling interest in eliminating discrimination against women"); *Bob Jones University*

v. United States, 461 U.S. 574, 604 (1983) ("[T]he government has a fundamental, overriding interest in eradicating racial discrimination"); *Runyon v. McCrary*, 427 U.S. 160, 179 (1976); *Railway Mail Association v. Corsi*, 326 U.S. 88 (1945). Indeed, the Court has recently ruled that a State government's interest in "eliminating discrimination and assuring its citizens equal access to publicly available goods and services"—an interest similar to that asserted by Richmond in this case—is not only a "compelling state interest[] of the highest order" (*Roberts v. United States Jaycees*, 468 U.S. 609, 624 (1984)), but is sufficiently weighty to justify the infringement of a constitutional right (see *id.* at 623). See also *id.* at 632 (O'Connor, J., concurring) ("the profoundly important goal of ensuring nondiscriminatory access to commercial opportunities in our society").

b. The City's interest in combatting private discrimination is even stronger in this case, because the City is attempting to ensure that its own expenditures of public funds do not contribute to the harms caused by discrimination. Richmond is not acting merely as a regulator of private affairs, as the States were in *Roberts*, *supra*, and *Rotary Club*, *supra*; instead, the City is attempting to prevent its own spending decisions from supporting subtle forms of discrimination or perpetuating the effects of past discrimination. The Court has recognized that a local government has unusually great latitude to promote its interests when it is not acting in a regulatory capacity but is, for example, "expend[ing] only its own funds in entering into construction contracts for public projects" (*White v. Massachusetts Council of Construction Employers*, 460 U.S. 204, 214-215 (1983)). See also *Reeves, Inc. v. Stake*, 447 U.S. 429, 436-437 (1980); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 810 (1976). When, as here, the City is attempting to avoid giving support to private racial discrimination and its effects, the City's power is at its greatest.

We note in this connection that several courts have held that a state or local government can violate the Con-

stitution by entering into contractual relationships with private firms that discriminate.[10] See also *National Black Police Association v. Velde*, 712 F. 2d 569 (D.C. Cir. 1983) (officials are subject to personal liability if they knowingly provide public funds to recipients engaged in discrimination), cert. denied, 466 U.S. 963 (1984). While we do not agree with these decisions, they further establish the extraordinary weight of state and local governments' interest in ensuring that public funds are not spent in a way that perpetuates racial discrimination or its effects. Cf. *Norwood v. Harrison*, 413 U.S. 455 (1973).

c. In view of the extraordinary importance of the government's interest in eliminating private discrimination and its effects, it would be unreasonable to preclude state and local governments from using race-conscious measures in appropriate circumstances. The Court has approved race-conscious remedies for government discrimination because there are occasions on which government discrimination, and its effects, cannot be eliminated without such measures. See, *e.g.*, *North Carolina State Board of Education*, *supra*; *McDaniel v. Barresi*, 402 U.S. 39, 41 (1971).

The same is sometimes true of private discrimination. As the Court has recognized, sometimes a mere requirement of nondiscrimination is not enough to prevent such discrimination or to alleviate its effects. See, *e.g.*, *Local 28 of Sheet Metal Workers v. EEOC*, 106 S. Ct. 3019, 3036-3037 (1986); *Fullilove*, *supra*. See also *Paradise*, 107 S. Ct. at 1065-1072. The Court has specifically stated that a school board may voluntarily remedy de facto segregation—segregation that is not the result of discrimination by the government—by adopting a race-conscious student assignment policy. *Swann v. Charlotte-Mecklen-*

[10] Notably, many of these cases involved the construction industry. See, *e.g.*, *Percy v. Brennan*, 384 F. Supp. 800, 811-812 (S.D.N.Y. 1977); *Byrd v. Local No. 24, IBEW*, 375 F. Supp. 545, 559-560 (D.Md. 1974); *James v. Ogilvie*, 310 F. Supp. 661 (N.D. Ill. 1970); *Ethridge v. Rhodes*, 268 F. Supp. 83 (S.D. Ohio 1967).

burg Board of Education, 402 U.S. 1, 16 (1971). See also *North Carolina State Board of Education*, 402 U.S. at 45.

We of course recognize that race-conscious measures must not be imposed casually, for whatever reason they are adopted. They must be supported by appropriate government interests. Moreover, the government must take care that they do not unfairly burden nonminorities. But there is no basis for wholly prohibiting state and local governments from using such measures to remedy discrimination in appropriate cases, even if the discrimination does not have its source in the government's own actions.

d. The court of appeals' conclusion that a state or local government is limited to remedying its own discrimination was based entirely on statements from *Wygant*. See J.S. App. 5a, quoting 476 U.S. at 274 (plurality opinion of Powell, J.). See also *Wygant*, 476 U.S. at 288 (opinion of O'Connor, J.). Understood in context, however, these statements do not support the court of appeals' conclusion.

Wygant involved a provision of a collective bargaining agreement under which a school board, in making layoffs, was to maintain a certain racial balance among teachers. See 476 U.S. at 270-272 (plurality opinion). That affirmative action provision, if analyzed as a remedial measure, was capable of being justified only in one of two ways—as a remedy for prior discrimination by the school board, or as a general response to the fact that widespread discrimination in society has placed racial minorities in a disadvantaged position. See *id.* at 288 n.* (opinion of O'Connor, J.).[11]

Justices Powell and O'Connor were concerned to reject the suggestion that this latter notion of societal discrimination could justify the provision. Justice Powell reasoned that such a justification is "too amorphous" and

---

[11] The school board also suggested that the measure could be justified on the ground that it provided "role models" for schoolchildren (see 476 U.S. at 274 (plurality opinion)), but that is a nonremedial justification that has no counterpart in this case.

"overexpansive"; because "[n]o one doubts that there has been serious racial discrimination in this country," any remedies based on this notion of societal discrimination would be "ageless in their reach into the past, and timeless in their ability to affect the future." *Id.* at 276 (plurality opinion).

It was in this context—in which the only suggested remedial justifications were an open-ended notion of societal discrimination, on the one hand, and "discrimination by the local government unit in question" on the other—that Justices Powell and O'Connor insisted on the latter. Richmond, however, did not enact its Plan on the basis of an open-ended assertion of societal discrimination. Rather, Richmond is attempting to remedy discrimination in a specific industry, on the basis of abundant evidence (including evidence of which this Court has taken judicial notice) that such discrimination exists. Such a remedial effort does not present the problems of limitlessness and amorphousness with which Justices Powell and O'Connor were concerned.

