

Articles

Racial Discrimination in Business Transactions

by

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Introduction

The Supreme Court in *City of Richmond v. J.A. Croson Co.*¹ invalidated a municipal minority business set-aside program on equal protection grounds, casting into doubt the legal status of all set-asides.² For the first time a majority of the Court applied strict scrutiny to a legislative racial classification which benefited rather than burdened historically disadvantaged minorities. The Court's ruling barely acknowledged³ the existence of ongoing discrimination against minority-owned firms.⁴ The Court premised its decision on the fundamentally flawed assumption that "[s]tates and their local subdivisions have many legislative weapons at their disposal both to punish and prevent present discrimination"⁵ This article begins by examining this critical assumption by the Court. Part I identifies the glaring inadequacies of existing legal remedies for discrimination in private business dealings. Part II demonstrates the insurmountable difficulties involved in drafting effective legislation to prohibit discrimination in private business transactions.

Part III argues that these problems, chiefly arising from the difficulty of showing that the discrimination was intentional, justify greater flexibility in judicial review of state and local government procurement

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1. 488 U.S. 469 (1989).
2. *Id.* at 493-98, 511.
3. *Id.* at 479-80, 494, 508-11, 533 n.3 (Marshall, J., dissenting).
4. See Suggs, *Rethinking Minority Business Development Strategies*, 25 HARV. C.R.-C.L. L. REV. 101, 109-12, 115-16 (1990) (discussing the difficulty of documenting present discrimination). Aggregate data has been used to infer discrimination in access to financial capital. See Bates, *The Changing Nature of Minority Business: A Comparative Analysis of Asian, Nonminority, and Black-Owned Businesses*, 18 REV. BLACK POL. ECON. 25, 37 (1989) ("[B]lacks get smaller loans than nonminorities who possess otherwise identical education, age, and equity capital traits.").
5. *Croson*, 488 U.S. at 494.

set-asides, which require prime contractors to subcontract a specified percentage of their government contracts to eligible minority owned subcontractors.⁶ A more flexible approach is necessary because the same obstacles that impede effective legal redress in individual actions for intentional discrimination in private commercial transactions also thwart the ability of jurisdictions to satisfy *Croson's* required justifications for set-asides, precise factual showings of prior unlawful intentional discrimination.⁷

If the Court continues to ignore these problems and if minority business enterprises (MBEs) simply must accept the market barrier and handicap that race creates, then the equity of *Croson* rests on whether whites would be prepared to accept analogous handicaps. The true test of the integrity of the doctrine established in *Croson* then becomes whether the policy handicaps the doctrine requires would be accepted if the shoe were on the other foot.⁸

If nebulous and subtle forms of discrimination excluded whites from major markets, would a set-aside be rejected unless the strict terms of *Croson* were met? Would a concern that "[c]lassifications based on race . . . may in fact promote notions of racial inferiority and lead to a politics of racial hostility"⁹ compel the national government to subordinate the economic well-being of the white business community to these overriding principles?

6. The recent five to four decision by the Supreme Court in *Metro Broadcasting, Inc. v. F.C.C.*, 110 S. Ct. 2997 (1990), displayed a welcome sense of reality. In upholding a congressionally mandated minority preference in the federally regulated transfer of broadcast licenses, the Court deferred to Congress, its co-equal branch, and did not apply a strict scrutiny analysis. *Id.* at 3008-09. The Court drew a sharp distinction between the use of remedial racial classifications by the federal government and their use by subordinate governmental entities. *Id.* at 3009. There is, however, some uncertainty as to the continued viability of the Court's approach in *Metro Broadcasting*. Justice Brennan, the author of the majority opinion, recently has retired from the Court, and the dissent unanimously applied a strict scrutiny test for federal set-asides. *Id.* at 3044. Since the Court predicated the legality of the set-aside on the important governmental objective of achieving broadcasting diversity, *id.* at 3010, the *Metro* holding may well be limited to cases involving first amendment considerations if Justice Brennan's replacement, Justice Souter, joins the dissenters when the Court inevitably revisits the issue.

7. For a discussion of the difficulty of showing individual instances of intentional discrimination, see *infra* text accompanying notes 95-111, and 122-160. For a discussion of the use of aggregate statistics to show intentional discrimination, see *infra* notes 257-281 and accompanying text.

8. "In order to detect means discrimination, it is necessary to ask whether the same decision would have been made if its racial impact had been reversed . . ." Schnapper, *Two Categories of Discriminatory Intent*, 17 HARV. C.R.-C.L. L. REV. 31, 51 (1982); see also Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935, 956-59 (1989) (articulating the "reversing the groups" test).

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

Such a parallel situation exists. Part IV compares the complaints of minority firms claiming discrimination in domestic markets to those of American firms claiming exclusion from Japanese markets.¹⁰ Like many minority firms in the domestic context, many American firms have had difficulty identifying and documenting convincing instances of intentional discriminatory treatment by potential Japanese customers in specific transactions.¹¹ Despite this inability to satisfy the *Croson* standards, (and despite elimination of formal trade barriers analogous to *de jure* discrimination), portions of the United States government and the American business community have demanded a specified share (in substance a set-aside) of various Japanese markets under the rubric of "managed trade."¹²

The Court's concern in *Croson* that awarding contracts based upon race¹³ can "promote notions of racial inferiority and lead to a politics of racial hostility"¹⁴ seems especially applicable to the U.S.-Japanese trade context, given the racist strands in both cultures and the legacy of the 1941-1945 Pacific War.¹⁵ American policy makers in international trade, however, think of "managed trade" as a remedy for the closed nature of the Japanese economy,¹⁶ not in terms of promoting their own racial inferiority.¹⁷ The failure to conceive of "managed trade" in terms of confirming American "racial" inferiority derives perhaps from the different perspective from which the administration views the issue. The *Croson* Court viewed the minority set-aside from the view-

10. I would like to thank Professor John P. Morris of Arizona State University College of Law for the genesis of this parallel.

11. See *infra* Part IV.A.

12. Advocates of "managed trade" argue that, after many years of failure, it is fruitless to seek to open Japanese markets by dismantling formal governmental and structural trade impediments. Instead, they urge that the only way to surmount Japanese nontariff trade barriers is to extract firm guarantees from Japan that assure American firms a specified share of Japanese markets. See *infra* text accompanying note 308.

13. Whether this classification is based upon race or nationality is immaterial for purposes of this analysis, especially since both are social constructs. In this instance nationality can also serve as a proxy for race.

14. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989). Racial hostilities between Japan and the United States may also have domestic "scapegoating" or retaliatory ramifications for Asian Americans. This risk directly implicates the *Croson* rationale.

15. See Fallows, *Containing Japan*, ATLANTIC MONTHLY, May 1989 at 40, 48; Ito, *Trans-Pacific Anger*, 78 FOREIGN POL'Y 131 (1990); Morita & Ishihara, *The Japan That Can Say No*, reprinted in 135 Cong. Rec. E3783-98 (daily ed. Nov. 14, 1989) (introduced by Rep. Levin); Spencer, *Japan as Competitor*, 78 FOREIGN POL'Y 153 (1990); see also *infra* text accompanying notes 330-334.

16. 'Revisionist' Influence Seen in Japan Talks, N.Y. Times, Nov. 6, 1989, at C2, col. 1.

17. At least some Japanese also might feel this way. See Ito, *supra* note 15; Spencer, *supra* note 15.

point of the “perpetrator” of the acts that the set-aside was intended to remedy. It considered whether a set-aside confirms racial inferiority in the minds of nonminorities rather than minorities. In contrast, advocates of “managed trade” view this policy from the “victim” perspective. From the victim’s viewpoint, mandating a specified market share solves the problem of a persistent wrongdoer who cannot be trusted to comply with neutral prohibitions.¹⁸ This shift in perspective may account for the failure of proponents of “managed trade” in the Administration to recognize that their position is inconsistent with *Crosson’s* policies.

A. Historical Background

While the legal system has done little to prevent business discrimination, it has played a major role in producing the current paucity of minority business activity. Several centuries of race conscious policies were designed to produce this result.¹⁹ Before the Civil War, laws of both general and specific application restricted the ability of blacks,²⁰ whether North or South, slave or free, to engage in commercial activity. The pervasive legal presumption that a black or mulatto was a

18. See generally Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978) (examining antidiscrimination laws from a victim’s perspective).

19. D. BELL, *RACE, RACISM, AND AMERICAN LAW* 589-632 (2d ed. 1980) (examining the role of race in American law); I. BERLIN, *SLAVES WITHOUT MASTERS: THE FREE NEGRO IN THE ANTEBELLUM SOUTH* 316-40 (1974) (describing laws that discriminated against blacks in the early 19th century); L. GREENE, *THE NEGRO IN COLONIAL NEW ENGLAND* 298-315 (1968) (describing political, economic, and social barriers imposed on free blacks in New England during the 18th century); A. HIGGINBOTHAM, *IN THE MATTER OF COLOR* (1978) (chronicling various state legal and economic barriers faced by slaves); L. LITWACK, *NORTH OF SLAVERY* 153-86 (1961) (describing how discriminatory laws and attitudes kept blacks of the North out of commerce, the professions, and skilled occupations); E. MCMANUS, *BLACK BONDAGE IN THE NORTH* 172-77 (1973) (explaining how post emancipation laws perpetuated the white hegemony); C. WOODWARD, *THE STRANGE CAREER OF JIM CROW* (2d ed. 1966) (detailing segregation known as the Jim Crow system); Coles, *The Unique Problems of the Black Businessman*, 26 VAND. L. REV. 509 (1973) (describing several 18th century laws preventing slaves from carrying on businesses).

20. I have chosen the term “black” to describe Americans of African descent. “Black” as a positive term has a popular history dating only from the 1960s and the advent of the “Black Power” phase of the civil rights movement. It was adopted as a term of self-identification, much as the term “African American” is being adopted now. While it may seem archaic to continue to use it, there are more important issues confronting black Americans than the latest trends in terminology. I use “black” as a correlative to “white.” Neither indicates geographic origin. If I had my druthers, I would reserve use of the term “African American” for contemporary immigrants from that continent who trace their origins to particular countries, such as Nigeria or Ethiopia, and use the term “Afro-American” for those of African descent who cannot trace their origins to a particular place and lack linguistic and cultural ties to a specific state or region.

slave unless proven otherwise and the inability of blacks to testify against whites in court or plead self-defense, even against a malicious attack from a white, made legal action or self-help in support of commercial transactions risky or practically impossible.²¹

In addition, specific enactments inhibited efforts by some minorities to acquire property. "Discrimination . . . [in colonial New England] reached its zenith in Connecticut, where legislative action prompted by citizens of New London threatened to make it impossible for free Negroes either to purchase property or to reside in the colony."²² In colonial Massachusetts, "[b]lacks, Indians, and mulattoes in Boston were . . . forbidden to keep hogs because such an activity allegedly tempted them to steal from their masters . . ."²³ In the antebellum South, the Slave Codes barred slaves from buying or selling goods.²⁴ Northern states by law prevented free blacks from purchasing public lands.²⁵ Virginia prohibited slaves from owning cattle,²⁶ and barred most free blacks from being licensed as shopkeepers,²⁷ while in South Carolina slaves could not deal in rice or coin.²⁸ In 1805 Maryland enacted a statute barring blacks from selling wheat, corn, or tobacco, the major cash crops of the time, without a state license.²⁹ Ohio went even further in 1807, requiring every black to register and post a bond in the sum of \$500, a considerable sum in that era.³⁰

After the Civil War the discretionary power of government officials to grant or deny licenses necessary to conduct a business was used to discriminate against minorities. In San Francisco a municipal board of control discriminated against the Chinese by refusing to issue them permits to conduct laundry businesses while granting permits to similarly situated whites.³¹ In the South, Jim Crow legislation circum-

21. E. GENOVESE, *ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE* 32, 401, 402 (1974). White hostility and prejudice also circumscribed commercial activity. In New York "[t]he prejudices of white labor and the fear of violence [against blacks] caused New York City authorities to refuse licenses to Negro carmen and porters." L. LITWACK, *supra* note 19, at 159.

22. L. GREENE, *supra* note 19, at 312.

23. A. HIGGINBOTHAM, *supra* note 19, at 79.

24. J. FRANKLIN, *FROM SLAVERY TO FREEDOM* 135 (5th ed. 1980).

25. Marable, *The Racial Contours of the Constitution*, 30 *How. L.J.* 953, 963 (1987).

26. A. HIGGINBOTHAM, *supra* note 19, at 56.

27. The few blacks who were licensed as shopkeepers were subject to harassment. I. BERLIN, *supra* note 19, at 242-43 (shopkeepers frequently were dragged into court for violating the city code in the hopes that they eventually would give up and not reopen their shops).

28. A. HIGGINBOTHAM, *supra* note 19, at 199.

29. Marable, *supra* note 25, at 963 (citing H. APTHEKER, *A DOCUMENTARY HISTORY OF THE NEGRO PEOPLE IN THE UNITED STATES, FROM COLONIAL TIMES THROUGH THE CIVIL WAR 209-10* (1951)).

30. *Id.*

31. C. MANGUM, *THE LEGAL STATUS OF THE NEGRO* 69 (1970). The Supreme Court

scribed the general social and legal rights of blacks. While Jim Crow legislation did not directly regulate black business activity, its practical effect was to limit black businesses to segregated markets that whites refused to serve.³²

Perhaps the absence of Jim Crow business legislation explains the failure, during the heyday of the civil rights era, to address problems of continuing racial barriers to business activity. There were no statutes to overturn, no egregious enactments whose immorality was clear. Instead, there existed only customs and practices quietly carried out within the zones of private and personal associations in which courts have refused to intrude.

Much like the barriers confronting American firms in Japan, the customs and practices hindering minority businesses are elusive, situational, and a matter of interpersonal relationships. Their effect, however, is far from insubstantial. Traditionally, law has not interceded in these arenas. Forms of associational discrimination that limit business opportunities have been challenged only recently.³³

B. An Unacknowledged History of Racial Discrimination in Business Transactions

In striking down a minority business set-aside, the Supreme Court in *City of Richmond v. J.A. Croson Co.*³⁴ virtually eliminated one of the few programs that effectively breached racial barriers for minority businesses. In doing so, the Court acted without any expressed awareness of the vulnerability of minority business to discrimination. Moreover, *Croson* reflects the Court's serious misconceptions about the legal scope and practical effect of prohibitions against discrimination even in the area of federal procurement.³⁵

invalidated this ordinance in *Yick Wo v. Hopkins*, 118 U.S. 356 (1885). The situation that the Supreme Court confronted in *Yick Wo* still occurs, although rarely so blatantly. Without such clear racist motives behind state or local licensing schemes, correction by litigation is difficult. As a result, few such cases are ever filed. *But see* *Isaac Manego v. Cape Cod Five Cents Sav. Bank*, 692 F.2d 174 (1st Cir. 1982) (plaintiff MBE challenged on antitrust grounds the denial of entertainment and liquor licenses, alleging in substance that racial discrimination was anticompetitive), *cert. denied*, 475 U.S. 1084 (1986).

32. L. LITWACK, *supra*, note 19, at 178-80 (In the few instances where blacks were allowed to serve a white clientele they were required to bar members of their own race from their services); R. SUGGS, *RECENT CHANGES IN BLACK-OWNED BUSINESS*, Joint Center for Political Studies 25-26 (1986) [hereinafter R. SUGGS, *RECENT CHANGES*].

33. *See e.g.*, *New York State Club Ass'n v. City of New York*, 487 U.S. 1 (1988) (holding that a purportedly private male club used for business purposes was not sufficiently private to be permitted to discriminate based on sex).

34. 488 U.S. 469 (1989).

35. *See infra* note 65 and accompanying text (concerning the Supreme Court's assumptions in *Fullilove v. Klutznick*, 448 U.S. 448 (1980) regarding the impact of Title VI on federal procurement).

Despite *Croson's* facile assumption about the existence of laws barring discrimination in business transactions,³⁶ no federal statute ever has been adopted specifically to bar racial discrimination in private commercial transactions between two business firms.³⁷ This glaring omission has had serious implications for minority business development and the ability of minorities to advance economically. Little attention has been devoted to discrimination against minority owned business firms. Legislation and programs have been enacted to foster minority business development, but their principal thrust has been to overcome the continuing effects of earlier discrimination, not to forbid current discrimination.

Discrimination in the business context has been treated largely as a phenomenon of the past.³⁸ While some black Americans undoubtedly have made economic progress,³⁹ the relative level of black incomes has seen little change. For decades incomes of blacks have been about three-fifths of white incomes.⁴⁰ The disparity in business activity is even more

36. *Croson*, 488 U.S. at 509.