This interpretation of the statements in *Wygant* is confirmed by Justice Powell's opinions in both *Bakke* and *Fullilove*. In *Bakke*, Justice Powell contrasted "identified discrimination" with " 'societal discrimination,' an amorphous concept of injury that may be ageless in its reach into the past." 438 U.S. at 307. In *Fullilove*, where there was no suggestion of prior discrimination by the federal government, Justice Powell again emphasized that "identified" discrimination was sufficient to uphold the race-conscious remedy. See 448 U.S. at 496, 497, 515. This demonstrates that Justice Powell's concern was that the discrimination be "identified"—that is, that it be narrower than general societal discrimination—not that it be attributable to the government actor in question. In *Wygant*, the only form of identified discrimination was discrimination by the unit of government itself. Richmond, however, is addressing another form of identified discrimination. Its Plan is therefore fully consistent with Justice Powell's approach.

3. *Richmond's plan does not unfairly burden nonminority contractors.*

The Court has emphasized that race-conscious remedial measures must not impose undue burdens on nonminorities. See, *e.g.*, *Johnson*, 107 S. Ct. at 1455-1456; *Wygant*, 476 U.S. at 282-284 (opinion of Powell, J.). The burdens that the Richmond Plan imposes on nonminorities can fairly be characterized as minimal. At all events, they are well within the range permitted by this Court's decisions.

To a large extent, the burdens imposed by the Richmond Plan fall on the City itself. They are therefore distributed among the taxpayers. Not only is this perhaps the fairest way of dealing with the costs of remedying discrimination, but it ensures that there will be a political check on the program. If its costs grow too great, not isolated individuals but the taxpayers as a whole will demand that the Plan be modified or repealed. Because it spreads much of its cost among the taxpayers, the Richmond Plan is superior to nearly every other remedial measure that this Court has considered; those measures imposed virtually the entire burden on specific individuals and shifted little or none of it to the taxpayers (or to a comparably large group).[12]

The principal burden of the Richmond Plan falls on the taxpayers because a general contractor can include

---

[12] In the cases involving competitive seniority—*Wygant*, *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984), and also, in important respects, *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976)—the burden fell entirely on the nonminority employees who lost the benefits of their seniority; it is difficult to identify any burden that fell on the employer or could be passed on to taxpayers or customers. In cases involving affirmative action in hiring, promotions, or university admissions—*Paradise*, *Johnson*, *Local No. 93*, *Firefighters v. Cleveland*, 478 U.S. 501 (1986), *Local 28 of Sheet Metal Workers*, *Weber*, and *Bakke*—the government or employer incurred, in theory, the additional cost of employing or educating a minority applicant who was supposedly less well-qualified. But in practical terms that cost is not likely to be great. Realistically, the burden fell on the disappointed applicant.

in its bid—and thereby pass through—any additional costs that reflect the competitive disadvantage of the minority subcontractors. Neither the general contractor, nor any bonding or lending institution, nor any other firm that deals with the minority subcontractor, is forced to incur additional net costs.

It is of course true that the Plan is likely to cause some nonminority subcontractors to lose business. But in this respect, as well, the Plan contrasts sharply, and favorably, with the measures that this Court has invalidated in the past. The collective bargaining agreement in *Wygant*, for example, resulted in layoffs of nonminority employees whose seniority would otherwise have protected them. This aspect of *Wygant* was crucial to the outcome of that case. See 476 U.S. at 282-284 (Powell, J.); *id.* at 294-295 (White, J., concurring).

By contrast, the burden imposed on individual firms by the Richmond Plan—like the burden imposed by the federal program upheld in *Fullilove*—is "limited and so widely dispersed that it[] . . . is consistent with fundamental fairness." *Fullilove*, 448 U.S. at 515 (Powell, J., concurring) (footnote omitted). The Richmond Plan affects only the construction industry, only a segment of that market—municipal contracts—and only 30% of the dollar volume of that segment. We know of nothing in the record that suggests that any costs that the Richmond Plan imposes on nonminority contractors will be concentrated on a few firms. Moreover, far from uprooting settled expectations acquired through years of seniority, the Richmond Plan threatens only the contingent possibility of future economic gain. This interest, as the Court has emphasized, has always been entitled to only minimal legal protection. See, *e.g.*, *Andrus v. Allard*, 444 U.S. 51, 66 (1979); *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 778 (1976); *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303, 308-309 (1927) (Holmes, J.).

Finally, since Richmond had ample reason to conclude that there was substantial discrimination in the con-

struction industry, "it was within [the City's] power to act on the assumption that in the past some nonminority businesses may have reaped competitive benefit over the years from the virtual exclusion of minority firms from these contracting opportunities." *Fullilove*, 448 U.S. at 485 (opinion of Burger, C.J.). As we noted, following Justice Powell's logic in *Fullilove*, the 30% figure chosen by Richmond was a reasonable estimate of the amount of City contracting dollars that would have reached minorities in the absence of discrimination. See page 8, *supra*. There is reason to believe, therefore, that the nonminority firms that are disadvantaged by the Richmond Plan may be losing only opportunities that they would not have had in the absence of prior discrimination.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

DAVID A. STRAUSS
University of Chicago
Law School
1111 East 60th Street
Chicago, IL 60637
(312) 702-9601

BENNA RUTH SOLOMON
Chief Counsel
STATE AND LOCAL
LEGAL CENTER
444 N. Capitol Street, N.W.
Suite 349
Washington, D.C. 20001
(202) 638-1445
Counsel of Record for the
Amici Curiae

April 21, 1988

APPENDICES

APPENDIX I

Minority Business Enterprise Programs of State Governments [1]

State	Citation	Coverage	Goals
Alabama	Exec. Order No. 89 (1978)		[2]
Arkansas	Exec. Order No. 83-2	Goods and services	10%
	Ark. Stat. Ann. §§ 5-916.2 to 5-916.6	Creates MBE office; defines functions	
	Exec. Order Proc. EO83-2	Goods and services	10%

[1] In addition to the procurement measures listed in the Table, Alaska law provides for an employment preference for "economically disadvantaged minority residents" in areas of the State suffering from underemployment. The Labor Commissioner identifies zones of underemployment. In those zones, residents who are "economically disadvantaged minority residents" have a preference for 25% of the jobs or a percentage representative of the number of minority citizens in the zone, whichever is greater. Alaska Stat. § 36.10.170 (1987).

Georgia allows an income tax credit of 10% of payments made by contractors to MBE subcontractors. H.B. 635 A/P, S.B. 48-7-38, eff. Jan. 1, 1985.

Kansas has established an Office of Minority Business to offer advice and technical assistance to MBEs; the office helps locate resources and acts as a minority advocate.

[2] The 1978 Executive Order created a Department of Small and Minority Business Enterprise to encourage those businesses. The policy was to be "implemented by all State agencies, departments and institutions by purchasing a fair proportion of the supplies, commodities and services required . . . ."