37. This sweeping statement must be limited to the domestic context. The Export Administration Act Amendments, 50 U.S.C.A. § 2407(a)(1)(A)-(B) (West Supp. 1990) (principally directed at the Arab boycott of Israel), bar discrimination by one United States business against another based on the race, religion, sex, or national origin of the owners of that business, when the discrimination is intended to further an unsanctioned foreign boycott. See 15 C.F.R. § 769.2(b)(1)(ii), example (vii) (1990).

38. In the entire discussion of discrimination in the *Fullilove* majority opinion, not a single unambiguous reference was made to current discrimination. Instead the Court focused on the continuing effects of prior discrimination. See *Fullilove*, 448 U.S. at 485-90.

In *Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997 (1990) the Court noted that "Congress found that 'the effects of past inequities stemming from racial and ethnic discrimination have resulted in a severe underrepresentation of minorities in the media of mass communications.'" *Id.* at 3009-10 (citing H.R. CONF. REP. NO. 765, 97th Cong., 2d Sess. 43 (1982), reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS 2261, 2287).

Congress and the Commission do not justify the minority ownership policies strictly as remedies for victims of this discrimination, however. Rather, Congress and the FCC have selected the minority ownership policies primarily to promote programming diversity, and they urge that such diversity is an important governmental objective that can serve as a constitutional basis for the preference policies. We agree.

Id. at 3010.

39. Since blacks are the largest minority group in the United States and there are more data available on blacks over a longer time period than on other minorities, this Article will refer generally to data on the status of blacks rather than of minorities as a whole.

40. Between 1970 and 1983 the ratio of black incomes to white incomes actually fell from 61.3% to 56.3%. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, Series P-60, No. 145, MONEY INCOME AND POVERTY STATUS OF FAMILIES AND PERSONS IN THE UNITED STATES: 1983, Table 3 (1984). The original framers of the Constitution no doubt would find this appropriate. See U.S. CONST. art. I § 2 (deeming non-freed persons as three-fifths of a free person).

Some Asian American minorities have income levels above those of any white ancestry group. Hispanics as a whole tend to fall between blacks and whites, although Hispanic subgroups

pronounced.⁴¹ The black business participation rate is only about one-quarter of the national average.⁴² While blacks make up twelve percent of the population, they own only two percent of all business firms.⁴³ In 1982, only sixteen dollars of every \$10,000 in business receipts, less than two-tenths of one percent, came from black-owned firms.⁴⁴ Black business receipts would have to increase seventy-five-fold before they would be proportionate to the black share of the total population.⁴⁵ Perhaps present discrimination against minority businesses explains the persistence of some of this disparity.

I. Remedies For Business Discrimination

The Supreme Court has assumed that effective legislative weapons are available to punish and prevent business discrimination.⁴⁶ The va-

(e.g. Puerto Ricans, Mexican Americans, Cuban Americans) range from below blacks to the bottom of the lowest white groups. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CENSUS OF POPULATION, GENERAL SOCIAL AND ECONOMIC CHARACTERISTICS, U.S. SUMMARY, Tables 164, 170 PC 80-1-C1 (1983).

41. Other minorities also are underrepresented in business activity. The two other minority groups included in the business census, (1) Hispanics and (2) Asian, Indian, and Other, are each significantly smaller in total population than blacks and have fewer absolute numbers of business firms. Businesses owned by each of these groups, however, in the aggregate employ more paid employees and have greater aggregate firm receipts than do black-owned firms. In 1982 black-owned firms accounted for about 40% of all minority owned firms and for less than 30% of all minority business revenues. Minority business revenues accounted for less than one percent of total business revenues. U.S. BUREAU OF THE CENSUS, 1982 SURVEY OF MINORITY-OWNED BUSINESS ENTERPRISES, MB82-1, Table 1, MB82-2, Table 1, MB82-3, Table 1 (1985, 1986, 1986) [hereinafter 1982 MBE CENSUS].

42. F. FRATOE & R. MEEKS, BUSINESS PARTICIPATION RATES OF THE 50 LARGEST U.S. ANCESTRY GROUPS: A PRELIMINARY REPORT; Research Div., Office of Advocacy, Research & Information, Minority Business Dev. Agency, U.S. Dep't of Commerce, June 1985.

43. R. SUGGS, RECENT CHANGES, *supra* note 32, at 3.

44. *Id.* at 2, 6.

45. The increase needed if all minority business receipts are to be proportionate to population is somewhat less, about 29-fold. This figure is derived from Appendix III in R. SUGGS, RECENT CHANGES *supra* note 32, and 1982 MBE CENSUS, *supra* note 41. It does not reflect the summary data that eliminates the double counting of some Hispanics. This figure compares small, usually closely held firms to a group that includes "Fortune 500 corporations." It also ignores the beneficial interest of blacks in pension funds that own shares in publicly traded firms. No Fortune 500 firm has evolved from a black-owned firm nor has any Fortune 500 firm ever been led by a black, and individual share ownership by blacks is extremely small. See U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS, Series P-70, No. 7, HOUSEHOLD WEALTH AND ASSET OWNERSHIP: 1984, 5, 8 (1986). If only partnership revenues are considered, which eliminates major publicly held firms as well as sole proprietorships (few of which are more than part-time, incidental endeavors), then in 1982 black partnership revenues would have had to increase by a factor of 27 to be proportionate to the black population. Derived from R. SUGGS, RECENT CHANGES, *supra* note 32, at apps. II & III.

46. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494 (1989).

lidity of this assumption may be tested by examining existing statutes and reported cases. Based on Reconstruction Era civil rights statutes,⁴⁷ legal theories can be constructed that would reach discrimination in a private business transaction.⁴⁸ A small number of decisions recognize causes of action based upon such theories,⁴⁹ but ultimate success on the merits has yet to be achieved in a reported opinion.

The reported cases disclose only a single instance in which a claim of racial discrimination in public sector procurement⁵⁰ has produced a damage award for a minority firm.⁵¹ Such a claim is clearly cognizable under current constitutional doctrine.⁵² Since there are abundant findings of discrimination in school,⁵³ housing,⁵⁴ employment,⁵⁵

47. 42 U.S.C. § 1981 (1988) (providing for equal rights to make and enforce contracts; originally enacted in 1870).

48. See *infra* text accompanying notes 155-160 (discussing § 1981 claims in private business transactions).

49. See *infra* note 156.

50. The distinction concerned here is not between "state action" and private action, but rather between public sector procurement procedures, which require acceptance of the lowest bid and thus, theoretically, provide an objective basis to determine intentional discrimination, and private bidding transactions in which no such obligation exists.

51. See *Brant Constr. Co. v. Lumen Constr. Co. Inc.*, 515 N.E.2d 868 (Ind. App. 1987). In *Brant*, a prime contractor was held liable under 42 U.S.C. §§ 1981 and 1983 for \$232,996.60 in damages, \$155,132 in attorney's fees and \$20,258.57 in expenses and expert witness fees. The plaintiff, an Hispanic-owned firm, claimed that after it had received a subcontract under a set-aside, the defendant prime contractor interfered with its performance in violation of the civil rights laws.

The holding of *Patterson v. McClean Credit Union*, 109 S. Ct. 2363 (1989), that § 1981 coverage does not extend beyond the formation stage of a contract, substantially vitiates the *Brant* holding unless the *Brant* result can be predicated on § 1983 alone, and if the scope of § 1983 is not limited by *Patterson*. See also *T & S Serv. Assoc. Inc. v. Crenson*, 666 F.2d 722, 728 (1st Cir. 1981). In *T & S* the trial court awarded \$22,787 in compensatory damages for racial discrimination that violated § 1981 in the award of a public school lunch contract. The court of appeals reversed on the ground that the trial court erroneously had imposed the burden of persuasion on the defendant on the issue of whether it had articulated a legitimate, nondiscriminatory reason for rejecting the plaintiff's bid. See *infra* Part II.B.(1) (discussing *T & S* and public procurement generally).

52. The fifth amendment of the United States Constitution bars direct racial discrimination by the federal government, and the fourteenth amendment bars discrimination by states and subordinate governmental entities.

53. Findings continue to be made even against school districts. See *e.g.*, *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181 (2d Cir. 1987), *cert. denied*, 486 U.S. 1055 (1988).

54. The most recent national study of housing discrimination, conducted in 1977 in 40 metropolitan areas, found that if a black visited four rental agents, at least one instance of racial discrimination would occur 72% of the time. If a black visited four sales agents, at least one instance of discrimination would occur 48% of the time. R. WIENK, C. REID, J. SIMONSON & F. EGGERS, *MEASURING RACIAL DISCRIMINATION IN AMERICAN HOUSING MARKETS: THE HOUSING MARKET PRACTICES SURVEY ES-1-ES-2* (U.S. Dep't of Hous. and Urban Dev.) (1979).

55. See generally *A COMMON DESTINY, BLACKS AND AMERICAN SOCIETY* (G. Jaynes & R. Williams eds. 1989) [hereinafter *A COMMON DESTINY*]. In 1985 the estimated lifetime earnings of white male college graduates was \$1.42 million, \$450,000 more than black male college graduates. *Id.* at 301.

voting,⁵⁶ and other contexts, it is unlikely that our business community has achieved the equity and harmony that has evaded the rest of society.⁵⁷ This stunning absence of success clearly indicates a lack of viable enforcement tools.

Discrimination against minority owned business firms can occur in three basic situations: (1) when the government discriminates in its choice of a prime contractor;⁵⁸ (2) when a government employed prime contractor discriminates in its choice of a subcontractor;⁵⁹ and (3) when a private firm discriminates in its selection of a supplier in a transaction not involving public funds.

MBEs have based claims of business discrimination⁶⁰ on federal constitutional and statutory grounds, and on state third party bene-

56. See, e.g., *Thornburg v. Gingles*, 478 U.S. 30, 46 n.11 (1986); see also *MINORITY VOTE DILUTION* (C. Davidson ed. 1984) (detailing the vote dilution mechanisms that make the votes of minority group members less effective than those of whites); *A COMMON DESTINY*, *supra* note 55.

57. Negative stereotyping of blacks still remains a significant feature of black-white relations. See H. SCHUMAN, C. STEEH & L. BOBO, *RACIAL ATTITUDES IN AMERICA: TRENDS AND INTERPRETATIONS* (1985); *A COMMON DESTINY*, *supra* note 55; see also Kluegel & Smith, *Whites' Beliefs About Blacks' Opportunity*, 47 AM. SOC. REV. 518 (1982) (examining whites' perceptions of discrimination and reverse discrimination. In each of the age groups surveyed (18-29, 30-39, 40-49, 50-59, and 60 plus), a significant number of subjects admitted to racist attitudes. Percentages of each age group, ranging from 17.6% to 51.3%, favored laws against interracial marriage; 24.5% to 45.8% felt that whites have a right to racial segregation in housing; 16.9% to 36.2% would object to a family member bringing a black friend home. *Id.* at 522, table 3.

58. There are also cases in which MBEs challenge as discriminatory a government's denial of a license that is either necessary or desirable for a business. See, e.g., *Isaac Manego v. Cape Cod Five Cent Sav. Bank*, 692 F.2d 174 (1st Cir. 1982) (plaintiff sued based on denial of a liquor license). While such actions undermine business activity, a detailed discussion of their impact on MBEs is beyond the scope of this Article. See *supra* note 31.

59. Most government contracts, as part of their boiler plate agreements, impose an obligation on both prime contractors and subcontractors not to discriminate in employment. See, e.g., Federal Highway Admin., Dep't of Transp., 23 C.F.R. § 172.9(a) (1989) ("All contracts awarded by grantees, subgrantees, and the contractors shall contain provisions requiring compliance with Title VI of the Civil Rights Act of 1964, as amended."); see also Exec. Order No. 11246, 3 C.F.R. 567 (1965-65) (mandating nondiscrimination in employment by government contractors and subcontractors). Even if such an obligation not to discriminate were extended to the choice of a subcontractor by the prime contractor, however, it is unclear whether a minority-owned firm can enforce such a provision, or whether only the government imposing the nondiscrimination obligation on the prime contractor can enforce it. The result may well turn on whether the entire MBE provision can be held to create a private right of action (see *infra* text accompanying notes 232-246) or to create a third party beneficiary contract right of action (see *infra* text accompanying notes 209-212). A number of courts have held that a government's failure to impose sanctions for violation of a contract's antidiscrimination provision is not state action for purposes of a 42 U.S.C. § 1983 claim. See *Cox v. Athena Cablevision*, 558 F. Supp. 258, 259-60 (E.D. Tenn. 1982); *Peterson v. Lehigh Valley Dist. Council*, 453 F. Supp. 735, 738 (E.D. Pa. 1978), *vacated on other grounds*, 676 F.2d 81 (3d Cir. 1982); *Technicable Video Sys. v. Americable*, 479 So. 2d 810, 814 (Fla. Dist. Ct. App. 1985).

60. Most reported cases appear as decisions on preliminary motions, so it would be

fiary contract theories.⁶¹ A typical suit alleges claims based upon several constitutional provisions as well as on all the Reconstruction Era civil rights statutes.⁶² The courts' opinions, however, generally limit their discussion to a single provision, usually section 1981, in the belief that the other theories are essentially equivalent.

The balance of Part I begins with an analysis of Title VI of the Civil Rights Act of 1964⁶³ and considers its application to both federal prime and subcontractors. This inquiry is germane because two Justices on the Court when *Fullilove v. Klutznick*⁶⁴ was decided assumed Title VI barred discrimination against MBEs in federal procurement.⁶⁵ Part I ends with a discussion of whether theories based upon section 1981 can remedy discrimination by private firms against MBEs on government funded subcontracts and whether section 1981 provides an effective remedy in purely private transactions.

A. Title VI of the Civil Rights Act of 1964

In federally funded infrastructure programs, such as the Public Works Employment Act of 1977,⁶⁶ which was the subject of the *Fullilove* decision, or the more recent Surface Transportation Assistance Act of 1982,⁶⁷ local governments receive federal grants⁶⁸ that they use

imprudent to hazard a guess on the true merits of the allegations of discrimination. See cases cited *infra* notes 97, 156, 167. But in the business world one does not lightly sue a potential customer.

61. See *Organization of Minority Vendors, Inc. v. Illinois Cent. Gulf R.R.*, 579 F. Supp. 574 (N.D. Ill. 1983); *Technicable Video Sys. v. Americable*, 479 So. 2d 810 (Fla. Dist. Ct. App. 1985).

62. See *Hudson Valley Theater, Inc. v. Heimbach*, 671 F.2d 702 (2d Cir), *cert. denied*, 459 U.S. 857 (1982) (alleging violations of 42 U.S.C. §§ 1981, 1983, 1985, 2000d, and the fourteenth amendment); *T&S Serv. Assocs., Inc. v. Crenson*, 666 F.2d 722 (1st Cir. 1981) (alleging equal protection and due process violations and violation of 42 U.S.C. §§ 1981, 1983, 2000d); *Des Vergnes v. Seekonk Water Districe*, 601 F.2d 9 (1st Cir. 1979) (alleging violations of 42 U.S.C. §§ 1981, 1983, 1985(3) and the thirteenth and fourteenth amendments).

63. 42 U.S.C. § 2000d (1988).

64. 448 U.S. 448 (1980).

65. *Id.* at 506 (Powell, J., concurring); *id.* at 540 (Stevens, J., dissenting):

66. Pub. L. No. 95-28, 91 Stat. 116 (1977) (codified in significant part at 42 U.S.C. §§ 6705(e)-6707(j) (1982)).

67. Pub. L. No. 97-424, 96 Stat. 2097 (1982) (codified at 23 U.S.C. § 104 (1983)).

68. Some specific grant statutes contain their own prohibitions against discrimination. See, e.g., *Comprehensive Employment and Training Act of 1973*, 29 U.S.C. § 991 (repealed 1982) (prohibiting discrimination in the federally funded Job Corps); *State and Local Fiscal Assistance Amendments of 1976*, 31 U.S.C. § 1242 (amended in scattered sections 31 U.S.C. §§ 6701-6720 (1982)) (repealed 1986) (forbidding discrimination in state and local programs receiving federal money); *Housing and Community Development Act of 1974*, 42 U.S.C. § 5309 (1988) (prohibiting discrimination in any program or activity supported by federal housing or community development funds); *Energy Conservation and Production Act*, 42 U.S.C. § 6870 (1988) (prohibiting recipients of federal energy conservation grants from discriminating in any activity supported by the grants).

to buy goods and services from private firms. The local government's selection of a prime contractor to provide goods and services in such a program is subject to Title VI of the 1964 Civil Rights Act.⁶⁹

Title VI provides that: "No person . . . shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."⁷⁰ Whether a government selected prime contractor could discriminate against a minority firm in the selection of a subcontractor without violating Title VI depends upon the resolution of a number of issues. These issues include whether the potential contractual arrangement between the prime contractor and MBE subcontractor constitutes a "program or activity receiving federal financial assistance" and whether the procurement of goods and services under such an arrangement constitutes receipt of "financial assistance" under Title VI.

(1) "Program or Activity"

To be unlawful under Title VI, the discrimination must occur in a program or activity receiving federal financial assistance. The first inquiry concerns the phrase "program or activity." Section 606 of the Civil Rights Restoration Act of 1987,⁷¹ which amended Title VI of the Civil Rights Act of 1964 and reversed the result in *Grove City College v. Bell*,⁷² broadly defines the phrase to include all operations of a unit of state or local government any part of which receives federal financial assistance.⁷³ With respect to a business firm, all operations of the firm are covered by the prohibition against discrimination if the firm as a whole is extended federal assistance, or if it is engaged principally in the business of providing education, health care, housing, social, or recreational services. In all other cases, only that geographically separate portion of a private firm receiving assistance is covered.⁷⁴ Thus,

69. 42 U.S.C. §§ 2000d to 2000d-7 (1988). The complaint in *Fullilove* alleged that the MBE set-aside provision was inconsistent with Title VI. The opinion by Justice Burger disagreed and held that to the extent that an inconsistency might have existed, the MBE provision, the later and more specific enactment, was controlling. *Fullilove v. Klutznick*, 448 U.S. 448, 492 n.77.

70. 42 U.S.C. § 2000d (1988).

71. Pub. L. No. 100-259, 102 Stat. 28 (1988) (codified as amended at 42 U.S.C. § 2000d-4a (1988)).

72. 465 U.S. 555 (1984) (a private college, some of whose students received federal financial aid, had to comply with federal antidiscrimination laws only in the operation of its financial aid program).

73. Pub. L. No. 100-259, 102 Stat. 28 (1988) (codified as amended at 42 U.S.C. § 2000d-4a (1988)).

74. In the context of a private firm that receives assistance, the relevant language from

a commercial prime contractor's selection of its subcontractor for federally funded procurement would come within the meaning of "program or activity" because either the firm as a whole receives federal assistance or that portion of the firm receiving assistance engages the relevant subcontractor.

Large federal government contractors, especially those that contract with the Department of Defense, often engage several tiers of subcontractors. Discrimination by a first tier subcontractor on a federal procurement contract in the selection of a second tier subcontractor probably is beyond the scope of the term "program or activity." The prohibitions of Title VI against discrimination by a prime contractor in its selection of a subcontractor do not extend beyond "all the operations of"⁷⁵ the prime contractor. By negative implication the statute could be construed as not addressing discrimination between the first and second tier subcontractors. This narrow construction is supported by the absence of language parallel to that applicable to governmental entities. Section 606, which deals with governmental entities, includes within the definition of the term "program and activity" not only all the operations of the state or local government entity receiving federal assistance, but also all the operations of each state or local government entity receiving assistance indirectly through another unit of state or local government.⁷⁶ No comparable language exists for assistance re-

the 1988 amendment defines the term "program or activity" to

mean all the operations of — . . .

(3)(A) an entire corporation, partnership, or other private organization, or entire sole proprietorship —

(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship . . .

any part of which is extended Federal financial assistance

42 U.S.C. § 2000d-4a (1988).

75. *Id.*

76. Civil Rights Restoration Act of 1987, Pub. L. No. 100-259 § 606 (1)(B), 102 Stat. 28 (1988) (codified at 42 U.S.C. 2000d-4a (1988)). Section 606 provides:

[T]he term 'program or activity' and the term 'program' mean *all of the operations of*

(1)(A) a department, agency, special purpose district, or other instrumentality of a State or a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government; . . .

any part of which is extended Federal financial assistance.

Id. (emphasis added).

ceived or distributed by private firms. This absence of parallel language for private firms likely would lead to an interpretation that discrimination by a first tier subcontractor (when the prime contractor receives assistance) in the choice of second tier subcontractors would not be included within the "operations" of the prime contractors and would be beyond the scope of this provision.

(2) "*Financial Assistance*"

Once a "program or activity" has been found, it is necessary to address the second issue of whether the phrase "federal financial assistance" encompasses all federal spending or has a more limited meaning. "Assistance" could be interpreted narrowly to mean a payment in the nature of a subsidy to enable the firm to provide services to the public, or it could be interpreted more broadly to include expenditures such as government purchases of office supplies or road construction services at market rates.

At the time Title VI was being debated in Congress, a narrow construction was adopted to prevent the loss of pivotal votes.⁷⁷ The legislative history of Title VI clearly shows an intent to exclude from its coverage the buying of goods and services for the benefit and use of the federal government. The federal government, acting in the role of a purchaser in the marketplace like any other buyer, was not considered to be giving "assistance."⁷⁸

Even if the legislative history excludes direct federal procurement for use "in house" by the federal government, it does not necessarily follow that federal assistance to local governments, such as under the Public Works Employment Act of 1977,⁷⁹ which funds a local government's procurement of roads and public works at commercial rates,

77. See 3 R. CAPPALLI, FEDERAL GRANTS AND COOPERATIVE AGREEMENTS: LAW, POLICY, AND PRACTICE § 19:30 (1987 & Supp. 1990). *But see* Glotten v. Connally, 338 F. Supp. 448 (D.D.C. 1972) (broadly construing "federal financial assistance" to include assistance provided through the tax system).

78. [S]ection 601 excludes federal procurement — the buying of goods and services for the benefit and use of the United States. In these transactions the payee is not considered to be "assisted" by the United States; rather, the federal government is operating in the marketplace like any other buyer. Accordingly, although § 602 specifically refers to contractual aid, normal procurement contracts are excluded. One would have to show an element of federal subsidy to subsume the "procurement" under Title VI.

R. CAPPALLI, *supra* note 77, § 19:30 (citing 110 CONG. REC. 13380 (1964) and 110 CONG. REC. 10076 (1964) (letter from Att'y. Gen. Kennedy to Sen. Cooper)).

79. Pub. L. No. 95-28, 91 Stat. 116 (1977) (codified in significant part at 42 U.S.C. §§ 6705(e)-6707(j) (1988)).

also must be excluded from the coverage of Title VI. Often the purpose of public construction spending is to assist the local economy and increase employment.⁸⁰

A narrow interpretation of "financial assistance," which would exclude a local government's procurement of goods or services at market rates, is suggested by the construction of "program or activity"⁸¹ applied to governmental agencies.⁸² The definition of "program or activity" explicitly includes governmental subrecipients within the program or activity of the initial governmental recipient.⁸³ No parallel flow down provisions exist for the receipt of financial assistance for either government or private firms. This absence suggests that a state or local government that receives financial assistance which it uses for procurement from a private firm does not provide "financial assistance" to that firm. This result is consistent with the ordinary meaning of "financial assistance," since a state or local government's procurement at market rates from a business firm usually would not be considered financial assistance to the firm.

However, it still could be argued that, through procurement at market rates, federal financial assistance is being provided to the state or local government recipient, to the public generally, or to the prime contractor's subcontractor. It is unclear who must be subsidized in order for there to be "assistance."⁸⁴

The Supreme Court shed some light on this issue in *United States Department of Transportation v. Paralyzed Veterans*,⁸⁵ which held that federal funds received as contractual grants by airport authorities were not federal financial assistance to the airlines that used these facilities pursuant to numerous contracts with the authorities. The Court drew a distinction between contractual recipients of subsidies and indirect beneficiaries of subsidies.⁸⁶ The governing principal seemed to be that "assistance" is the receipt of a subsidy (not procurement at market rates), and the receipt of that subsidy must be pursuant to a contractual

80. See, e.g., H.R. REP. NO. 1077, 94th Cong., 2nd Sess. 2 (1976). This House report, which discusses the purpose of the bill to make various federal grants available for state and local construction projects, was accepted by the Conference Committee in preference to the Senate version. S. CONF. REP. NO. 939, 94th Cong., 2nd Sess. 1 (1976); H.R. CONF. REP. NO. 1260, 94th Cong., 2nd Sess. 1 (1976).

81. See *supra* note 76.

82. See *supra* notes 75-76 and accompanying text.

83. *Id.*

84. Even when "assistance" concededly is involved, there remain questions about the extent to which prohibitions flow down to subrecipients. See R. CAPPALLI, *supra* note 77, §§ 19:36, 19:37.

85. 477 U.S. 597 (1986).

86. *Id.* at 606-10.

relationship, as contemplated by the flow down provisions of section 606(1) of Title VI.⁸⁷ Thus, to be protected by Title VI, MBE subcontractors must be the intended beneficiaries, not the state or local government nor the public generally, and these MBEs must have contractual relationships with the prime contractor which receives the assistance as part of a "program or activity" receiving assistance.

This interpretation creates an anomaly. Some statutes may permit procurement at subsidized rates. The Public Works Employment Act of 1977 (PWEA)⁸⁸ and the Surface Transportation Assistance Act of 1982 (STAA)⁸⁹ were enacted with the ancillary purpose of aiding and benefitting minority business firms.⁹⁰ The PWEA recognized that the bids made by MBEs might be higher than otherwise expected because they reflect the continuing effects of prior discrimination.⁹¹ Therefore, procurement under these statutes might be viewed as providing "assistance" directly to the prime contractor for purposes of Title VI. To the extent that a prime contractor's bid reflects its minority subcontractor's legacy of discrimination, it could be argued that it is a program or activity in receipt of federal financial assistance and therefore is subject to Title VI. If, however, a prime contractor does not select a minority subcontractor, then its bid presumably would be at market rates and it would not be in receipt of federal financial assistance. In the former case, the legal coverage of Title VI would turn on the murky factual issue of whether any MBEs awarded subcontracts had included in their bids higher costs reflecting the continuing effects of prior discrimination. Title VI would protect MBEs only in cases in which they had been awarded subcontracts, making protection unnecessary. On the other hand, in cases in which MBEs failed to win subcontracts, indicating a potential need for protection, Title VI would not apply.

Contrary to the Supreme Court's superficial assumption that minority firms could rely on applicable legislation⁹² to prevent their discriminatory exclusion from federal procurement, commercial procurement at market rates is not covered by Title VI.⁹³ Minority sub-

87. See *id.* at 604-12; *supra* note 76.

88. Pub. L. No. 95-28, 91 Stat. 116 (1977) (codified in significant part at 42 U.S.C. §§ 6705(e)-6707(j) (1982)).

89. Pub. L. No. 97-424, 96 Stat. 2097 (1982) (codified at 23 U.S.C. § 104 (1983)).

90. 123 CONG. REC. 5097-98 (1977) (Remarks of Rep. Mitchell).

91. See *Fullilove v. Klutznick*, 448 U.S. 448, 470 (1980) (discussing PWEA's implementing guidelines).

92. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494 (1989).

93. In his dissenting opinion in *Fullilove*, which upheld a federal set-aside, Justice Stevens, who voted with the majority in *Croson*, wrote:

Title VI of the Civil Rights Act of 1964 unequivocally and comprehensively prohibits

contractors—and the vast majority of minority firms are too small to participate in such procurement as prime contractors—must rely on other theories for protection against discrimination.⁹⁴ Protection under any of these other theories is, as we shall see, just as fanciful.

(3) *The Intent Problem*

The intent problem creates a dilemma for claims of business discrimination. When intent is a requisite element of the claim, it creates virtually insurmountable practical problems of proof. If it is eliminated, then no adequate limiting criterion exists to distinguish legitimate claims from bogus ones. Even assuming the practical problems of proving intent could be overcome, Title VI would do little or nothing to protect MBEs from discrimination. What protection it does clearly provide duplicates constitutional protection.

Title VI does provide theoretical protection to minority firms large enough to participate as prime contractors to state and local governments that are funded by grants of federal financial assistance, because the state or local government's operations constitute a "program or activity" covered by Title VI.⁹⁵ However, Title VI's coverage does not extend to protect MBEs holding direct prime contracts with the federal government, if these contracts were at market rates;⁹⁶ these transactions would theoretically be covered by the fifth amendment.⁹⁷ Even the lim-

discrimination on the basis of race in any program or activity receiving federal financial assistance. In view of the scarcity of litigated claims on behalf of minority business enterprises during this period, and the lack of any contrary evidence in the legislative record, it is appropriate to presume that the law has generally been obeyed.

Fullilove, 448 U.S. at 540 (Stevens, J., dissenting).

94. One theory would be to attribute discrimination against a minority subcontractor by a prime contractor to the state for purposes of satisfying the state action requirement of § 1983, if "there is a sufficiently close nexus between the State and the challenged action . . . so that the . . . latter may be fairly treated as that of the state itself." *Jackson v. Metropolitan Edison*, 419 U.S. 345, 351 (1974). In *Jackson* the plaintiff complained of termination of utilities. The utility operated under a state grant of monopoly at regulated rates, but the Court did not find state action. In *Rendall-Baker v. Kohn*, 457 U.S. 830 (1982), a private school received 90% of its funding from public sources to educate maladjusted students, but despite this public function and financial dependency, the school was not acting for the state when it discharged several teachers.

95. Private actions may be maintained under Title VI of the Civil Rights Act of 1964. See *Guardians Ass'n v. Civil Service Comm'n of New York*, 463 U.S. 582, 597 (1983).

96. See *supra* notes 77-78 and accompanying text.

97. In *Marshall v. Kleppe*, 637 F.2d 1217 (9th Cir. 1980), the court refused to dismiss a suit brought by an MBE against the federal government under the due process clause of the fifth amendment for discriminatory cancellation of a loan authorization by the Small Business Administration. The reasoning employed in this case would apply equally to a suit charging discrimination by a federal official in the award of a contract for goods or services.

ited protection that Title VI provides to minority prime contractors funded by state or local governments may merely duplicate the theoretical relief already available under the fourteenth amendment, because Title VI probably requires a showing of discriminatory intent, as do fifth and fourteenth amendment claims.⁹⁸

If Title VI provides a modicum of protection that expands existing constitutional protection, it is because there is at least an argument that it does not require a showing of discriminatory intent. Federal agencies implementing Title VI have issued regulations that go beyond prohibiting intentional discrimination to prohibiting discriminatory effects as well. Several administrative agencies have pronounced that "a recipient [of federal funding] . . . shall not . . . utilize criteria or methods of administration which have *the effect* of subjecting persons to discrimination because of their race"⁹⁹ Similar agency action, which looks beyond innocent or neutral motives to discriminatory effects, was upheld by the Supreme Court in *Lau v. Nichols*.¹⁰⁰ This result, however, may have been undermined by *Regents of the University of California v. Bakke*,¹⁰¹ in which five Justices concurred in the view that Title VI should be read as synonymous with the equal protection clause, which requires discriminatory intent to ground a violation.¹⁰²

The meaning of discriminatory purpose¹⁰³ was developed in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*¹⁰⁴ In this case the plaintiff developer claimed that the Village's refusal to rezone certain land to allow low and moderate income housing violated the equal protection clause of the fourteenth amendment. The Court held that if the plaintiff proved the village's denial was in part

98. See *infra* notes 101-102 and accompanying text.

99. 15 C.F.R. § 8.4(b)(2) (1990) (Dep't of Commerce); 24 C.F.R. § 1.4(b)(2)(i) (1990) (Dep't of Housing & Urban Dev.); 45 C.F.R. § 80.3(b)(2) (1990) (Dep't of Health & Human Services) (emphasis added).

100. 414 U.S. 563, 568-69 (1974).

101. 438 U.S. 265 (1978).

102. *Id.* at 287, 325. Since the intent question was not before the Court, this assessment may be too pessimistic, but as a practical matter, in the business context there is no adequate substitute for intent. See *infra* notes 177-188 and accompanying text (discussing disparate impact theory); see also *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 268 (1977); *Washington v. Davis*, 426 U.S. 229, 239 (1976). For a somewhat fuller explanation of how this came about, see R. CAPPALLI, *supra* note 77, §§ 19:24-25.

103. The Court has treated "discriminatory purpose," "discriminatory intent," and "discriminatory motive" as interchangeable terms although analytically this leads to considerable confusion. See Schnapper, *supra* note 8, at 44-45; Strauss, *supra* note 8, at 951. Schnapper argues that the meaning of "intent" is broader than "purpose." For use in this Article, it is sufficient to note that, however defined, all three terms require proof of subjective states of mind.