State	Citation	Coverage	Goals
Arizona	Exec. Order No. 87-9 (10/22/87)	All contracts	[3]
California	Cal. Gov't Code §§ 8790.70 - 8790.87 (West 1987)	All contracts for construction, professional services, materials, supplies, equipment, and repairs	15%
	Cal. Gov't Code § 14132, eff. Jan. 1, 1989, 1988 Cal. Stat. ch. 9	Highway construction	15%
	Cal. Gov't Code § 14839 (West 1987)	Establishes Office of Small and Minority Business	
	Cal. Gov't Code § 16850, eff. Jan. 1, 1989, 1988 Cal. Stat. ch. 61	Professional bonding services	15%
	Cal. Pub. Cont. Code § 10108.5, eff. Jan. 1, 1989 (West 1988)	State prison facilities	15%

	Cal. Pub. Cont. Code § 10115, eff. Jan. 1, 1989, 1988 Cal. Stat. ch. 61	All state contracts except highway construction	15%
	Cal. Pub. Cont. Code § 10470 (West 1988)	Correctional facilities	15%
	Cal. Sts. & Hy. Code §§ 94.3, 94.4 (West 1987)	MBE certification provision	
	Cal. Pub. Cont. Code § 2000 (West 1987)	Permits local agencies to establish MBE goals for local purchases	
Colorado	Exec. Order (Dec. 10, 1987)	State procurement	17%
Connecticut	Conn. Gen. Stat. Ann. § 32-9e (1987)	Construction, goods, and services	15-25%
Florida	Fla. Stat. Ann. § 287.042 (West 1988)	Construction, contractual services, commodities	15%

[3] The Executive Order expands the Governor's Office of Affirmative Action to encompass minority and women owned business enterprises. The office is "to facilitate, preserve and strengthen minority and womens business enterprises and ensure their full participation in the State of Arizona's free enterprise system."

State	Citation	Coverage	Goals
(Fla. cont.)	Fla. Stat. Ann. § 287.093 (West 1987)	Authorizes set-asides by counties, cities, and school districts in purchases of goods and services	10%
Illinois	Ill. Stats. Ann. ch. 127, ¶ 132-600 *et seq.* (Smith-Hurd 1985)	State contracts	10%
Indiana	Ind. Code § 4-13-16.5-2(e) (7) (Michie 1987)[4]	State constracts	5%
Iowa	Iowa Code § 314.14 (West 1985)	Highway construction	10%
Kentucky	Ky. Rev. Stat. §§ 45.470 - 45.510 (Michie 1986)	Goods, services, and construction	[5]
Louisiana	La. Rev. Stat. Ann. §§ 39:1951 to 39:1991 (West 1987)[6]	Public works, goods, and services	10%

	La. Rev. Stat. Ann. § 38:2233.2 (West 1987)	Authorizes local government set-aside programs	10%
Maryland	Md. State Fin. & Proc. Code Ann. § 18-601 (Michie 1985)	Transportation construction contracts over $100,000	10%
		All other state procurement	10%
Massachusetts	Exec. Order No. 237 (1984); Mass. Gen. Laws Ann. ch. 23A, §§ 39-44 (West 1987); and	Goods, supplies, and services	5%
		Construction	10%

[4] The State information brochure, *Indiana/We'll Help You Make It*, states that the "MBE program relies on voluntary goal setting by individual state agencies for increasing minority participation in contracts."

[5] Kentucky's Small or Small Minority Business Purchasing Act sets no specific goals. The Act provides that the Finance and Administration Cabinet set aside contracts for minority business enterprises if the Cabinet can identify 3 minority businesses that can reasonably be expected to bid and the businesses are "capable of furnishing the desired property or services."

[6] Louisiana's Minority Business Enterprise Act deals with procurement. Louisiana's Minority Development Act (La.Rev.Stat.Ann. §§ 51:1751 - 51:1765) defines "minority business enterprise," sets up an authority and a fund, and authorizes loan guarantees to MBEs.

State	Citation	Coverage	Goals
(Mass. cont.)	Mass. Admin. Reg. 509 (1984)		
Michigan	Mich. Stat. Ann. § 3.540 (51), (52) (Callaghan 1985)	Construction, goods, and services	7% [7]
Minnesota [8]	3 A Minn. Stat. Ann. § 16B.19 (5), (6); § 16B.22 (1986)	All procurement	9%
Missouri	Mo. Ann. Stat. § 33.752-5 (7) (Vernon 1988)	State contracts	[9]
Nebraska	Exec. Order (Jan. 16, 1984)	State contracts	[10]
New Jersey	N.J. Stat. Ann. § 52:32-21 (West Supp. 1987)	Goods, equipment, construction, and services	7% [11]
	N.J. Stat. Ann. § 58:11B-26 (West Supp. 1987)	Wastewater treatment trust: Local government purchases	10%
	N.J. Stat. Ann. §§ 5:12-184 - 5:12-190	Purchases of goods and services by casinos	15%

	(West Supp. 1987); 1987 N.J. Sess. Law Serv. ch. 137 (West)		
New Mexico	Exec. Order No. 83-52 (1983)[12]	Each Cabinet Department	Negotiated fair share (no numeric goals)

[7] The Michigan statute (Mich.Stat.Ann. §§ 3.540(31)-3.540(35)) authorizes a Minority Business Enterprise Division within the Department of Commerce. The Division must develop plans and specific program goals. The procurement policy requires a goal of "not less than 7%." Mich.Stat.Ann. §§ 3.540(51), (52).

[8] The Minnesota statute authorizes a set-aside for the "socially and economically disadvantaged," including "racial minorities, women, or persons who have suffered a substantial physical disability."

[9] Mo.Ann.Stat. §§ 33.750 - 33.755 creates a Minority Business Development Commission. Mo.Ann.Stat. § 33.752-5(7) states that it is the duty of the Commission to "[e]stablish as a goal that state contracts be let to racial minority businesses." The statute contains no specific percentages.

[10] Article IV of the Executive Order requires each department to prepare an Affirmative Action Plan of Implementation for the Internal/External Contract Compliance Program. The plan "shall facilitate the promotion and enhancement of economic opportunities for all disadvantaged businesses and members thereof."

[11] The New Jersey Set Aside Act for Small Businesses, Female Businesses, and Minority Businesses (N.J.Stat. Ann. §§ 52:32-17 to 52:32-30) states that at least 25% of state purchases of goods, equipment, services, or construction must be purchased from small (15%), minority (7%), or female (3%) businesses. The 1987 legislature established a grant program to counties and municipalities for pilot programs to assist in the development of small, minority, and women owned businesses. 1987 N.J. Sess.Law Serv. ch.56 (West).

[12] As of April 18, 1988, a new executive order is pending.