104. 429 U.S. 252 (1977).

motivated by race, a discriminatory purpose had been shown.¹⁰⁵ To show a discriminatory purpose, claimants could rely on disparate impact, events leading up to the challenged decision, departures from normal procedural sequence and usual substantive policies, and the legislative and administrative history of the action.¹⁰⁶ Then in *Personnel Administrator v. Feeney*,¹⁰⁷ the Court rejected the formulation that a person intends the natural and foreseeable consequences of voluntary actions. Instead, the Court adopted a more limited definition of "discriminatory purpose" requiring not a mere awareness of consequences, but "that the decisionmaker . . . selected . . . a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."¹⁰⁸

The intent requirement immunizes from redress discrimination based upon differences resulting from the continuing effects of prior discrimination, including for example, small size, inadequate capital, and lack of experience. If a prime contractor will use only large subcontractors with considerable capital and experience, it can eliminate most MBE subcontractors using neutral criteria. Thus, discriminatory effects can result from facially neutral policies.¹⁰⁹ A viable legal remedy for discrimination requires both a legal theory of recovery and access to the facts necessary to prove the case. When subjective evil intent is the critical element necessary for recovery, success on the merits becomes virtually impossible.

Many other causes of action require proof of intent, such as criminal indictments, or claims for intentional torts. In those actions, however, the result achieved by the intentional act, harm to a victim, is both unusual and not otherwise desirable. Intent may be inferred from the act itself. But in the business context, the result achieved by the intentional discrimination, a contract with a non-MBE, is a routine and unremarkable occurrence. Only in extreme cases such as when discriminatory actions so severely affect the MBE that courts presume bigotry or when no other possibility explains the action can a plaintiff show intent without an admission by the defendant of culpability.

105. *Id.* at 265-66.

106. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105, 1112 (1989) (citing *Arlington Heights*, 429 U.S. at 266-68).

107. 442 U.S. 256 (1979).

108. *Id.* at 279.

109. Some MBEs have used the existence of MBE set-asides or good faith provisions, coupled with the lack of cooperation received from prime contractors when they attempt to bid, as a way of showing discriminatory intent. See *Khalifa v. State*, 397 N.W.2d 382 (Minn. Ct. App. 1986); *Technicable Video Sys. v. Americable*, 479 So. 2d 810 (Fla. Dist. Ct. App. 1985).

The lack of effective protection against business discrimination even in federal procurement clearly contrasts with the facile assumption of several Justices in *City of Richmond v. J.A. Croson*¹¹⁰ and *Fullilove v. Klutznick*.¹¹¹ As in the era of *Plessy v. Ferguson*,¹¹² the Court's pursuit of doctrinal symmetry has led it to ignore economic and social realities.

B. Section 1981 and Equal Protection

Section 1981¹¹³ provides the broadest potential basis to redress claims of business discrimination.¹¹⁴ At least in theory, this provision provides the basis for claims of discrimination that would reach all three of the paradigmatic transactions: governments with MBE prime contractors; prime contractors, subcontracting with MBEs on publicly funded projects; and purely private transactions between commercial customers and MBE suppliers. Since the analysis under section 1981 and the equal protection analysis under the fifth and fourteenth amendments are essentially equivalent¹¹⁵ for the issues raised by this Article, equal protection doctrine will not be discussed separately.¹¹⁶

110. 488 U.S. 469, 494 (1989).

111. 448 U.S. 448, 540 (1980) (Stevens, J., dissenting).

112. 163 U.S. 537 (1896) (upholding a statute requiring separate accommodations for white and black persons).

113. 42 U.S.C. § 1981 (1988).

114. See *Runyon v. McCrary*, 427 U.S. 160, 168-70 n.8 (1976), for an explanation of the controversy surrounding the legislative history of this provision. A historical note appended to the present codification indicates that this section was derived solely from § 16 of the Act of May 31, 1870, which itself was enacted pursuant to the fourteenth amendment. Yet the majority opinion in *Runyon* traced this statute (as § 1977 of the Revised Statutes of 1874) to both § 1 of the Civil Rights Act of 1866 (a similar statute enacted pursuant to the thirteenth amendment and reenacted as § 18 of the Voting Rights Act of 1870) and to § 16 of the 1870 Act. *Id.* If based solely on the fourteenth amendment, Justice White argued in his dissent, the prohibitions of the Act could reach only state actions. *Id.* at 206 (White, J., dissenting). It would not reach private action as the Court held in *Runyon*. If based upon the thirteenth amendment, however, as held in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 437-38 (1968), § 1981 reaches private discrimination as a prohibition against the badges and incidents of slavery.

Three articles in the 1989 issue of the *Yale Law Journal* present the historical evidence and argue persuasively that Congress intended § 1981 to reach private action. See Kaczorowski, *The Enforcement Provisions of the Civil Rights Act of 1866: A Legislative History in Light of Runyon v. McCrary*, 98 *YALE L.J.* 565 (1989); Sullivan, *Historical Reconstruction, Reconstruction History, and the Proper Scope of Section 1981*, 98 *YALE L.J.* 541 (1989); Kennedy, Book Review, 98 *YALE L.J.* 521 (1989) (reviewing FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1862-1877* (1988)).

115. *Washington v. Davis*, 426 U.S. 229, 238-39 (1976).

116. Nor will this article pursue two other complications suggested by scenario two: whether discrimination by a prime contractor against MBEs on a publicly funded project amounts to state action for purposes of equal protection doctrine; and whether the contractor is acting "under color of law" for purposes of 42 U.S.C. § 1983.

Section 1981 provides that “[a]ll persons . . . shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens”¹¹⁷ While this provision has been interpreted broadly as reaching the making and enforcement of private contracts without requiring state action,¹¹⁸ it also has been interpreted narrowly as remedying only purposeful discrimination.¹¹⁹ Proof of disparate impact is not enough.¹²⁰ Section 1981 does not prohibit decisions made on facially neutral grounds even if such decisions would adversely affect MBEs.¹²¹ As under Title VI, a prime contractor does not violate section 1981 by refusing an MBE’s bid because the MBE is small, inexperienced or undercapitalized, even though these characteristics are the continuing effects of prior discrimination. As a practical matter, even if a prime contractor deliberately adopts policies or procedures because they have a disparate impact on minority firms, but leaves no record of its true purpose, no violation of section 1981 could be shown.

(1) *Public Procurement*

Although establishing a violation of section 1981 does not require a showing of state action, a claim is most likely to succeed if it is brought against a public agency that is subject to the competitive bidding requirements of most public procurement.¹²² The obligation imposed on public agencies to accept the lowest responsible bid¹²³ provides a basis

117. 42 U.S.C. § 1981 (1988).

118. *Runyon*, 427 U.S. at 168. In *Patterson v. McLean Credit Union*, 109 S. Ct. 2363 (1989), the Supreme Court reconsidered and affirmed this holding, but it limited the protection of § 1981 to the formation stage of contracting. *Id.* at 2369.

119. *General Bldg. Contractors Ass’n v. Pennsylvania*, 458 U.S. 375, 389 (1982).

120. *Id.*; see *infra* text accompanying notes 177-188 (discussing hypothetical local government legislation which would impose liability upon a showing of disparate impact alone).

121. *General Bldg. Contractors Ass’n*, 458 U.S. at 392-97 (invidious discrimination practiced by a labor union was not imputed to employer who selected employees from those referred by labor union).

122. Only one such claim ultimately has ever succeeded on the merits in a reported decision. See *Brant Constr. Co. v. Lumen Constr. Co., Inc.*, 515 N.E.2d 868 (Ind. App. 1987); see also *infra* text accompanying note 5, at 217-224.

123. See, e.g., MODEL PROCUREMENT CODE FOR STATE AND LOCAL GOV’TS §§ 3-202(5), 3-203(7) (1979). These sections provide, *inter alia*:

Sec. 3-202(5) *Bid Acceptance and Bid Evaluation*. . . . Bids shall be evaluated based on the requirements set forth in the Invitation for Bids, which may include criteria to determine acceptability such as inspection, testing, quality, workmanship, delivery, and suitability for a particular purpose. Those criteria that will affect the bid price and be considered in evaluation for award shall be objectively measurable, such as discounts, transportation costs, and total or life cycle costs

Sec. 3-203(7) *Award*. Award shall be made to the responsible offeror whose proposal is determined in writing to be the most advantageous to the [state] taking into

to infer discrimination when the low bidder is a responsible minority firm whose bid has been rejected. When, as in private commercial procurement, no obligation to accept the lowest bid exists and a showing of intentional discrimination is required, a violation of section 1981 becomes virtually impossible to prove without a confession. Any claim of discrimination in the selection process could be rebutted by a defense of cronyism or a similar legal, if hardly laudable, motive.¹²⁴

Even in the public procurement context, in which the lowest bid must be accepted, discrimination remains extremely difficult to prove since the victim invariably will lack direct proof of the required intent. The decision in *T & S Service Associates, Inc. v. Crenson*¹²⁵ aptly illustrates this problem. In that decision the First Circuit Court of Appeals, in the most fully articulated application of section 1981 to the public bidding process, ruled against an MBE despite facts strongly supporting its claim. The minority firm involved was an experienced prime contractor, large enough actually to have performed similar contracts successfully in the past.¹²⁶ Yet even with the mandated procedures of the public bidding process, which include, for example, published specifications, sealed bids, and the obligation to accept the lowest responsible bid, a large element of subjective discretion involving the nonprice related terms of the bid entered into the determination of which firm would receive the contract award. This element of subjectivity enabled the court of appeals to find that the victim had failed to show intentional discrimination.¹²⁷

In *T & S*, a minority-owned food catering service sued a Rhode Island Town School Committee and its school superintendent for racial

consideration price and the evaluation factors set forth in the Request for Proposals.

No other factors or criteria shall be used in the evaluation.

Identical language appears in the AMERICAN BAR ASSOCIATION MODEL PROCUREMENT ORDINANCE FOR LOCAL GOVERNMENTS (1982).

124. More realistically, the minority firm would not even receive timely and accurate bid specifications. Even if its cost structure enabled it to be the low cost supplier, without the public notice of bid specifications required in public contracting, the MBE could not submit a meaningful bid. Moreover, these public sector protections are hardly foolproof. In other contexts complaints often are voiced that contracts are steered to politically favored firms.

125. 666 F.2d 722 (1st Cir. 1981).

126. *T & S Serv. Assoc., Inc. v. Crenson*, 505 F. Supp. 938, 940 (D.R.I. 1981).

127. *T & S*, 666 F.2d at 727. In *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775 (1989), a mixed motive sex discrimination case, a woman denied promotion to partner in an accounting firm successfully showed sufficient evidence of intent. Written evaluations downgraded her for failure to conform to gender stereotypes. The discriminatory intent shown was not found in the subjective evaluation process but in the objective process that allowed such subjective impressions to play a role in promotions. Such evidence is probably rare in employment discrimination cases (and will become even rarer after this case). Similar negative stereotypes about minority firms are unlikely to be memorialized in the files.

discrimination in the award of a federally funded school lunch contract.¹²⁸ Plaintiff based its claims on the equal protection and due process clauses of the United States Constitution and 42 U.S.C. sections 1981, 1983, and 2000d (Title VI).¹²⁹ Limiting its discussion to section 1981,¹³⁰ the trial court found intentional discrimination in violation of that provision, and awarded \$22,787 in compensatory damages.¹³¹ The court of appeals vacated this judgment and remanded it for further proceedings in light of its opinion. It held that the trial court inappropriately applied the Supreme Court's analysis in *McDonnell Douglas Corp. v. Green*,¹³² which had established a methodology for evaluating evidence in cases alleging purposeful employment discrimination when direct proof of intentional discrimination is lacking.

In clarifying the *T & S* trial court's misapplication of the *McDonnell* method, the First Circuit set out the *McDonnell* test as follows:

First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant 'to articulate some legitimate, nondiscriminatory reason for the employee's rejection.' . . . Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.¹³³

The First Circuit then modified these guidelines to adapt them from the employment context to the public contract bidding context.¹³⁴

128. *T & S*, 505 F. Supp. at 942.

129. *Id.* at 940.

130. *Id.* at 942. The trial court also noted that plaintiff failed to show how analysis of the § 1983 claim would differ from the § 1981 analysis when the § 1983 claim was based upon a disparate treatment theory, and that an equal protection claim would also require proof of purposeful discrimination. *Id.*; see also *Washington v. Davis*, 426 U.S. 229 (1976) (discussion of constitutionality of written employment test is limited to alleged violation of § 1981).

131. *T & S*, 505 F. Supp. at 946.

132. 411 U.S. 792 (1973).

133. *T & S Serv. Assoc., Inc. v. Crenson*, 666 F.2d 722, 724 (1st Cir. 1981) (quoting *McDonnell Douglas*, 411 U.S. 792, 802 (1983)).

134. *Id.* at 725. In *Selden Apartments v. United States Dep't of Hous. & Urban Dev.*, 785 F.2d 152 (6th Cir. 1986), the court also applied *McDonnell* to a claim of business discrimination. It considered a claim that HUD had discriminated against a black limited partnership when it evaluated bids solicited to purchase real estate. The Sixth Circuit upheld a district court's jury instructions that:

Plaintiff has the burden to establish by a preponderance of the evidence that Defendant did not accept Plaintiff's proposal based on a legitimate non-discriminatory business reason but intentionally discriminated in whole or in part against Plaintiff because of the racial make-up of its partners.

Plaintiff is not required, however to prove that it is more qualified than the firm which was selected to receive the property. Discrimination exists if you find Defendant

The court decided that the rejection of a bid, offering no price or other significant advantages, from a minority firm that was no more qualified than the firm whose bid was accepted, would not support an inference of intentional discrimination.¹³⁵ The court did not require the minority bidder to show that its bid was the lowest one, since this would preclude a minority firm with a slightly higher bid and superior credentials from making a *prima facie* case.¹³⁶ Instead it held that T & S could

prove its *prima facie* case of intentional discrimination by showing, by a preponderance of the evidence, that: (i) T & S is a minority-owned firm;¹³⁷ (ii) T & S's bid met the specifications required of those competing for the contract; (iii) the T & S bid was significantly more advantageous to the Committee than the bid actually awarded, whether in terms of price or some other relevant factor;¹³⁸ and (iv) the

treated Plaintiff less favorably than other businesses because of the racial make-up of Plaintiff's partners. Plaintiff does not have to prove that race was the sole motivating factor but it must prove by a preponderance of the evidence that race was one of the motivating factors.

Id. at 161.

135. *T & S*, 666 F.2d at 725.

136. *Id.* at 725 & n.4.

137. The effect of the First Circuit's approach requires the plaintiff to show that the defendant knew it was a minority-owned firm. "[I]t is difficult to see how the Committee could be liable for discrimination in making the first decision It is by no means clear from the record that the Committee knew that T & S was a minority firm" *Id.* at 727. Thus, the court created a dilemma for the MBE. In *T & S*, the defendants denied knowing that the plaintiff was black, but the trial court found testimony that the defendants would not have told each other that the plaintiff was black "simply inconceivable." *T & S Serv. Assoc., Inc., v. Crenson*, 505 F. Supp. 938, 944 (D.R.I. 1981). The court of appeals' approach requires the plaintiff to show that each member of a decision group (or perhaps only a majority) had the requisite knowledge. Because such information would usually be conveyed informally, rather than memorialized in a document, defendants lacking personal contact with a minority plaintiff could have convenient memory lapses. Since the plaintiff has the burden of proof and no documentary evidence, its case might be dismissed at this point.

Furthermore, many MBEs prefer that their racial identity remain unknown, suspecting that they will benefit if they can "pass" as nonminority firms and avoid even the possibility of discrimination. The First Circuit's approach, however, requires an MBE to communicate its status with its solicitation or risk losing its claim if its identity is later learned and subsequent discrimination occurs. Placing an MBE in this dilemma is unnecessary. Since a defendant only must articulate some legitimate nondiscriminatory purpose for rejecting the MBE's bid, an innocent defendant is sufficiently protected. Assuming the defendant does not choose capriciously, the plaintiff gains a windfall only if the defendant has a nondiscriminatory reason for its decision that it cannot reveal, such as bribery.

138. By not requiring that the MBE bid be the lowest, and considering other terms that make its bid the most attractive, the court thought it lessened the MBE's burden. By introducing a subjective element, however, it made proof more difficult. Even when the MBE is the low bidder, it must counter the argument that another bid is in fact more advantageous without there being hard and fast criteria for this determination. A test that includes a subjective

Committee selected another contractor.¹³⁹

The MBE in *T & S* could satisfy these prima facie elements, but after defendants offered purportedly nondiscriminatory reasons for its rejection of the bid, the MBE also had to show that these reasons were pretexts. The nondiscriminatory reason offered by the defendant was that the MBE's bid was deficient because it varied from the required specifications in five respects.¹⁴⁰ The intent issue then turned on whether these variations had real significance or were being used as pretexts to reject the MBE's bid.¹⁴¹

It is understandably difficult to expunge subjective elements entirely from the process of bid evaluation. Customers might ignore minor variations from bid specifications in a bid submitted by a firm that has gained their confidence. On the other hand, these same variations might be viewed as critical in a bid submitted by a firm that lacks their confidence. Unconscious or conscious racism¹⁴² might easily prevent MBEs from gaining this confidence.

The trial and appellate courts in *T & S* did not agree in their characterization of the variations from the bid specifications. This disagreement reflects the difficulty involved in second-guessing a customer's characterization of variations from these specifications. Although the trial court rejected defendants' assertions with respect to bid variations and found *T & S*'s bid fully qualified, the appellate court viewed the question of the significance of the variations as an open one. The ap-

assessment of the attractiveness of a bid permits a defendant to create a post hoc basis for accepting an advantageous but higher bid. As a result a plaintiff has no objective basis to determine whether its bid was the most advantageous and thus whether it can establish a prima facie case. It must resort to litigation, with all the ill will this necessarily creates for customer relations, based only upon its suspicions of discriminatory treatment.

139. *T & S*, 666 F.2d at 725; cf. *Szabo Food Serv., Inc. v. Canteen Corp.*, 823 F.2d 1073, 1082 (7th Cir. 1987) (in addressing a business discrimination claim arising from a public sector subcontract, the court, in dicta, outlined a prima facie case of racial discrimination against a business as: "that [plaintiff] has black participants; that [the firm awarded the contract] does not; that [plaintiff] made a 'better' bid, but that [the other firm] got the contract").

140. The bid was allegedly deficient because it did not contain: (1) two entree choices; (2) an analysis of employee benefits; (3) a residential manager; (4) a guarantee of employment of existing personnel; and (5) a detailed analysis of foods to be served. The trial court found that the bid contained: (1) two daily entree choices set out in detail; (2) life and health insurance for employees working over 20 hours per week; (3) a designated on-site supervisor; (4) a commitment that existing employees would be given first preference for all nonmanagement positions; and (5) a detailed analysis of foods to be served. *T & S*, 505 F. Supp. at 943.

141. *Id.* at 943-44.

142. See Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 335 (1987); see also Welch, *Removing Discriminatory Barriers: Basing Disparate Treatment Analysis on Motive Rather than Intent*, 60 S. CAL. L. REV. 733, 744-45 (1987) (discussing racially selective sympathy and indifference).

pellate court focused on the bid specification requiring that:

the successful bidder "must provide [present] employees an opportunity to stay with" the food program. The T & S bid promised only that current employees would be given "first preference of all job openings." The [winning] Servomation bid, by contrast, stated its intention to "offer employment to the present staff."¹⁴³

Reasonable people might differ about the significance of this variance. If any variance at all is permitted, however, the absence of explicit criteria by which to assess the significance of variations opens the door to subjective discretion and thus even favoritism or covert discrimination. In *T & S* the school committee overlooked some variances in other bids. It accepted the Servomation bid even though that bid failed to comply with the requirement that it accept responsibility for cleaning certain parts of the kitchens. The school committee also considered another bidder that bid on a one year contract when the bid specifications called for a three-year term.

The most significant bid variation led the defendant to mistakenly award the contract to Servomation. Due to confusion surrounding the defendant's bid specifications, four bidders submitted "profit and loss" bids,¹⁴⁴ and of these T & S bid the lowest. After Servomation submitted a "management fee" bid,¹⁴⁵ which was artificially low, the school committee selected Servomation. Upon discovering the error it nevertheless decided to continue with Servomation even though its bid was not the lowest.¹⁴⁶

T & S claimed that this decision showed discrimination. The school committee rebutted this charge by asserting that it had proceeded with Servomation because there was not enough time before the school year began to rebid the contract, because Servomation had begun preparation, and because the school was pleased with the company's performance. According to the appellate court's decision, T & S had the burden of demonstrating that the reasons advanced by the school committee were pretextual "by showing that the asserted reasons were insufficient to explain the employer's decision or were not applied in a

143. *T & S*, 666 F.2d at 726.

144. In a "profit and loss" bid the bidder provides meals at a fixed cost and bears the risk that expenses will exceed revenues including government subsidies. *T & S*, 666 F.2d at 723-24 n.1.

145. In a "management fee" bid the bidder receives a set fee per unit and the school pays all costs and collects all revenues. *Id.*

146. *Id.* at 726-27. Servomation's bid did not include total costs because it did not reflect federal and state reimbursement subsidies. When these were included, Servomation's bid exceeded T & S's bid.

nondiscriminatory fashion, or by proving that a discriminatory reason more likely motivated the employer."¹⁴⁷

T & S also attempted to show intentional discrimination by showing that the school administrators visited the operations of either all or all but one of the other bidders, but did not visit T & S's operations despite its aggressive marketing efforts and despite the fact that it operated locally.¹⁴⁸ The trial court concluded that defendant's failure to visit a locally based firm "bespeaks only of bad faith."¹⁴⁹

The court of appeals viewed these same facts much more favorably for the defendants. The defendants only had to articulate a legitimate nondiscriminatory reason for rejecting the T & S bid, having only a burden of production and not a burden of persuasion.¹⁵⁰ The burden of production required the defendants "only to introduce admissible evidence which raises a genuine issue of fact as to whether they discriminated against plaintiff."¹⁵¹ If the plaintiff showed direct credible evidence of improper motivation, only then would the burden of persuasion shift to the defendant to show that it would have made the same decision even if it had not considered the impermissible factor.¹⁵² This formulation comes perilously close to requiring direct proof of intent, of a subjective state of mind. In complex business transactions reasons always can be advanced, as here, to justify a particular choice and excuse what may be covert discrimination.

Even if on remand the plaintiff could negotiate this gauntlet, the difficult task of showing damages remained. In this aspect of the case the court of appeals again placed an inappropriate and unnecessary burden on the plaintiff, perhaps because it adhered too closely to the employment discrimination analogy. It imposed on the plaintiff a mitigation obligation analogous to one found in awards of back pay in employment discrimination cases, in which amounts earned in other employment reduce the award.¹⁵³ The court held that:

147. *Id.* at 727.

148. *T & S Serv. Assoc., Inc. v. Crenson*, 505 F. Supp. 938, 944 (D.R.I. 1981). T & S twice visited the defendant Barrington schools, met with school officials, provided copies of its contracts with other Rhode Island schools where it provided food services, and spoke several times with school officials by phone. *Id.* at 940.

149. *Id.* at 945.

150. *T & S*, 666 F.2d at 725-26.

151. *Id.* at 726.

152. *Id.* at 727; *see also Lee v. Russell County Bd. of Educ.*, 684 F.2d 769 (11th Cir. 1982) (holding that once unconstitutional motive was proved, the defendant can rebut only by proving by a preponderance of the evidence that the same decision would have been reached in the absence of that factor).

153. *T & S*, 666 F.2d at 728.

T & S failed completely to demonstrate that it actually lost money as a result of the alleged discrimination; it may have engaged in other jobs during the relevant period which it could not have handled had it been awarded the Barrington contract. If so, its actual earnings should have been subtracted from what it would have earned absent the discrimination.¹⁵⁴

This mitigation requirement presupposes that a business, like an employee, has a finite number of hours during which it can perform work. A business, however, can expand far beyond the activities of a single individual. The mitigation obligation unfairly requires the plaintiff to show that it could have expanded its activities to perform both the work it did perform and the work it lost due to the discrimination. To meet this requirement a plaintiff would have to show that it could have obtained the necessary working capital and hired the additional manpower. Absent firm commitments from banks or clearly available equipment and employees, a court might well dismiss as speculative most evidence introduced to meet this requirement. It is unlikely that a plaintiff, already injured by having futilely expended resources seeking a contract denied it by discrimination, would expend still more resources to find additional employees, equipment, and working capital to prove that it could have expanded. Since most businesses continually attempt to grow, the fairer procedure would place on the defendant the burden of showing any special circumstances that would prevent the plaintiff from expanding.

As it stands, given the extreme difficulty of proving intentional discrimination and the adverse impact on marketing efforts that lawsuits against potential customers create, this formulation of damages can only be described as a booby prize. MBEs with the resources to bid competitively on prime contracts and to litigate these issues will have likely "mitigated" their damages. Those that have not may well lack the resources to pursue such claims or even continue in business. The most common time that suppliers and customers sue each other is when one or the other is going out of business. If an MBE, driven out of business by racial exclusion, should bring such a claim and win, its victory truly could be termed pyrrhic.

(2) *Private Procurement*

Claims against private firms for discrimination in transactions not involving public funds present the most difficult problems of proof. Unlike the statutory obligation in the public sector, that procurement be accomplished with both competitive bidding and the acceptance of the lowest responsible bid, in the private sector customers often choose

154. *Id.*

their suppliers for noneconomic reasons such as friendship, social, political, or ethnic ties, or feelings of animosity towards a competing bidder, or for economic reasons prohibited in public procurement, such as returning a business favor, or wanting to develop an alternative supplier. Prohibiting these bases of choice in the private sector would raise problems regarding freedom of association under the first amendment,¹⁵⁵ or of due process infringement under the fifth or fourteenth amendments.

No case has articulated clearly the requirements under section 1981 for a prima facie showing of business discrimination in a private transaction. Virtually no decisions have been reported involving litigation in this area.¹⁵⁶ In view of this paucity, despite the fact that the contract in *T & S* involved a public sector prime contract, because the court analyzed the case under section 1981, its analysis may be adaptable to a claim of discrimination in a private business transaction.

The first problem with this adaptation arises from the lack of mandatory bidding rules and procedures in the private sector analogous to those in the public sector. It is unclear how a plaintiff MBE would make the showings the court required.¹⁵⁷ In a private sector transaction an MBE usually would not know of a specific contract opportunity, the time schedule for bidding, or bid specifications. The plaintiff thus would have difficulty showing that its "bid met the specifications required of those competing for the contract."¹⁵⁸ If after the fact it constructed a hypothetical bid to show what it would have bid, and this hypothetical bid met the required specifications, the plaintiff still would have to show that its bid "was significantly more advantageous . . . than the bid actually awarded, whether in terms of price or some other

155. See, e.g., *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 18-20 (1988) (O'Connor, J., concurring) (stating that first amendment rights to freely associate may shield private noncommercial groups from antidiscrimination laws).

156. Three cases have been reported. In *Howard Sec. Servs. v. Johns Hopkins Hosp.*, 516 F. Supp. 508 (D. Md. 1981), a corporation was held to have standing to sue under § 1981 because it was wholly owned and operated by its black president. In *Baskin-Robbins Ice Cream Co. v. D & L Ice Cream Co.*, 576 F. Supp. 1055 (E.D.N.Y. 1983), a franchisor sued to terminate a licensee because of trademark infringement and unfair competition and the licensee counterclaimed under § 1981 alleging that termination was sought because the franchisee was black. Because the franchisee consistently failed to pay rent or invoices for ice cream, failed to abide by the franchise agreement, and sold another brand of ice cream in the trademarked containers, it failed to show that the license had been terminated for discriminatory reasons. In *Randle v. Lasalle Telecommunications, Inc.*, 697 F. Supp. 1474 (N.D. Ill. 1988), *aff'd*, 876 F.2d 563 (7th Cir. 1989), an MBE claimed a violation of § 1981, but the claim was dismissed because the plaintiff failed to establish either direct evidence of discrimination or that defendant's nondiscriminatory explanation for its action was pretextual.

157. See *supra* text accompanying notes 137-139.

158. *T & S Serv. Assoc., Inc. v. Crenson*, 666 F.2d 722, 725 (1st Cir. 1981).

relevant factor.”¹⁵⁹ Even if the plaintiff could show that it made the best bid, it also would have to show that it did not use hindsight to prepare its after-the-fact best bid. Unless the plaintiff also has a previously published price list, or equivalent records for the goods or services being purchased, it would have difficulty rebutting the suspicion of self-serving hindsight. Published price lists exist only for commodity goods, typically stocked in inventory, or routine services, but even then the plaintiff’s bid would be deficient unless service or maintenance requirements, delivery schedules, and warranties were irrelevant.

Even to bring such an action entails difficult and significant business risks, in addition to the ill will that lawsuits usually generate. A private customer rarely makes a public announcement of the amount of a winning bid. Short of using commercial espionage, only by bringing suit and using discovery could an MBE that suspects discrimination verify the terms of the winning bid and determine whether its own bid would have been more advantageous. Such a suit, especially if ultimately unfounded, will not generate the good will necessary to persuade a reluctant potential customer to consider the MBE as a future supplier. It may also result in Rule 11 sanctions against counsel filing the suit.¹⁶⁰

Moreover, customers and suppliers often negotiate the specifications in their contracts. They engage in dialogue and exchange information in order to agree on final specifications. This process typically develops specifications that only the supplier involved can meet. This even happens in the public sector despite regulations designed to discourage it. In the private sector it would be difficult to overcome such indirect favoritism and show deliberate discrimination by a customer.

The difficulty of showing discrimination is compounded in a private sector transaction by the many legitimate business needs that can justify rejecting a low bid. For example, a customer might legitimately choose a higher priced supplier over a lower priced minority supplier to return an earlier favor. This situation might arise if the favored supplier performed an earlier contract despite unanticipated problems and suffered a loss on the transaction. In addition, a customer might decide to pay an important supplier a higher price to generate good will and ensure a supply in times of market shortages. Thus, even if an MBE could overcome the difficulties of a section 1981 suit in the private

159. *Id.*

160. *See* FED. R. CIV. P. 11; *Szabo Food Serv., Inc. v. Canteen Corp.*, 823 F.2d 1073, 1082 (7th Cir. 1987) (involving a claim of business discrimination where the court imposed Rule 11 sanctions for attorneys fees).

sector by showing that its previously published prices were lower than the bid accepted and that it would have satisfied the third requirement of the *T&S* formula without the benefit of hindsight, a customer that wanted to discriminate could still successfully do so by showing one of many commercially valid reasons why it chose not to select the MBE supplier.

At best, a private sector section 1981 challenge amounts to an academic exercise. Given the difficulties presented by such a suit, only a foolhardy MBE would incur the wrath of potential customers by filing such a suit. As a practical matter these actions cannot succeed. There remains, however, the possibility that legislation could be designed to overcome the practical difficulties encountered. The next Part considers this possibility.

II. Can a Remedy Be Created?

To provide a legislative remedy permitting private plaintiffs to bring suit introduces a novel issue into antidiscrimination law. In other civil rights areas the injured parties are natural individuals. In this instance the probable claimant would be a corporation. Although sole proprietorships and partnerships also might bring claims, corporations account for the overwhelming share of business activity. The novel feature is that corporations, as legal fictions, traditionally have not been considered to have a race, and this raises the issue of standing.

A. Standing

At least on the issue of standing some courts appropriately have taken a practical approach to business discrimination and have allowed corporations to bring racial discrimination claims. Not all courts, however, have been able to escape abstract doctrine and permit recognition of the real persons behind minority firms. The Supreme Court in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*¹⁶¹ stated in dicta, "a corporation, as a faceless creature of the state, may not assert claims of racial discrimination under the Fourteenth Amendment on its own behalf, and cannot be the 'target' of racial discrimination."¹⁶² Subsequent court of appeals decisions have declined to embrace this formulation, and these decisions provide sub-

161. 429 U.S. 252 (1977).

162. *Id.* at 263.

stantial authority that a corporation can assert such claims.¹⁶³ The Supreme Court later buttressed this view in *Fullilove v. Klutznick*¹⁶⁴ and *City of Richmond v. J.A. Croson Co.*,¹⁶⁵ in which it implicitly recognized that corporations can have a race by allowing white owned corporations to challenge set-asides on constitutional reverse discrimination grounds.¹⁶⁶

Courts have attributed the race of a sole shareholder to his corporation.¹⁶⁷ No court has decided whether the same result would follow in corporations with numerous shareholders, and no court has decided what race would be assigned to a corporation with both minority and nonminority shareholders. Set-aside regulations have been more explicit. To be eligible for most set-asides, minorities must own at least a majority of the shares and control the business affairs of the corporation.¹⁶⁸ These regulations, however, do not address whether majority ownership means majority voting rights or the right to receive a majority of the economic benefits of ownership.¹⁶⁹ In more complicated ownership structures courts potentially could look beyond the racial identity of shareholders to that of management or even to the public's perception of the corporation.