State	Citation	Coverage	Goals
New York	N.Y. Gen. Mun. Law §§ 955 - 969 (McKinney 1986)		[13]
	N.Y. Transp. Law § 428(2) (McKinney 1983)		
	N.Y. Unconsol. Laws § 6267 (McKinney 1983)		
	Exec. Order No. 21 (1983)	State construction contracts, goods, and services	12%
North Carolina	N.C. Gen. Stat. § 136-28.4 (Michie 1987) [14]		
	Exec. Order No. 34 (1987)	Contract purchases	4%
Ohio	Ohio Rev. Code Ann. §§ 122.71(e); 123.151; 125.081 (Page 1984) [15]	Construction	5%

Oklahoma	Okla. Stat. Ann. tit. 74, § 85.45c (West 1987)	Goods and services	10% [16]
Oregon	Or. Rev. Stat. §§ 200.005 - 200.085 (1987)	[17]	

[13] The New York State Economic Development Zones Act defines an MBE and provides that economic development zone plans must contain a description of programs to stimulate MBEs. N.Y. Gen.Mun. Law 962(h). MBEs must also be given an opportunity for "meaningful participation" in a "fair share of contracts" for New York City transit projects. N.Y. Pub. Auth. Law § 1266-c14(a)(i) (McKinney 1986).

[14] The North Carolina law declares that it is state policy to "encourage and promote use of small, minority, physically handicapped and women contractors" in construction of state roads. N.C.Gen.Stat. § 143-135.5 contains a similar provision for the construction of public buildings.

[15] In addition to the set-aside program, Ohio law establishes both a minority business development commission (Ohio Rev.Stat.Ann. §§ 122.92 - 122.94) and a minority development financing commission (Ohio Rev.Stat. Ann. §§ 122.71-122.85). There is also a special bonding program for minority contractors (Ohio Rev.Stat.Ann. §§ 122.87 - 122.89).

[16] The Oklahoma statute requires the State Purchasing Director to certify annually the percent of funds expended on state contracts which have been awarded to minority business enterprises. If the percentage is less than 10%, then a 5% bid preference goes into effect. The percentage is adjusted annually according to formula. Okla. Stat. Ann. tit. 74, § 85.45c(B).

[17] The Oregon Minority and Women Business Assistance Act defines disadvantaged, minority, and women business enterprises, establishes a certification procedure, prohibits fraud, establishes an advocate to "assist in the development and implementation of an aggressive strategy . . . that encourages participation of minorities and women in the state's economy," and sets standards for good faith efforts to meet goals. Or.Rev.Stat. §§ 200.005 - 200.085.

State	Citation	Coverage	Goals
Pennsylvania	73 Pa. Stat. Ann. §§ 390.1 - 390.18 (1987)	[19]	
	Exec. Order No. 1987-18 (1987)	State agency purchases	
Rhode Island	R.I. Gen. Laws §§ 37-14.1-1 to 37-14.1-8	Any and all goods and services	10%
	Exec. Order No. 85-4 (Feb. 20, 1985)	State purchases	10% minimum
South Carolina	S.C. Code Ann. §§ 11-35-5010 to 11-35-5270 (Law. Coop. 1986)	Total procurement	[19]
Tennessee	Tenn. Code Ann. § 4-3-728	Community development block grants	[20]
Texas	Tex. Civ. Code Ann. art. 4413 (301)	State procurement	[21]

[18] The Pennsylvania Minority Business Development Authority Act creates an authority and a bureau as part of the Department of Commerce and establishes a development fund. The Authority can lend money and guarantee investments in MBEs. The Executive Order creates an Office of Minority and Women Business Enterprise to "aggressively pursue contracting and subcontracting opportunities for MBEs . . . with State Government." Each agency is to "establish specific goals for meaningful and significant participation of MBEs . . . ." The Order also requires all departments, boards, and commissions to appoint a minority business coordinator to cooperate with the Office of Minority and Women Business Enterprise in developing an effective program in each agency "in establishing specific goals . . . ." *Id.* at 4 and 5(d).

[19] The law, which applies to all procurement, states that each agency director must set up an MBE plan annually with a goal that a "reasonable percentage" of the agency's "total procurements" will be purchased from minority businesses. S.C.Code Ann. § 11-35-5240(1). The South Carolina law also sets up a Small and Minority Business Assistance Office that provides lists of minority contractors, training of minority contractors, other training programs, and special publications. S.C. Code Ann. § 11-35-5270. The S.C. Department of Highways & Public Transportation is required by its enabling legislation to expend 5% of its construction funds with "small business concerns owned and controlled by economically and socially disadvantaged individuals." S.C.Code Ann. § 12-27-1320 (Law.Coop.Supp. 1987).

[20] Tenn.Code Ann. §§ 4-26-101 - 4-26-105 (Michie 1985) defines "disadvantaged business" enterprises; the statute authorizes the Department of Economic and Community Development to assist disadvantaged businesses by offering aid and developing loan sources. That statute contains no specific goals. Tenn.Code Ann. § 4-3-728, however, states that a "substantial portion" of community development block grants must be used, when "reasonably possible," for contracts with disadvantaged businesses.

[21] Several provisions of Texas law concern MBEs. Tex.Civ.Code Ann. art. 4413 (301), §§ 5.001 - 5.007 sets up a program to assist small businesses, including "disadvantaged" businesses. The Office of Small Business Assistance must offer guidance, assist with bidding, and foster participation by those businesses in state procurement. State agencies must keep data on the number of contracts awarded to disadvantaged businesses. Tex.Civ. Code Ann. art. 1118y, § 20 (d)(1) (Vernon 1988) authorizes regional transportation authorities to adopt MBE programs; Tex. C.P. & R. Code Ann. § 106.001 defines an MBE and authorizes municipalities to establish MBE programs.

State	Citation	Coverage	Goals
Virginia	Va. Code § 11-48 (Michie 1985)	[22]	
	Governor's Memorandum re: Minority Business Procurement Goals (1/15/83)	Contractual services, supplies, materials, and capital outlay projects	1.3%
	Governor's Memorandum re: 1984-85 goals (10/12/84)	State purchases as above	3-5%
Washington	Wash. Rev. Code Ann. §§ 39.19.010 to 39.19.921 (West 1988)	Goods and services	[23]
Wisconsin [24]	Wis. Stat. Ann. § 16.855 (10m) (a) (West 1987)	Construction contracts	5%
	Wis. Stat. Ann. § 16.75 (3m) (a); § 16.87(2) (1985-86);		

Wis. Stat. Ann.
§ 560.036 (West 1987)

---

[22] The statute is intended to foster small businesses and those owned by minorities and women. "All public bodies shall establish programs" to facilitate the participation of minority businesses in state procurement transactions.

[23] The Washington Code establishes an Office of Minority and Women's Business Enterprises. The Office must establish overall goals for each state agency and educational institution for the procurement of goods and services, including professional services, from minority and women owned businesses. The programs are to be administered on a contract-by-contract basis or in a class-of-contract basis. Washington law also requires "first class cities" (those over 20,000) to "invite at least one proposal from a minority or woman contractor" when letting bids on "small public works." Wash. Rev. Code Ann. § 35.22.650. All contracts exceeding $10,000 let by first class cities must contain a clause that requires the contractor to "actively solicit" employment of minority group members and to solicit bids from minority group subcontractors. Wash. Rev. Code Ann. § 35.22.620(7)(b).