The court of appeals decision in *Hudson Valley Freedom Theater, Inc. v. Heimbach*¹⁷⁰ involved some of these issues, but it did not de-

163. See Novetsky, *Federal Practice and Procedure I, Standing*, 1983 ANN. SURV. OF AM. L. 345, 354-57 (1984); Note, *Corporate Standing to Allege Race Discrimination in Civil Rights Actions*, 69 VA. L. REV. 1153 (1983) (authored by Robert N. Strassfeld); Comment, *A Corporation of a Different Color: Hudson Valley Freedom Theater, Inc. v. Heimbach*, 49 BROOKLYN L. REV. 1179 (1983) (authored by John D. Dalton).

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

165. 488 U.S. 469 (1989).

166. *Id.* at 510-11. Racial standing for a corporation only has been an issue when minority firms have sued. When nonminority firms sue to challenge set-asides, the courts have assumed standing. Counsel defending set-asides would not raise the standing issue because it would undermine their client's strategic position if they should ever claim business discrimination.

167. See *Marshall v. Kleppe*, 637 F.2d 1217, 1220-21 (9th Cir. 1981); *Howard Sec. Servs. v. Johns Hopkins Hosp.*, 516 F. Supp. 508, 513 (D. Md. 1981).

168. "'Minority business enterprise' . . . means . . . at least 51 per centum owned by one or more minorities . . . or, in the case of a publicly owned business, at least 51 per centum of the stock of which is owned by one or more minorities" 49 C.F.R. § 23.5 (1990).

169. In more complex capital structures, by using nonvoting cumulative preferred stock, an investor without any voting rights at all may receive all of the distributed earnings of the firm. Minorities with voting and operating control might receive only their salaries. If options, warrants, convertible preferred, and convertible debt are added to the capital structure and restrictive provisions added to the corporate charter, the determination of control may be situational and dependent upon future events.

170. 671 F.2d 702, 707 (2d Cir.), *cert. denied*, 459 U.S. 857 (1982). In this case, a not-for-profit organization that produced theatrical productions for black and Hispanic audiences sued local government executives and the county alleging that its grant application was denied for racial reasons. It sought relief under 42 U.S.C. §§ 1981, 1983, 1985, and 2000d, and the equal

velop any general principles to resolve them. The court recognized the standing of a not-for-profit corporation that alleged racial discrimination against it by local government executives who had failed to approve its grant application.¹⁷¹ As a not-for-profit corporation it had no shareholders, so the court determined the corporation's racial identity by its corporate purpose and past activity.¹⁷² Since it had produced theatrical productions for minority audiences, it was found to have standing.

The problem created by this expansive approach to standing is that the determination of whether the corporate purpose benefits minorities involves subjective value judgments. One could argue that such special minority theater programs, rather than affirming the cultural identity of minorities, reinforce their isolation and inhibit their assimilation.¹⁷³ Also, many opponents of affirmative action argue that their actions benefit minorities in the long term. Is a court to accept such a statement of purpose at face value? If not, by what standards should it reject it?¹⁷⁴

A court could respond by denying standing to not-for-profit corporations claiming discrimination, but this would produce at least one anomaly. Under *Des Vergnes v. Seekonk Water District*,¹⁷⁵ a not-for-profit corporation has "an implied *right of action* against any other person who, with a racially discriminatory intent, interferes with [its] right to make contracts with non-whites."¹⁷⁶ Given this view, it would be difficult to deny standing when the not-for-profit is the direct target of discrimination because it is perceived as a minority organization. Perhaps the most useful conclusion to be drawn is that the legal doc-

protection and due process clauses of the fourteenth amendment. The judgment of the trial court, dismissing the complaint for lack of standing to raise questions under the equal protection clause and 42 U.S.C. § 2000d, was reversed by the court of appeals.

171. *Id.* at 706.

172. *Id.*

173. This assumes that assimilation would be desirable, an issue with its own controversy.

174. For the moment this problem seems more theoretical than real. What could substitute for purpose and past activity? Could the court rely on whether minorities comprise a majority of its board of directors? (Notably, directors typically are selected at least as much for their fund raising ability as for whatever wisdom they can offer to guide the corporation.) The race of the executive staff might be considered, but how would the various offices be weighted? Would one minority CEO outweigh two nonminority vice presidents or vice versa? These questions demonstrate the theoretical problems.

175. 601 F.2d 9 (1st Cir. 1979) (Judge Wyzanski sitting by designation); see also *Heritage Homes of Attleboro, Inc. v. Seekonk Water Dist.*, 648 F.2d 761 (1st Cir.); *vacated and remanded*, 454 U.S. 807, *cert. denied*, 454 U.S. 898 (1981); *Heritage Homes of Attleboro, Inc. v. Seekonk Water Dist.*, 670 F.2d 1 (1st Cir.), *cert. denied*, 457 U.S. 1120, *cert. denied*, 459 U.S. 829 (1982).

176. *Des Vergnes*, 601 F.2d at 14.

trines applicable to claims of business discrimination reflect the lack of attention paid them by legal scholars and legislators.

B. Surrogates for Intent

(1) *Disparate Impact*

The difficulty of showing intent is the major impediment to remedying business discrimination. None of the theories available under current law imposes liability without a showing of intentional discrimination. Employment discrimination law, however, provides a potential alternative approach that does not require proof of intent. Under Title VII,¹⁷⁷ disparate impact theory, first recognized by the Supreme Court in *Griggs v. Duke Power Co.*,¹⁷⁸ imposes liability for employment discrimination even without the presence of invidious intent. Originally, disparate impact theory prohibited neutral employment practices that had a disproportionately adverse impact on minorities unless those practices were justified by business necessity.¹⁷⁹ Recent decisions require only that defendants justify these practices with a legitimate business purpose.¹⁸⁰ The business necessity justification existed if statistical data demonstrated that no other practice could achieve the required business result. The demonstration validated the business justification. The absence of an intent requirement makes disparate impact theory a potential candidate for a new legislative remedy for business discrimination. Whether it can be usefully adapted from the employment to the business context remains to be seen.¹⁸¹

177. 42 U.S.C. §§ 2000e to e-17 (1988).

178. 401 U.S. 424 (1971).

179. *Id.* at 432.

180. *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642 (1989) and *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988) have changed the nature of the business justification required for a neutral practice having an adverse impact on a minority group. The burden of showing business necessity has shifted from being part of the defendant's affirmative defense to an element of the plaintiff's case. *Wards Cove Packing*, 490 U.S. at 660; *Watson*, 487 U.S. at 998. The nature of the burden has changed further from one of business necessity to merely business purpose. *Wards Cove Packing*, 490 U.S. at 659. Disparate impact theory may no longer be distinguishable from covert intentional discrimination. See Brodin, *Reflections on the Supreme Court's 1988 Term: The Employment Discrimination Decisions and the Abandonment of the Second Reconstruction*, 31 B.C.L. REV. 1, 5-11 (1990). The Court's interpretation has been the subject of legislative action seeking to undo the 1988 Term's damage. See S. 2104, 101st Cong., 2d Sess. (1990).

Whatever the applicable standards for disparate impact in Title VII cases, applying them in the business context would require new legislation. New legislation could reject the current Supreme Court's approach in favor of the one pending in Congress.

181. At least one state court decision cryptically upheld a disparate impact claim of business

The particularized settings of most business transactions make a disparate impact theory, which requires a statistical basis, difficult to apply. To make useful statistical comparisons, data must be collected from a large number of similar transactions. Otherwise, statistical discrepancies purporting to reveal a disproportionately adverse impact on minorities have in reality no statistical significance since they could result from chance.¹⁸² Only in rare circumstances would the defendant firm have engaged in enough similar transactions during a time of stable market conditions for the collection of credible data.

One seemingly neutral business practice with a disproportionately adverse effect on minority firms (because on average they tend to be less experienced) is the strong preference for doing business with firms that have performed successfully in the past or have substantial prior experience.¹⁸³ Validation studies demonstrate that a neutral criterion is job (or contract) related and permit companies to use the criterion for selecting employees (or suppliers).¹⁸⁴ These studies, however, are difficult to develop and interpret even for large groups of unskilled or semi-skilled workers employed by a single firm. Furthermore, such studies would be extremely expensive, difficult (if not impossible) to conduct, and unlikely to go unchallenged.

Consider a firm that is accused of discrimination in its purchase of computer services because it used prior performance as a key determinant in awarding the contract. Which transactions would provide data showing disparate impact if minority plaintiffs challenged the fa-

discrimination against a motion to dismiss, but it did not indicate the statutory or constitutional basis for its decision. See *Khalifa v. State*, 397 N.W.2d 383, 387 (Minn. Ct. App. 1986) (relying on *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), which formulated an alternative means by which discriminatory motives can be inferred when a set-aside program is ignored).

182. See Cranor & Nutting, *Scientific and Legal Standards of Statistical Evidence in Toxic Tort and Discrimination Suits*, 9 LAW & PHIL. 115 (1990).

Traditionally, scientists have accepted statistical evidence which satisfies a 95 percent (or 99 percent) rule—that is, only evidence which has less than five percent (or one percent) probability of resulting from chance.

When uncritically adopted as a rule for admitting legal evidence, the 95 percent rule distorts the balance of interests historically protected by the legal system. Plaintiffs in employment discrimination suits are effectively held to a heavier burden of proof in showing that their injuries were more probably than not caused by the defendant's actions. The result is that too many victims of employment discrimination cannot win legal redress for their injuries. *Id.* at 154-55.

183. Another common facially neutral business practice with a disproportionately adverse impact on minority firms is the use of social networks, which tend to be segregated, as business networks. So long as character and integrity remain important concerns in business relationships, and social relationships provide insights and information about these traits, such a business practice serves a valuable business purpose. Whether this business practice is a business necessity is another question.

184. *Albemarle Paper Co. v. Moorly*, 422 U.S. 405 (1975).

cially neutral practice of requiring prior successful performance for prospective suppliers? Could data from all purchases of computer services be used? This would include not only a diverse group of suppliers, but also a variety of transactions. The transactions might vary in size, length of term, working capital needed for performance, sophistication and proprietary nature of the technology used to provide the service, timeliness of performance requirements, staffing requirements, geographic locations, and a host of other factors. Suppliers might vary by size, previous experience in the industry, previous experience with that customer or its competitors, previous experience providing the specific services required, financial or technical resources, reputation, interpersonal relationships or history with the customer, or key divisions or personnel.

Prior successful performance might be critical if the supplier must service customized applications or of little significance if the services required are available on a commodity basis. Even commodity services, those required for numerous geographic locations, on short notice and in intensive amounts, might put staffing, organizational, and working capital demands on the supplier that would raise prior successful performance to the critical level. Other variables would have a similar effect on the comparability of data collected. If the statistical study pared down the group of transactions examined to those involving the purchase of computer services at similar times and locations with similar technological requirements and in similar amounts, the group likely would consist of too few transactions to have statistical significance. Broadening the pool of transactions studied to include similar (however defined) transactions by other purchasers adds the complication that different purchasers may have widely varying priorities, business plans, and organizational cultures.¹⁸⁵

These complications would add insurmountable complexities to validation studies already notorious for their difficulty.¹⁸⁶ Absent the

185. To study these transactions would require extensive cooperation by many companies over considerable periods of time, and these other companies would have neither a financial incentive to cooperate nor, as nonparties, a legal compulsion. Why should firms that are not parties to a discrimination action voluntarily assume the financial risks and burden of abandoning a standard business practice just so it can be scientifically validated? To validate such a common practice would require convincing firms in a particular industry to use some other factor to select suppliers that would be racially neutral, perhaps a lottery or some other random selection process. Such cooperation is unlikely to occur without legal compulsion, and compelling cooperation, assuming a public purpose could be found, could amount to a constitutional taking for which compensation must be provided. Attempting to circumvent this problem by joining all firms needed to conduct a validation study as a class of defendants creates its own problems, since class action requirements then would have to be met.

186. See *Watson v. Fort Worth Bank & Trust Co.*, 487 U.S. 977, 995 n.3 (1988), in which the Court referred to some of the criticisms made of statistical studies.

legal justification provided by such validation studies, widely used neutral business practices, such as using prior good performance as a basis for renewing a supplier,¹⁸⁷ would be jeopardized by the disparate impact approach. Since validation studies rarely can meet the business necessity standard, the defendant, with the burden of proving necessity, invariably would lose.¹⁸⁸ Banning such pervasive and wide ranging practices might have dire consequences for the economy, especially if these practices have the utility commonly perceived in the business community. In any event, legislation barring practices so fundamental to business activity would meet intense and probably successful opposition.

(2) *Noncompliance with an MBE Program*

Given the difficulty of showing intentional discrimination, imaginative counsel have attempted to provide a surrogate for intent in a particular transaction or to plead theories that do not rely on the civil rights statutes or constitutional provisions. For example, a failure to comply with even a good faith MBE program has been used as surrogate proof of intentional discrimination. Good faith MBE programs impose a best efforts obligation on a prime contractor to seek out MBE subcontractors without mandating a specific MBE percentage share.¹⁸⁹ If the defendant prime contractor fails even to contact MBEs that solicit opportunities to bid, then presumably it intentionally has discriminated against them.

Another approach seeks to create an implied private right of action

187. See, e.g., *supra* note 183. Other widely used neutral business practices include requiring suppliers to have sufficient bonding capacity, acceptable credit ratings, or relevant industry certifications.

188. In *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642 (1989), the Court justified its evisceration of disparate impact theory by expressing its fear that otherwise an employer "could be haled into court and forced to engage in the expensive and time-consuming task of defending the 'business necessity' of the methods used to select the other members of his workforce. The only practicable option for many employers will be to adopt racial quotas." *Id.* at 652.

189. At the federal level, for example, see Amendment to the Small Business Act and the Small Business Investment Act of 1958, Pub. L. No. 95-507, § 211, 92 Stat. 1757, 1767 (1978) (codified as amended at 15 U.S.C. §§ 632, 637)

It is the policy of the United States that small business concerns, and small business concerns owned and controlled by socially and economically disadvantaged individuals, shall have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency.

For a local government counterpart, see *Technicable Video Sys., Inc. v. Americable*, 479 So. 2d 810, 811 (Fla. Dist. Ct. App. 1985); see also *infra* notes 209-212 and accompanying text.

so MBEs can intervene directly with recalcitrant local bureaucracies and force compliance with the terms of "soft" MBE programs, namely those that lack vigorous implementation. A third approach argues that good faith MBE participation obligations, imposed on prime contractors in procurement contracts with governments, create third party beneficiary contract rights. None of these attempts has proceeded beyond preliminary skirmishes, and all have met with mixed success.

Each of these alternatives uses the existence of MBE programs as a critical element.¹⁹⁰ The first approach, using noncompliance with MBE programs to show discrimination, could be used against either the jurisdiction subject to the program¹⁹¹ or against the prime contractors obligated under the terms of the program to make some effort to use MBE subcontractors. In *Williams v. City of Sioux Falls*,¹⁹² the plaintiff tried to demonstrate that Sioux Falls engaged in a pattern and practice of intentional discrimination against minority contractors by disregarding federal and local MBE regulations.¹⁹³ The evidence presented to show noncompliance included testimony by a former city MBE compliance officer of instances in which the city failed to fulfill MBE participation goals and notice requirements. To rebut this, the then current MBE compliance officer explained why MBE requirements either had not applied to the project or actually had been satisfied. The trial court noted two instances in which city contractors failed to comply fully with MBE requirements and the city failed to take adequate corrective action. In one case the federal government had revoked funding as a result of noncompliance.¹⁹⁴ The plaintiff also relied on administrative determinations by the Sioux Falls Human Relations Commission and the United States Department of Housing and Urban Development that

190. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), made the status of state and local MBE programs constitutionally suspect. In effect, the Court declared MBE programs unnecessary because of antidiscrimination legislation, while at the same time undermining the ability of minority plaintiffs to pursue individual claims of business discrimination. *Id.* at 509-11.

191. Federal grants to state and local government often contain set-asides or good faith MBE programs. In *Fullilove v. Klutznick*, 448 U.S. 448, 492 (1980), the Court upheld such a federal program in the Public Works Employment Act of 1977, presently codified at 42 U.S.C. §§ 6705(e)-6707(j) (1982). The Surface Transportation Assistance Act of 1982, presently codified at 23 U.S.C. § 104 (1983), contained a similar provision. Local bureaucracies often ignore or circumvent these MBE obligations. See *infra* notes 192-208 and accompanying text.

192. 846 F.2d 509 (8th Cir. 1988).

193. *Id.* at 510-11. As an alternate theory, the plaintiff argued that violation of MBE regulations was actionable under 42 U.S.C. § 1983. *Id.* at 511. The court of appeals found it unnecessary to reach this contention because it concluded, without explanation, that any violations of MBE regulations were insignificant and unlikely to occur again. *Id.* at 513.

194. *Id.* at 512.

the city had discriminated against minority contractors. Both the trial and appellate courts found these administrative determinations unpersuasive since they were based on a finding only of probable cause without the benefit of an adversarial proceeding.¹⁹⁵

In sustaining the trial court's decision, the Eighth Circuit decided that "evidence of a failure to implement an affirmative action plan can amount to circumstantial evidence of discriminatory intent, [but] it does not, by itself, support a finding that the City treated minorities in a less than equal manner because of race."¹⁹⁶ To succeed in its claim of a pattern and practice of discrimination, the plaintiff needed to show "that 'discrimination was the [City's] standard operating procedure—the regular rather than the unusual practice.'"¹⁹⁷

Plaintiff's weak factual case may have dictated its litigation strategy of showing that the city adhered to a general policy of discrimination instead of attempting to show that the city discriminated in specific dealings with the plaintiff. The plaintiff had submitted a losing bid of \$5,000 to remove a structure from and clear a city-owned site. Because the winning bidder intended to salvage and reuse the structure in its own business, it submitted a bid of only one dollar. The plaintiff was unaware of the procedures or even the possibility that such a bid could be made. The court found no intentional discrimination in the city's failure to so inform the plaintiff.¹⁹⁸ The city treated the plaintiff the same as it did every other contractor with respect to the salvage possibility and provided it several hours of extra assistance in preparing its bid; it did not provide nonminority contractors such assistance. The plaintiff introduced no evidence that it would have bid less than one dollar nor that it had an alternate use for the structure to be removed.¹⁹⁹

The Second Circuit also has ruled on an attempt to use inadequate implementation by a local government entity of a federally required MBE program to show discrimination. In *Jones v. Niagara Frontier Transportation Authority*,²⁰⁰ an MBE bid unsuccessfully on a number of large prime contracts.²⁰¹ It sought to enjoin award of the contracts

195. *Id.* at 513 n.4.

196. *Id.* at 512.

197. *Id.* (quoting *Craik v. Minnesota State Univ. Bd.*, 731 F.2d 465, 470 (8th Cir. 1984) (quoting *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 (1977))). The requirement that the plaintiff also produce evidence of discriminatory intent in transactions to which it was not even a party creates a difficult hurdle.

198. *Id.* at 511-12.

199. *Id.* at 512.

200. 524 F. Supp. 233 (W.D.N.Y. 1981), *aff'd*, 836 F.2d 731 (2d Cir. 1987).

201. *Id.* at 235-36.

to a competing nonminority firm claiming discrimination. On one contract, the MBE had the lowest bid at \$8,725,292—about \$900,000 below the transportation authority engineer's estimate—while the successful nonminority firm bid the second lowest at \$11,196,328. The MBE was the low bidder on five of seventeen contracts, but was awarded none.²⁰² On a related contract of nearly the same size the winning bid from a nonminority firm was nearly \$650,000 below the engineer's estimate. The Authority based its refusal to award the contract to the MBE on its failure to submit the required ten percent bid bond and because it was not a "responsible and responsive" bidder. This latter conclusion was based upon plaintiff's lack of financial resources (\$974 in cash), lack of necessary equipment (less than \$50,000 worth), and lack of major contracting experience (no project larger than \$136,000 in the previous five years).²⁰³ The plaintiff also conceded it was "broke" at oral argument.

The federal statute under which funding for the work was being provided obligated the Authority to "[provide] assistance to MBEs in overcoming barriers such as the inability to obtain bonding, financing, or technical assistance."²⁰⁴ Yet the authority in this case never provided any assistance. The court denied the request for a preliminary injunction, finding it merely "ironic that plaintiff's lack of bonding is a major reason asserted by the NFTA for its refusal to award plaintiff a contract when the NFTA had refused to help plaintiff obtain bonding in apparent derogation of its duty under federal regulations."²⁰⁵

Both of these decisions involved MBEs with characteristics which reflected (or at least were similar to) economic disadvantages resulting from earlier historical discrimination. As prime contractors, both were marginal firms with clear disadvantages that could justify the rejection of their bids. Ironically, despite the existence of MBE programs, which are intended to compensate for MBEs' disadvantages, jurisdictions still are able to use these disadvantages to reject MBE bids.

A more favorable situation develops when an MBE subcontractor sues a prime contractor because it has failed to perform its MBE program obligation to seek out and make good faith efforts to use minority subcontractors. If a prime contractor seeks to avoid its obligation entirely, some racial animus might be inferred by a court. Even contractual obligations limited to good faith or best efforts expand the

202. *Id.* at 238.

203. *Id.* at 236.

204. *Id.* at 239 (quoting 49 C.F.R. § 23.45(c)(2) (1990)).

205. *Id.*

legal possibilities for MBEs to challenge their exclusion from subcontracting. The MBE subcontractors, however, still are faced with the problem of proving intent if a clever prime contractor solicits bids from MBEs but rejects them for covert discriminatory reasons. Since the prime contractor has no obligation to select the lowest responsible bid, the good faith or best efforts obligation alone might not justify an inference of discrimination if an MBE's low bid were rejected. Under reasoning similar to that in *Williams v. City of Sioux Falls*²⁰⁶ and *Jones v. Niagara Frontier Transportation Authority*,²⁰⁷ courts also might require the MBE to demonstrate that its characteristics as a supplier exceeded those of the winning bidder and to rebut any business reasons advanced to explain the rejection of the lowest bid.²⁰⁸

While federal courts have not welcomed these claims, a few state courts have been more receptive. In *Technicable Video Systems v. Americable*,²⁰⁹ an MBE sued Americable claiming it had ignored a good faith MBE provision in its nonexclusive license from the city of Miami to operate and maintain a cable television system. The complaint alleged that on numerous occasions Americable had refused to engage in negotiations with the plaintiff MBE and that the defendant lacked the required MBE participation. Relying on a third party beneficiary theory, the plaintiff argued that the MBE provision had been enacted to benefit a limited class to which the plaintiff belonged. In sustaining the theory, the appellate court allocated the burden to the plaintiff to prove it was qualified and

competent to perform the task contracted for in a reasonably workmanlike and timely fashion at a competitive, though not necessarily the lowest, price. The defendants, on the other hand, may avoid liability by producing evidence demonstrating that they in fact made reasonable and good faith efforts to meet the goal of . . . MBE participation.²¹⁰

The standards of "competent," "reasonably workmanlike and timely fashion," and "competitive, though not necessarily the lowest price" that *Technicable Video* requires provide little definitive guid-

206. 846 F.2d 509 (8th Cir. 1988).

207. 524 F. Supp. 233 (W.D.N.Y. 1981), *aff'd*, 836 F.2d 731 (2d Cir. 1987).

208. *See supra* text accompanying note 155 for examples of business reasons that justify accepting a higher bid.

209. 479 So. 2d 810 (Fla. Dist. Ct. App. 1985).

210. *Id.* at 813. The court went on to emphasize that "to be qualified the MBE need not offer the most outstanding contract in every regard. While the MBE must indeed be qualified, it is sufficient if the work or goods offered are commercially reasonable and competitively priced." *Id.* at 813 n.4.

ance.²¹¹ Even less clear are the standards a defendant must meet to rebut a plaintiff's case. The opinion merely requires defendants to show that they "made reasonable and good faith efforts to meet the goal."²¹² These essentially procedural standards presumably would require a prime contractor at least to solicit bids from MBEs and to provide them the information necessary to prepare a timely bid. If broadly interpreted, the standards have the potential of inhibiting some ongoing discrimination. They do nothing, however, to correct disadvantages produced by earlier discrimination such as small size, inexperience, or inadequate capital, that keep many, if not most, MBEs on the margins. The standards also leave protection against discrimination almost wholly to the discretion of the trier of fact.

Two other state decisions involving firmer or mandatory set-asides produced startling results. Both found evidence of intentional discrimination against an MBE, and one awarded substantial damages.

In *Khalifa v. State*,²¹³ a state appellate court reversed the trial court's grant of a motion to dismiss and held that an MBE had made a prima facie claim of discrimination in two ways. The MBE alleged that under a state human rights act, the reversal by the state Commissioner of an administrative decision by the state small business coordinator to set aside a \$1.2 million contract for minority firms had been impermissibly racially motivated. The first prima facie case consisted of showings that: (1) plaintiff was an MBE; (2) it sought and qualified for the contract under the set-aside program; (3) it was denied the opportunity for the contract under the set-aside program; and (4) the contract was then given to a nonminority firm under competitive bidding procedures.²¹⁴ The plaintiff also established an alternative prima facie case by direct proof of impermissible racial motivation.²¹⁵ The contract was withdrawn from the set-aside program after telephone calls from thirty to forty nonminority firms urging this result.

The state attempted to rebut the plaintiff's case by showing that the reversal was made as a precaution against letting a set-aside contract go to a single bidder and that it followed an informal internal policy requiring competitive bidding for all contracts of more than \$1 million in order to ensure the state a fair price. To prove these excuses were

211. From the perspective of an MBE contemplating a suit against a potential customer, clear guidance would be critical. The one thing worse than suing a potential customer would be suing one and losing.

212. *Id.* at 813.

213. 397 N.W.2d 383 (Minn. Ct. App. 1986). This decision also cryptically upheld a disparate impact claim without indicating its statutory or constitutional basis. *Id.* at 388.

214. *Id.* at 387.

215. *Id.*

pretexts, the plaintiff argued that the reversal by the Commissioner did not follow standard operating procedure and that the procurement division's ability under established practices and regulations to estimate a fair price adequately protected the state from an unfair price. No subsequent opinions have been reported, but the following year the plaintiff won the disputed contract in open competitive bidding.²¹⁶

The only decision imposing liability for business discrimination after a trial on the merits is *Brant Construction Co., Inc. v. Lumen Construction, Inc.*²¹⁷ The plaintiff, a Hispanic-owned firm, claimed that once it had received a subcontract under a set-aside, the defendant interfered with its performance in violation of the civil rights laws. The trial court imposed liability on a prime contractor for *quantum meruit* recovery as well as for violations of 42 U.S.C. sections 1981 and 1983.²¹⁸ It awarded \$232,996.60 in damages, \$155,132 in attorney's fees and \$20,258.57 in expenses and expert witness fees.²¹⁹

The appellate court sustained the trial court's finding of a section 1981 violation.²²⁰ The appellate court determined that the defendant's interference with the plaintiff's performance on the excavation project and refusal to offer the assistance to MBEs required under the terms of the Environmental Protection Agency (EPA) funded set-aside prevented Lumen from making and enforcing contracts.²²¹ Lumen established its section 1983²²² claim by showing that the project was built on public land with public funds; that MBE participation was required by the EPA; and that Brant's actions had deprived Lumen of the benefits of the set-aside program.²²³ The trial court also found intentional discrimination because "Brant attempted to prevent Lumen from participating in the project, . . . Brant wrongfully exercised control over Lumen's finances, . . . Lumen's employees were intimidated into leaving the job site and . . . Brant failed to assist Lumen as required by MBE regulations."²²⁴

216. *Id.* at 391.

217. 515 N.E.2d 868 (Ind. Ct. App. 1987).

218. *Id.* at 871-73.

219. *Id.* at 877.

220. *See supra* note 117 and accompanying text.

221. 515 N.E.2d at 873.

222. 42 U.S.C. § 1983 provides that:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

223. *Brant*, 515 N.E.2d at 873-74.

224. *Id.* at 874.

These state court opinions offer genuine potential for creating legal doctrines that realistically deal with discrimination in business transactions. Unfortunately, the Supreme Court's holding in *Patterson v. McClean Credit Union*²²⁵ places the continuing viability of these state court opinions in question. *Patterson* held that section 1981 coverage does not extend beyond the formation stage of a contract.²²⁶ This holding overrules *Brant* unless the holding in *Brant* can be predicated on section 1983 alone, and assuming *Patterson* does not limit the scope of section 1983.²²⁷

*City of Richmond v. J.A. Croson Co.*²²⁸ may also limit such favorable state court opinions. In *Khalifa* the result depended upon the existence of a state set-aside similar to the one invalidated by *Croson*.²²⁹ Pervasive business discrimination can exist without leaving the kind of hard evidence of its presence that *Croson* demands before state and local set-asides are permitted.²³⁰ *Croson* undermines even the good faith plans that made the *Technicable Video Systems v. Americable*²³¹ result possible. The Supreme Court, in short, seems intent on aborting a promising trend of recognizing the significance of race in the marketplace.

C. Private Rights of Action

Another group of litigants has directly attacked noncompliance with MBE programs. Instead of using noncompliance as evidence of the discrimination, they seek to compel effective implementation of these programs. The question these litigants pose is, if a prime contractor ignores the obligations imposed upon it by an MBE program, can an MBE sue to remedy this violation, or does only the government imposing the obligation have standing to sue.²³² In *Organization of*

225. 109 S. Ct. 2363 (1989).

226. *Id.* at 2369-71.

227. *See supra* note 118.

228. 488 U.S. 469 (1989).

229. The set-aside in *Brant* originated with the federal government. *Brant*, 515 N.E.2d at 870. Assuming the Supreme Court can trace its mandate to Congress rather than to a federal agency, *Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 1997 (1990), would sustain its authorization as long as that five to four decision survives. *See supra* note 6.

230. Legislation has been introduced (so far unseccessfully) to delegate to subordinate governments Congress's greater power to enact set-asides. *See Civil Rights Act of 1990*, S. 2104, 101st Cong., 2d Sess. (1990).

231. 479 So. 2d 810 (Fla. Dist. Ct. App. 1985).

232. Some district courts have held that a government's failure to impose sanctions for violation of a contract's antidiscrimination provision is not state action for purposes of a § 1983 claim. *See Cox v. Athena Cablevision*, 558 F. Supp. 258, 259 (E.D. Tenn. 1982); *Peterson v. Lehigh Valley District Council*, 453 F. Supp. 735, 738 (E.D. Pa. 1978), *vacated on other grounds*, 676 F.2d 81 (3d Cir. 1982).

Minority Vendors v. Illinois Central Gulf Railroad,²³³ a trial court found an implied private right of action under the Railroad Revitalization and Regulatory Reform Act,²³⁴ which provided federal funds to rebuild the railroad infrastructure (as well as a contract cause of action under a third party beneficiary theory).²³⁵ Despite the promising result in this case, it is contrary to the prevailing trend.

During a period of activism in the 1960s, courts viewed certain federal statutes expansively and granted litigants standing to sue for statutory violations even though the statute did not provide explicitly for enforcement by private parties.²³⁶ Then in the 1970s the Supreme Court retreated.²³⁷ In *Cort v. Ash*,²³⁸ the Court announced several new requirements to establish whether a private remedy was implicit in a statute not expressly providing one. First, the plaintiff must be “one of the class for whose *especial* benefit the statute was enacted.”²³⁹ Second, there must be an “indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one.”²⁴⁰ Third, it must be “consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff.”²⁴¹ Finally, the Court asked whether “the cause of action [was] one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law.”²⁴²

Most federal MBE enactments would have a fairly easy time satisfying all but the second requirement concerning legislative intent. In *Howing Co. v. Nationwide Corp.*,²⁴³ a recent securities decision finding an implied right of action under section 13(e) of the 1934 Securities Exchange Act, the Sixth Circuit applied the *Cort* analysis and elaborated on the required showing of explicit or implicit intent.²⁴⁴ It ruled

233. 579 F. Supp. 574, 588 (N.D. Ill. 1983).

234. 45 U.S.C. §§ 801-802 (1988).

235. *Minority Vendors*, 579 F. Supp. at 600-01.

236. *J.I. Case Co. v. Borak*, 377 U.S. 426, 430-34 (1964); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 382-83 (1970).

237. This did not affect implied private rights of action based upon state statutes.

238. 422 U.S. 66 (1975).

239. *Id.* at 78 (quoting *Texas & Pacific R.R. v. Rigsby*, 241 U.S. 33, 34 (1916)).

240. *Id.*

241. *Id.*

242. *Id.*

243. 826 F.2d 1470 (6th Cir. 1987), *cert. denied*, 486 U.S. 1059 (1988). Some cases also distinguish between “right creating” language and “duty creating” language. *See, e.g.*, *Universities Research Ass’n, Inc. v. Coutu*, 450 U.S. 754, 769 (1981); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19-24 (1979); *Touche Ross & Co. v. Reddington*, 442 U.S. 560, 568-77 (1979); *Davis v. Passman*, 442 U.S. 228, 236-44 (1979); *Cannon v. University of Chicago*, 441 U.S. 667, 683-717 (1979).