[24] A number of Wisconsin statutes contain specific goals for minority business enterprises: Wis.Stat.Ann. § 84.075—a 5% set-aside provision for engineering services and highway construction and maintenance contracts; Wis.Stat.Ann. § 16.87 (2)—5% set-aside for engineering, architectural, and environmental consultant services; WIS.Stat.Ann. § 16.75 (3) (3m) & (b)—5% set-aside for purchase of materials, supplies, equipment, and contractual services by the legislative and judicial branch. Wisconsin municipalities with sewer construction projects funded under the combined sewer overflow abatement program must set goals of awarding 20% of the subcontracts to MBEs. Wis.Stat.Ann § 66.905.

APPENDIX II

Minority Business Enterprise Programs of Municipal and County Governments [1]

The city and county programs listed on this chart include a wide variety of initiatives, including contracting goals, subcontracting goals or requirements, good faith efforts, bid preferences, set-asides, workforce requirements, and outreach programs, among others. A numerical percentage in the "Goals" column should not be read to imply a fixed and nonwaivable requirement or the absence of a waiver provision.

State and City/County	Citation	Types of Contracts Covered	Goals
Alabama:			
Birmingham:	Birm. Code § 3-3-16	Construction and purchase of goods, material, equipment, and services	Encourage, facilitate, and effect greater minority participation [2]
Alaska:			
Anchorage	Mun. Code § 7.60.010 *et seq.*; Mun. Reg. 7.60.006	All	Mayor sets annual goals on recommendation of MBE coordinator
Juneau	Ord. Serial No. 80-26; Res. Serial No. 677;	Construction Services	12-15% 2%

	City & Borough Code § 53.50.95 and program guidelines	Goods Other	2% 5%
North Slope Borough	Mun. Code § 2.36.130	All	5% bid preference
Soldotna	Female and Minority Enterprise Program (Sept. 1980, rev. Jan. 1984)	FAA assisted projects	5%

[1] This list is intended to be illustrative only and should not be regarded as exhaustive. The information in this appendix was collected from a survey drafted by the State and Local Legal Center and circulated through three channels to more than 3,600 state and local government officials. The Legal Center mailed the survey to more than 200 minority business development coordinators and contract compliance officers from mailing lists obtained from the Minority Business Enterprise Legal Defense and Education Fund, Inc., which has published another compilation in its Report on Minority Business Enterprise Programs of State and Local Governments (Jan. 1988). The National Association of Counties mailed the survey to 350 elected county executives, 780 professional county managers, and 300 appointed county civil attorneys. The National Institute of Municipal Law Officers mailed the survey to 2000 city attorneys. More than 700 responses were received. All information contained in this appendix is on file at the State and Local Legal Center.

[2] This plan was adopted after a goal of 10% participation by minorities in city contracts was invalidated. *Arrington v. Associated General Contractors,* 403 So.2d 893 (Ala. 1981), cert. denied, 455 U.S. 913 (1982).

State and City/County	Citation	Types of Contracts Covered	Goals
Arizona:			
Maricopa County	Program scheduled for adoption May 1988	Overall goal	10%
Mesa	Res. No. 4556 (1980)	CDBG funds	12%
Phoenix	Res. No. 15629	City-wide MBE utilization plan	Same percentage city-wide as applicable to federal grant-in-aid programs
Tucson	Res. No. 13567	All	Dollar value set on case-by-case review
California:			
Anaheim	Res. No. 85R-311	All	11.9%
Bell Gardens	Res. No. 84-11	Federally funded construction projects	10% goal and failure to meet goal can be grounds for rejecting

			the low bid on a particular project
Culver City	Res. No. 86-RO48	UMTA funds	10%
Fresno	Res. No. 87-344	Construction	25%
Gardena	Minute resolution (2/17/84)	UMTA funded projects	13.1%
Hayward	Ord. No. 86-09 C.S.	Procurement contracts over $10,000	10% bid preference for MBE
		Public works contracts exceeding $100,000	Percentage goal set annually
Los Angeles	Exec. Directive No. 1-B (March 29, 1983)	All, with some dollar minima	12-20% set by Dept.
Oakland	Ord. 9739CMS (March 13, 1979)	Purchasing	30% goal and 10% preference
	Res. 60691 (June 15, 1982)	Construction	30%
	Res. 58715CMS (Feb. 19, 1980)	Professional services	40%
Pasadena	Res. No. 83-2 (1983)	Community development funds	20%

State and City/County	Citation	Types of Contracts Covered	Goals
(Pasadena cont.)	Res. No. 54-82 (1980)	All contracts	10%
Richmond	Res. No. 183-84	Construction employment	population parity
		Construction contracting	20%
		Permanent project employment	good faith effort to achieve 125% of SMSA as of 1980 census (but not less than 35%)
		Business developed by the City	20%
		Goods, services, and franchises	20%
Sacramento	Res. No. 85-328	Procurement	20% (combined MBE and WBE)

Santa Clara County	Bd. of Supervisors Policy, Dec. 11, 1984	Construction Services contracts of $12,000 or more	12% contract-by-contract
San Diego	Res. Nos. R-262633: R-270402	Construction Consultant Vendor	20% 12% 10%
San Francisco	Ord. No. 139-84, S.F. Admin. Code ch. 12D [3]	Overall goal All contracts All purchases	30% 5% bid preference 10% set-aside
San Jose	Res. No. 56342 (1983); Res. No. 59890 (1987); Res. No. 58915 (1986)	Construction contracts over $50,000	Set for each project
Santa Monica	Res. No. 6386 (1981)	Public works and all purchasing	10% goal (22% achieved)
Solano County	Ord. No. 1310 (1987)	All for-profit contracts	13%

[3] This plan was largely invalidated in *Associated General Contractors of California v. City & County of San Francisco*, 813 F.2d 922 (9th Cir. 1987), pet. for rehearing pending.

State and City/County	Citation	Types of Contracts Covered	Goals
Stockton	Res. No. 87-0584	All public works, supply, and services contracts over $20,000	15%
Colorado:			
Denver	Ord. No. 246 (1983)	Construction, professional services, and design	20%
Greeley	Ord. No. 420	Federally funded projects	Annual goals
Connecticut:			
Hartford	Resolutions of June 10, 1985, and Feb. 14, 1983	Construction	At least 10% MBE and WBE with determination to be made for particular contracts whether a greater percentage for MBEs is possible

New Haven	Ord. No. 12½ (1965)	Construction projects over $100,000	15%
Delaware:			
New Castle County	Exec. Order No. 12 (1985)	All contracts	15%
Wilmington	1 Wilm. Code §§ 20-40 through 20-43	Construction All contracts	15% set-aside 25% goal in FY 1990
District of Columbia	D.C. Code §§ 1-1141 to 1-1150	All contracts	35% unless otherwise set
Florida:			
Alachua County	Ord. No. 86-8	All bid contracts	15% (subject to reevaluation)
		Specific contracts	Percentage can be set aside
Broward County	Ord. No. 84-14; Admin. Order No. 852; Res. Nos. 84-1688 and 87-3570	All procurement except medical and legal services, and construction contracts over $150,000	Annual goals proportioned to population

State and City/County	Citation	Types of Contracts Covered	Goals
(Broward Cty. cont.)		Particular contracts	Percentage can be set aside to remedy past acts of discrim-ination
Daytona Beach	Ord. No. 84-131, City Code ch. 13½, art. II	Subcontracts	10%
Dade County	Cty. Code § 10-38	Construction	Contract specific
	Cty. Code § 2-8.2	Goods and services	Contract specific
Escambia County	County Commission Policy Statement, March 4, 1983	Contracts for goods and services in the construction industry:	
		$1 million or less	10%
		$1 to 10 million	5%
		over $10 million	1%

Fort Lauderdale	Code § 2-40.1	Procurement	Equitable opportunity to participate
Fort Myers	Ord. No. 2333 (1986)	All contracts and subcontracts	12%
Gainesville	Res. No. 86-60	All	Must take affirmative action to solicit quotations from MBEs; all factors being equal, preference shall be given MBEs
Hialeah	City Code § 2-5 (1984)	Contracts over $50,000	25% of contractor's workforce must be minority
Hillsborough County	Res. No. R 86-0170	Construction contracts of $100,000 or more	25%
		Goods and services	5%

State and City/County	Citation	Types of Contracts Covered	Goals
Jacksonville	Ord. No. 83-1200-647	All	10%
Leon County	Bd. of Commissioners Policy, Sept. 29, 1987	Capital improvement budget (except construction), equipment, commodities, and services	5%
Miami	Ord. No. 10062, City Code § 18-67	Procurement	51%
Orange County	Cty. Code art. IV, ch. 1, § 1-63 to 1-69	All contracts and subcontracts	18%
Orlando	City Code, ch. 57, art. II	Construction, services, and supplies	18%
Palm Beach County	Ord. No. 88-4	All	Encourage participation by MBEs and use good faith efforts to achieve

			the maximum use of MBEs [4]
Pensacola	Ord. pending passage to create § 3-3-4 of Pens. Code (formerly by executive policy)	All	15%
St. Petersburg	City Code ch. 2, art. III, § 2-57	Goods and services	10%
	City Code ch. 2, art. III, § 2-59	Construction	Contract by contract
Tallahassee	Res. No. 82-R-1216	Contracts over $100,000	15%
Tampa	Exec. Orders No. 85-19 and 86-14	All contracts	25%
Georgia:			
Atlanta	Admin. Order No. 84-5	Contracts over $25,000 and contracts for professional or consulting services	Set annually (35% for 1985)

[4] A draft ordinance including overall goals for MBE participation in county contracting was redrafted following the Fourth Circuit's decision in the *Croson* case. Memorandum of March 31, 1988, to the State and Local Legal Center from Maureen Cullen, Assistant County Attorney, Palm Beach County, Florida.

State and City/County	Citation	Types of Contracts Covered	Goals
Augusta	Res. No. 9842 (1984)	Transit Dept. contracts	10%
Dekalb County	Res. of Aug. 15, 1982	All	15%
Fulton County	Res. of July 17, 1987	Contracts over $25,000 and contracts for professional or consulting services	Goal of 20% for FY 88; set annually
Macon	Res. No. R-83-0008	Inner city development project	Start-up costs for MBEs
Richmond County	Bd. of Commissioners Policy Statement, 12-1-87	Contracts over $25,000 and contracts for professional or consulting services	Foster and promote MBEs; actively solicit bids

Hawaii:			
Maui	Res. No. 82-3	Federally assisted projects	10%
Illinois:			
Bloomington	City Code ch. 22.2	Construction	8.9% (by population)
Evanston	Res. No. 59-R-73	All goods and services	Must solicit bids from MBEs
		Specific projects and commodities	Percentage set aside annually by city manager
Peoria	City Counsel Policy and City Affirmative Action Plan 1985-88	Subcontracts	10%
Peoria County	County Affirmative Action Policy, August 14, 1984	All	County will not contract with any business that does not have an affirmative action plan; contractor must supply information on

State and City/County	Citation	Types of Contracts Covered	Goals
(Peoria Cty. cont.)			racial composition of workforce during bidding
Rockford	Mayor's Program on Minority Businesses (1985)	All	Recruits and refers MBEs
	Equal Employment Opportunity Ord. No. 91½	All contractors with the City	Must maintain a minimum 9% minority workforce
Indiana:			
Anderson	Resolutions 1981 and 1985	Construction and other purchases	10%
Fort Wayne	Gen. Ord. No. G-84-07 (1984)	Procurement Construction	15% 10%
Indianapolis/ Marion County	Exec. Order No. 1 (1987)	All	10%
Iowa:			

Cedar Rapids	Res. Nos. 532-4-84; 1373-9-85; 76-1-86	All Federally funded projects	5% 10%
Des Moines	Contract Compliance Program and Policy Statement (1986)	Public works contracts Professional services	7-9% 4%
Iowa City	Res. No. 83-417	All Contracts over $25,000	3% Contractor must have affirmative action program
Mason City	Human Rights Code, tit. II	All Federally funded projects	2% 10%
Waterloo	Res. No. 1986-58	Construction projects over $100,000 Construction funded all or in part by federal funds	5% 10%
Kansas:			
Lawrence	Ord. No. 5436 (1983)	All contracts over $10,000	12.9%
Leavenworth	Res. No. B813 (1984)	Construction	10%
Wichita	Admin. Reg. 64 (1983)	CDBG funded construction	10%

State and City/County	Citation	Types of Contracts Covered	Goals
Kentucky:			
Jefferson	Res. No. 75, Series 1987	Construction subcontracts	15%
Lexington/ Fayette County	Code § 2.46	All	Policy to encourage use of MBEs
Louisville	Ord. No. 136 (1983)	All	5% credit on MBE bids if 20% of prior year's expenditures are not awarded to MBEs [5]
	Proposed Ord.	All	MBE Utilization Plan
Louisiana:			
Baton Rouge	City Ord. No. 10390; Parish Ord. No. 16793 (1980)	Construction contracts over $100,000, professional services, equipment, and supplies	10%
Calcasieu Parish	Motion of Police Jury Jan. 21, 1988	Jail and Courthouse Improvement Project	10%
Lake Charles	Ord. No. 6747 (1980)	All	10%

Monroe	Ord. Nos. 7932 (1986); 7322 (1981)	All DOT assisted programs	10%
New Orleans	City Ord. No. 2-50.5; Exec. Order 84-01; Admin. Dir. 210	Construction and public works contracts over $100,000	20% goal and 1% set aside
Shreveport	Exec. Order No. 88-1	Construction and purchases	10%
		Professional services	5%
Maryland:			
Anne Arundel County	MBE Procurement Guidelines and Procedures, Nov. 1985	All contractors on contracts over $10,000	Must take affirmative steps to use MBEs, including soliciting bids and either confirming use of MBE subcontractors or showing good faith efforts; noncompliance with MBE policy can be grounds for denial of contract and actions against contractor

[5] This plan was invalidated in *J. Edinger & Son, Inc. v. City of Louisville, KY*, 802 F.2d 213 (6th Cir. 1986).

State and City/County	Citation	Types of Contracts Covered	Goals
Baltimore	Ord. No. 790 (1986)	All	20%
Baltimore County	Exec. Order (1983)	Capital improvement projects over $100,000	10%
Howard County	Cty. Code tit. 4, subt. 1, § 4.103(d)	All	10% if solely city funded, 15% if federally funded
Montgomery County	Cty. Code § 11B-23A	All contracts over $75,000	15%
Prince George's County	Ch. 102, 1984 County Laws; chs. 87 & 88, 1987 County Law; CR-33-1985; CR-107-1987	All	30%
Massachusetts:			
Amherst	Selectmens Policy G-2-11-86	All	5%
Arlington	Town Plan (1984)	Construction, supplies, materials, services, and equipment	5%

Attleboro	MBE Plan/Statement of Policy, Dec. 1981	Construction contracts over $50,000, other contracts over $4,000	5%
Boston	Exec. Order, Dec. 1, 1987	Goods and services	15%
		Construction	15%
		Construction in an impacted area	30%
Fitchburg	Policy Statement (1986)	All contracts and purchases	10%
Lynn	Policy Statement (1985)	Construction contracts over $150,000, goods, services, and supplies	10%
Malden	Ord. No. 754 (1985)	Goods, services, and supplies	10%
Marlborough	MBE Policy Statement (1982)	Purchases over $25,000	5%
New Bedford	Exec. Order No. 3 (1986)	Construction, materials, goods, and services	10%
			5%
Springfield	Exec. Order (1984)	All	10% MBE and WBE combined

State and City/County	Citation	Types of Contracts Covered	Goals
Michigan:			
Battle Creek	Res. No. 114 (1980)	All contracts over $10,000 and all contractors with more than 15 employees	Failure to comply with affirmative action package precludes award of contract and can be basis for sanctions
		Construction	Contractors must employ minimum SMSA minorities
Detroit	City Code 18-5-31 *et seq.*	All city contracts	20%
Flint	Res. No. R-19 (Feb. 11, 1985)	Construction contracts over $10,000	20-46% phased in by 1990
Grand Rapids	City Commission Policy, May 25, 1982 (Code 1600-05)	Construction contracts over $10,000	10%
		Other contracts	Use of MBEs is encouraged
Saginaw	City Ord. D-1516 (1986)	Construction contracts	
		$50,000-$100,000	9%
		$100,000-$250,000	12%
		over $250,000	15%

		Procurement	up to 20% set aside for MBE/WBE
Minnesota:			
Hennepin County	Res. No. 7221	All above $50,000	
		Construction	6-10%
		Services	10%
		Goods	10%
		Construction subcontracting	10%
Minneapolis	Ord. No. 139.50; Res. of Dec. 20, 1980	Purchases and construction	10%
		Development	15%
St. Paul	Admin. Code ch. 81	All	5-15%
Twin Cities Metropolitan Waste Control Commission	Res. No. 87-262	Construction and engineering	Percentage set on each contract
		Goods and Services	Goals of 3½ to 10%
Mississippi:			
Jackson	Order 3-Z-323 (1985)	All	15%

State and City/County	Citation	Types of Contracts Covered	Goals
Missouri:			
Independence	City Affirmative Action Plan (rev. 1988)	All contracts over $10,000	2.5%
Kansas City	Admin. Reg. of City Manager (Sept. 5, 1980)	Construction Supplies Services	16% 10% 15%
St. Charles	Admin. Policy Jan. 1987	All	Good faith effort
St. Louis	Exec. Order Dec. 6, 1984	Construction contracts over $100,000	25-30% city residents in contractor's workforce, of whom 50% must be minorities
Nebraska:			
Lincoln	Ad. Reg. No. 12 (1984)	All contracts	Good faith efforts
Omaha	City Code ch. 10, § 10-108 § 10-194	Central Park Mall All	10% Must solicit

	§ 10-200	All	bids from minority sub-contractors 5% of contracts and 5% of dollar value of contracts
Nevada:			
Nye County	Res. No. R8 5-2A	All contracts over $10,000	5%
New Jersey:			
Atlantic City	Ord. No. 14 (1979); Exec. Orders No. 1 (1985) and No. 2 (1984)	All	25%
Atlantic County	County Exec. Order, May 19, 1983	Construction contracts over $100,000	15%
Atlantic County Improvement Authority	P.L. 1975, ch. 127	All	15% combined MBE and WBE

State and City/County	Citation	Types of Contracts Covered	Goals
Camden	Ord. MC 1964 (June 1983)	Construction, goods, and services	25% to 50% subcontracting (depending on size of contract)
	Ord. MC 2274 (Feb. 1987)	Construction, services, and procurement	15% set aside
East Orange	Ord. No. 7 (1982)	Construction and capital goods	25%
Newark	Ord. No. 6S & FE	Construction	33 1/3%
		Goods and services	25%
New Brunswick	Rev. Ord. No. 2-6v (Aug. 1986)	All procurement, all major construction projects and other enterprises	Percentage negotiated on contract-by-contract basis
Plainfield	Mun. Code art. 18, § 11-18-1	Construction subcontracting	25%
Union County	Res. No. 676-87	All purchases unless county has no discretion as to payee	7%

New Mexico:			
Albuquerque	Bill No. R-19, Enactment No. 27-1986	All public money expended by City for purchase of goods and services	10%
		US DOT funds	15%
New York:			
Albany	City Code § 1-706 to 1-718	All	17.8%
Albany County	Res. No. 124 (1985)	All contracts over $100,000	10%
Binghamton	Ord. No. 83-31	All	10%
Broome County	Res. No. 260 (1983); Res. No. 139 (1985)	Construction contracts over $100,000	3.5%
Buffalo	Common Council Proceedings 169 May 1, 1979	CDBG funded construction and demolition contracts	10%
Erie County	Local Law No. 6-1987	All contracts of County Dept. of Public Works and Dept. of Planning	10%

State and City/County	Citation	Types of Contracts Covered	Goals
(Erie Cty. cont.)		and Engineering over $100,000	
Monroe County	Exec. Order No. 1 (1983)	Construction	10%
New York	N.Y.C. Admin. Code tit. 6, § 6-108.1; § 6-108.2	Construction contracts in economic developments areas	10% for locally based enterprises including MBEs
Rochester	Res. No. 80-83 (1980 and annually thereafter)	Construction	Percentage set annually by City Council
Syracuse	City Charter, ch. 42	Construction contracts: $20,000 to 100,000 over $100,000	10% 15%
North Carolina:			
Chapel Hill	Disadvantaged Business Enterprise Program, September 1984	US DOT contracts	Each contract to have goals; failure to meet goals or show good faith effort can result in determination

			that bid is not responsive
Charlotte	N.C. SB 290, ch. 344 (1987); City Plan, Nov. 23, 1987	Construction	10%
		Procurements and professional expenditures	3%
		Federally assisted airport construction	14%
		US DOT UMTA funds	13%
Durham	Res. No. 5797 Res. Book 6, p. 41	Services, materials, and construction	20-35%
Greensboro	Code ch. 2, art. IV, § 2-117 (1985)	Commodities, services, construction, and repair work	10%
Mecklenburg County	Bd. of County Commissioners, Minority and Women's Business Enterprise Program (1986-87)	Construction and consulting	10%
		Procurement and professional services	3%
Winston-Salem	Res. Adopting Minority and Women Business Enterprise Program (July 18, 1983)	Construction	Goals negotiated for each contract; 5% penalty if contractor fails to meet

State and City/County	Citation	Types of Contracts Covered	Goals
Ohio:			
Akron	City Code § 34.10	Construction	15%
		Equipment, supplies, materials, nonprofessional services	7%
		Professional services	5%
Cincinnati	Ord. No. 242-1987	Construction	20%
		Equipment, supplies, materials, nonprofessional services	7%
		Professional services	5%
Cleveland	City Codified Ord. ch. 187	Construction	30%
		Services	20%
		Professional services	30%
		Supplies	20%
		Concessions	15%
Columbus	City Code §§ 3901-3927	Construction, services, purchase or lease of personal property	10%

Cuyahoga County	Res. No. 737333 (1987)	Construction contracts over $10,000	25%
		Supplies, goods, and services over $10,000	15%
		Contracts between $1,000 and $10,000	Percentage may be set aside
Dayton	R.C.G.O. §§ 35.30-35.35	Construction	20%
		Goods and services	5%
	R.C.G.O. -- 35.40-35.47	Sheltered market:	
		Construction	15%
		Goods and services	2.5%
Elyria	Ord. No. 83-758	Construction	14%
		Supplies, services, and professional contracts	5%
Lima	Ord. No. 131-86; Exec. Order (12/20/82, revised 4/7/83)	CDBG funded contracts	16%
Lorain	Ord. No. 23-82	Construction	15%
		Supplies	5%
Lorain County	Res. No. 84-547	Contracts over $20,000 for construction, supplies, and services	15%

State and City/County	Citation	Types of Contracts Covered	Goals
Massilon	Ord. No. 84-1983	All	10%
Montgomery County	Res. No. 87-1509	All procurement and additional programs:	15%
		Construction	Preference to contractor who meets subcontracting goal
		Professional services	Bid credits
		Goods under $10,000	Sheltered markets
Springfield	Ord. No. 84-608	Construction	10%
		Goods and services	5%
		Others	Conscientious effort
Stark County	Bd. of County Commissioners Res. of March 18, 1986	Construction contracts over $10,000	Waivable 10% set aside and 10% goal
Youngstown	Ord. No. 80-744; 84-465	All	Short-term 10% Long-term 15%

Oklahoma:			
Tulsa	Res. of 4/18/86	All	Each City Dept. to set feasible goals
Pennsylvania:			
Harrisburg	Ord. No. 7-1983	Construction	15%
		Equipment purchases	5%
		Material, supplies	10%
		Services	15%
		Professional services	15%
Philadelphia	Phila. Code, ch. 17-500	Construction, vending, and services	15%
South Carolina:			
Charleston	City Code § 2-267		Set annually, but not less than
		Construction	8%
		Services	3%
		Supplies	5%
Columbia	Res. No. R-86-10 (1986)	All	Specific procurement goals set annually; specific contract goals set

State and City/County	Citation	Types of Contracts Covered	Goals
(Columbia cont.)			on each prime contract of $25,000 or more
Richland County	Ord. No. 1068-83HR	All over $5,000	15%
South Dakota:			
Sioux Falls	Res. No. 158-86	City street projects	5%
	Res. No. 36-88	Construction	10%
	Res. No. 271-85	Procurement	Equitable opportunity to compete
Tennessee:			
Chattanooga	Res. No. 13618	Contracts over $500,000	10-13%
Memphis	Ord. introduced 3/17/87	All goods and services	10%
		Construction contracts over $100,000	10%
Shelby County	Res. No. 18 (1986)	All	10%
Texas:			
Austin	Ord. No. 87-0219-Q	Construction contracts	5%

		Construction subcontracts	10%
		Goods and nonprofessional services	10%
		Professional services	5%
Beaumont	Res. No. R-86-164	Construction over $50,000	10%
		Professional services over $25,000	20%
Dallas	Res. No. 84-5301	Over $25,000	17%
		$10,000 to $25,000	2%
		Under $10,000	7%
El Paso	Ord. of Aug. 13, 1985	Construction	25%
		Professional services, equipment, supplies, services	20%
Fort Worth	City Council Policy, July 8, 1986	All	12%
Houston	Ord. No. 84-1309	Construction over $1 million	12%
		Goods over $100,000	9%
		Services	19%

State and City/County	Citation	Types of Contracts Covered	Goals
Lubbock	City Council Minority/Women Business Enterprise Statement, March 1984; Res. No. 667 (Dec. 11, 1980)	All contracts and projects	Good faith effort
San Antonio	Ord. No. 51954 (1980)	Procurement Construction Professional services	5-9% 12-15% 32-35%
Virginia:			
Richmond	Mun. Code § 12-156(a)[6] Mun. Code § 12-156(b)	Construction All other contracts	30% 20%
Washington:			
King County	Cty. Code ch. 4.18 of 1982, amended by Ord. Nos. 7789, 8121, 8313	Construction Services Goods Concessions Consultant	18% 10% 15% 10% 15%

Renton	R.C.W. § 35-35.22.650	Construction	Set by contract
Seattle	Ord. No. 109113, codified at Mun. Code ch. 20-46	Construction and consulting	20%
		Purchasing	15%
Spokane	City Council Res. 1988	All contracts	5%
Tacoma	Official Code ch. 10.26	Construction	15%
Wisconsin:			
Madison	Res. No. 39,920	Consulting, construction, vendor	Overall goal 10% and specific projects 5%
Milwaukee	Mun. Ord., ch. 360	All projects	28% phased in over 7 years (enacted 1987)
Milwaukee County	Ord. chs. 32, 42, 44	All procurement, professional services, construction	15%

[6] This plan is under review in this case.

State and City/County	Citation	Types of Contracts Covered	Goals
Milwaukee Sewerage District	Exec. Orders No. 12138, 11625, 12432; NR 128.14	Construction	10% 1980-82 and 15% thereafter
		Professional services	10% until 1984 and 15% thereafter
Racine County	Ord. under consideration [7]		

[7] Memorandum of March 28, 1988, from Joseph R. Buchanan, Racine County Affirmative Action Officer.