244. *Howing*, 826 F.2d at 1474-76.

that the law prior to *Cort* presumed a private remedy if legislation was silent on the issue, but that for subsequent enactments Congress could indicate its intent to imply a private right of action by patterning a statute on another statute for which a private action already had been implied.²⁴⁵ The federal set-aside enactments, virtually all of which post-date *Cort*, have not been so patterned.

Now that *Croson* has undermined the validity of all state and local set-aside programs, those programs not repealed may face increased indifference from the bureaucracies charged with their implementation. Although *Cort* did not limit private rights of action premised on state statutes or local ordinances, such actions become moot if the legislation they seek to enforce is invalidated. At the federal level, while *Metro Broadcasting Inc. v. FCC*²⁴⁶ sustained a federal minority preference, federal set-asides have not been patterned on enactments for which private rights of action previously had been implied. Private enforcement of either federal or local MBE legislation is therefore unlikely to be a viable alternative.

D. Eliminating the Intent Requirement

As a practical matter, the burden of proving intentional discrimination has been insurmountable, and Congress is unlikely to amend existing law to eliminate this onerous requirement. Since minorities control a number of major urban jurisdictions and since *City of Richmond v. J.A. Croson Co.*²⁴⁷ recognized the power of local governments to legislate against discrimination occurring within their borders,²⁴⁸ the Court practically invited local government to correct discrimination with legislation.²⁴⁹ Could these jurisdictions, whose set-asides have been undermined by *Croson*, simply prohibit private business discrimination with laws that do not require proof of intentional discrimination?²⁵⁰

245. *Id.* at 1475.

246. 110 S. Ct. 1947 (1990).

247. 488 U.S. 469 (1989).

248. “[A] state or local subdivision (if delegated the authority from the State) has the authority to eradicate the effects of private discrimination within its own legislative jurisdiction.” *Id.* at 491-92.

249. “States and their local subdivisions have many legislative weapons at their disposal both to punish and prevent present discrimination.” *Id.* at 494. “Where such discrimination occurs, a city would be justified in penalizing the discriminator and providing relief to the victim of such discrimination.” *Id.* at 509.

250. See *supra* text accompanying notes 177-188 for an approach based upon disparate impact theory.

This approach presents a number of problems. Primarily it would intrude into the operations of private firms in unprecedented ways. To create the factual basis for discrimination suits, such a law would have to impose on private procurement transactions the same requirements found in public procurement, chiefly public notice of bid opportunities and an obligation to accept the lowest responsible bid. To avoid the problems of proving intent created by *T & S Service Associates, Inc. v. Crenson*,²⁵¹ the law also would have to require the acceptance of a low bid without regard to the capabilities of the bidder. Such a degree of inflexibility would be economically wasteful and unmanageable and probably would result in a wholesale relocation of business firms to neighboring jurisdictions. In addition, subjecting the entire local business economy to such pervasive regulation would require an enormous bureaucracy to administer and enforce. The direct expense of operating such a system would be compounded by the indirect costs arising from the delays inherent in the bureaucratic process. Eliminating the intent requirement, therefore, is simply not politically or economically feasible.

III. Reconsidering Set-Asides

Does current doctrine leave MBEs without an effective remedy for business discrimination? Since existing legislation provides no relief and effective legislation cannot be created, MBEs have no choice but to rely on set-asides if they are to be protected against discrimination.²⁵² The efficacy of set-asides in protecting MBEs from discrimination depends on whether the local political leadership in jurisdictions where discrimination occurs can and will make the findings necessary for a business set-aside to survive strict scrutiny under *Croson*. Questions of political will aside, given the difficulty in making adequate findings required by *Croson*, even in circumstances of pervasive discrimination, *Croson's* abhorrence of racial classifications in effect endorses and supports this discriminatory status quo. Legal doctrines that leave businesses victimized by discrimination without an effective remedy, when all the victims are minorities and all the culprits are nonminorities, are racially neutral only from the perspective of the culprits.

A. Findings of Discrimination

In theory at least, the Court could uphold a state or local set-aside if the enacting jurisdiction showed a compelling governmental interest

251. 666 F.2d 722 (1st Cir. 1981); see *supra* text accompanying notes 125-152.

252. For a prophylactic approach relying on market incentives, see Suggs, *Rethinking Minority Business Development Strategies*, *supra* note 4.

supported by adequate findings of discrimination and tailored the set-aside narrowly. "In the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion."²⁵³ In practice, however, generating the necessary findings to justify the set-aside may prove to be nearly impossible.

The *Croson* Court avoided articulating a definitive standard for the required findings of discrimination, but it seemed to suggest that such findings must satisfy the requirements for a constitutional or statutory violation by at least someone.²⁵⁴ In a separate concurrence, however, Justice Kennedy did articulate a specific standard for findings of discrimination and it is a forbidding one. He stated that: "evidence which would support a judicial finding of *intentional* discrimination *may* suffice also to justify remedial legislative action"²⁵⁵ As has been illustrated earlier in this Article, it is extremely difficult to show intentional discrimination, the predicate for statutory or constitutional violations, in a particular transaction.²⁵⁶

Without readily obtainable data about individual instances of discrimination, localities might rely on aggregate data to show discrimination against minority businesses. Seeming to support this approach, the Court has suggested that "[w]here gross statistical disparities can be shown, they alone in a proper case may constitute prima facie proof of a pattern or practice of discrimination."²⁵⁷ Unfortunately, the Court has a conceptually flawed view of statistical disparities. In its uncritical application of statistical disparities in employment discrimination to minority business utilization,²⁵⁸ the Court made a serious error. With

253. *Croson*, 488 U.S. at 509. In his concurring opinion, Justice Scalia argued that states and subordinate governments should be permitted to act by race to undo the effect of past discrimination, only when it is their own unlawful discrimination that is being remedied. *Id.* at 524 (Scalia, J., concurring). Further, he would permit only race neutral remedies for discrimination by prime contractors against minority subcontractors, however ineffective they might be. *Id.* at 525-28.

254. "There is nothing approaching a prima facie case of a constitutional or statutory violation by *anyone* in the Richmond construction industry." *Id.* at 500 (citing *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274-75 (1986) (O'Connor, J., concurring)).

255. *Id.* at 519 (Kennedy, J., concurring) (emphasis added).

256. See *supra* text accompanying notes 125-160; see also Suggs, *Rethinking Minority Business Development Strategies*, *supra* note 4, at 109-12.

257. *Croson*, 488 U.S. at 501 (quoting *Hazelwood School Dist. v. United States*, 433 U.S. 299, 307-08 (1977)).

258. In using statistical evidence to show employment discrimination, "where special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the task." *Croson*, 488 U.S. at 501-02. The *Croson* court therefore rejected Richmond's showing of a disparity between black population and MBE participation in Richmond's construction contracting, because the city should have shown a disparity between participation and minority firms qualified to

employment the employer usually does not control access to the relevant labor pool. For instance, in *Wygant v. Jackson Board of Education*,²⁵⁹ the defendant school board did not control the ability of minority teachers to attend college and obtain teaching credentials. But in the construction industry, prime contractors' decisions to exclude minorities from participation in private construction directly thwart the ability of these firms to qualify for inclusion in the relevant pool of MBEs "qualified to undertake prime or subcontracting work in public construction projects."²⁶⁰ Applying the *Croson* Court's analysis to conditions in Richmond during the heyday of *de jure* segregation or slavery demonstrates the flaw in the Court's reasoning. During that period there were few, if any, qualified MBE construction firms and no participation by MBEs in the City of Richmond's procurement of construction services. Zero participation in Richmond's construction procurement compared to zero MBE firms in the qualified pool is no disparity at all, so there existed no statistical basis to find any discrimination.

Some scholars have taken heart from the *Croson* Court's apparent reliance on *Ohio Contractors Association v. Keip*.²⁶¹ This suggests an implied approval of the Sixth Circuit's findings of discrimination based upon the use of statistical data.²⁶² The court of appeals in *Ohio Contractors* found two statistical disparities to be convincing evidence of discrimination against minority groups in the award of state contracts.²⁶³ Under closer analysis, however, neither of these two disparities hold up.

The first disparity involved the number of minority firms participating in state procurement compared to the number present in Ohio.²⁶⁴ During the period 1975-1977, minority firms comprised seven percent of all Ohio businesses but received less than 0.5 percent of purchase contracts from the state department of transportation. This disparity no more supports an inference of intentional discrimination than does a disparity between population and business participation. Since a disproportionately large number of minority firms operate in the personal

participate. "Reliance on the disparity between the number of prime contracts awarded to minority firms and the minority population of the city of Richmond is . . . misplaced." *Id.* at 501.

259. 476 U.S. 267 (1986).

260. *Croson*, 488 U.S. at 502.

261. 713 F.2d 167 (6th Cir. 1983).

262. See, e.g., Karst, *Private Discrimination and Public Responsibility: Patterson in Context*, 1989 SUP. CT. REV. 1, 45.

263. *Ohio Contractors*, 713 F.2d at 171.

264. *Id.*

service and small retail trade sectors of the economy, a disproportionately small number operate in industries from which state departments of transportation purchase goods and services.²⁶⁵ If analysis further refines the seven percent figure to exclude not only minority firms in inappropriate industries but those that are too small (often part-time moonlighting ventures)²⁶⁶ to serve as government suppliers, the disparity becomes much smaller and might disappear.

The second disparity relied upon by the court in *Ohio Contractors* came from a study revealing that only 0.24 percent of the dollar value of general construction contracts went to minority firms.²⁶⁷ Since minority firms made up seven percent of all Ohio firms, the disparity approaches a magnitude of twenty-eight to one. Here, too, a simple analysis and refinement of these data greatly reduces the disparity. The court's comparison of minority firms to minority state construction revenues assumes erroneously that minority firms are on average as large as other firms, while in fact they are on average much smaller. Nationally, black-owned firms constitute two percent of all firms but garner only 0.16 percent of all business revenues.²⁶⁸ In addition, they account for about forty percent of minority firms but generate only about thirty percent of minority firm revenues.²⁶⁹ If we assume that construction spending and prevalence of MBEs in Ohio are representative of the nation, then the expected participation of MBEs in state contracting would be about 0.53 percent.²⁷⁰ This simple refinement reduces the disparity from the "gross" level of 28:1 to little more than 2:1. If the revenue disparity further were refined by industry, as with the first disparity, it might disappear altogether.

The basic problem, however, is not the absence of shocking disparities but that gross statistics at such an elementary level cannot demonstrate intentional discrimination. *City of Richmond v. J.A. Croson Co.*,²⁷¹ with its favorable citation of *Ohio Contractors*, created a trap for the unwary. *Croson's* dictates cannot be satisfied simply by pulling a few statistics from a handy census report; not given the hostility towards affirmative action of much of the current federal judiciary.²⁷²

265. See generally, R. SUGGS, RECENT CHANGES, *supra* note 32.

266. Compared with whites, a substantially lower percentage of blacks are self-employed year round. This suggests a greater reliance by blacks on self-employment as an income supplement or as an alternative to periodic employment. *Id.* at 4 n.10.

267. *Ohio Contractors*, 713 F.2d at 171.

268. See R. SUGGS, RECENT CHANGES, *supra* note 32, at 6.

269. R. SUGGS, MINORITIES AND PRIVATIZATION: ECONOMIC MOBILITY AT RISK 522-53 (1989).

270. If the black share of Ohio's MBE business community is the same as the black national share, and if the level of participation of MBEs in Ohio's construction spending were proportional to the black share of national business receipts, then 0.16% divided by 30% = 0.53%.

271. 488 U.S. 469 (1989).

272. See *Cone Corp. v. Hillsborough County*, 723 F. Supp. 669, 678 (M.D. Fla. 1989).

Only the most thorough²⁷³ and comprehensive studies²⁷⁴ can expect to pass *Croson's* muster.

The problem is that standard aggregate data on minority business and the effects of discrimination do not and cannot distinguish between current discrimination and the continuing effects of prior discrimination (i.e., small size, inexperience, and undercapitalization). Such data also fail to distinguish between the effects of "societal discrimination"²⁷⁵ and acts of business discrimination. Discriminatory membership policies of private country clubs probably would not qualify for the findings *Croson* requires, but such policies undoubtedly have an impact on the ability of minority entrepreneurs to make the social contacts that are a vital part of the business world.²⁷⁶ New data would have to be generated to reflect current racial realities.

The Court's treatment of societal discrimination in *Wygant v. Jackson Board of Education*²⁷⁷ and *Croson* and its discussion of the requisite findings of discrimination in *Croson* serve notice that it will require much more specific information than previously has been collected.²⁷⁸ The Court also suggested that other government entities might

[A]fter reviewing the *best evidence* brought forward by the defendants, . . . the court is at a loss to understand why there had been no stipulation for entry of a preliminary injunction This Court is forced to question the good faith of Defendants in opposing the efforts of Plaintiffs to suspend the MBE program of Hillsborough County

Id. President Reagan's impact on the federal judiciary may well be his most lasting legacy:

By 1992, as many as three-quarters of the country's 752 federal trial and appeals court judges will owe their jobs to Reagan or Bush. . . .

. . . [T]he judges named by Reagan [are] far more likely than those selected by his predecessor, Jimmy Carter, to reject claims of race or sex discrimination, rule against criminal defendants and find that environmental, civil rights groups and others had no standing to sue.

Reagan appointees, who faced an ideological screening process unprecedented in its rigor, now control eight of the 13 appeals courts.

Kamen & Marcus, *Liberal Judges May Become Endangered Species*, BLACK ISSUES IN HIGHER EDUCATION, February 16, 1989, at 8.

273. The City of Atlanta's current study in support of several minority business initiatives runs to eight volumes and about 1100 pages and cost \$517,650. Brimmer & Marshall, Public Policy and Promotion of Minority Economic Development (June 29, 1990).

274. The cost of such studies probably would exceed the resources of all but the largest local government jurisdictions. The smaller the jurisdiction, the less recourse it has to standard census data sets compiled for states, counties, major cities, and standard metropolitan statistical areas. Creation of new data for such a jurisdiction would be extremely expensive.

275. *Croson* denied local governments the power to remedy "societal discrimination." *Croson*, 488 U.S. at 490-91.

276. The United States Golf Association estimates that three of every four private golf clubs in the country have membership restrictions of some kind. Sixteen of the 22 clubs hosting upcoming major golf tournaments have no black members. *Few Blacks in Clubs for Majors*, N.Y. Times, Aug. 8, 1990, at A18, col. 6.

277. 476 U.S. 267 (1986).

278. In contrast to this treatment for states and localities, Congress may have an easier

have to show more than Congress before undertaking race conscious measures: "the degree of specificity required in the findings of discrimination . . . may vary with the nature and authority of a governmental body."²⁷⁹ Thus, smaller jurisdictions with fewer resources appear to be at a disadvantage given the difficulty of making the requisite showing and the more rigorous and expensive documentation required. All in all, despite two recent court decisions refusing to invalidate local set-asides on summary judgment motions,²⁸⁰ when states and localities must do more than raise an issue of material fact, it will not be easy for them to satisfy *Croson's* dictates.²⁸¹

B. The Justification of Set-Asides as a Preventive Measure: Recognition of a Market Barrier

One remarkable feature of set-aside jurisprudence is its failure to consider the existence or relevance of ongoing discrimination against

burden. In *Fullilove v. Klutznick*, 448 U.S. 448 (1980), Justice Powell pointed out in his concurring opinion:

One appropriate source [for a record] is the information and expertise that Congress acquires in the consideration and enactment of earlier legislation. After Congress has legislated repeatedly in an area of national concern, its Members gain experience that may reduce the need for fresh hearings or prolonged debate when Congress again considers action in that area.

Id. at 503 (Powell, J., concurring). *Fullilove* is still good law for federal set-asides, and this more reasonable standard still might be availed of by Congress. It is questionable, however, whether set-asides established by federal agencies without the clear imprimatur of Congress will have recourse to this more lenient standard for the requisite findings of discrimination.

279. *Id.* at 515 n.14 (Powell, J., concurring). This language was quoted with approval by the Court in *Croson*, 488 U.S. at 489.

Perhaps one way a city could gather evidence would be to analyze the experience of MBEs that aggressively market themselves to the firms which are significant suppliers to the jurisdiction. If the MBEs are discouraged from bidding or are treated in a manner that is not commercially reasonable, this might be evidence of racial barriers to their ability to participate in city subcontracting. This approach might not be useful more than one time. Once suppliers became aware of what was occurring, they might adopt the procedures presently found in the housing industry. Housing discrimination, although not losing its effectiveness, is hidden by a veneer of superficial politeness and courtesy. Given the Court's view that the specificity of the required findings increases at lower levels of government, it is unlikely that smaller jurisdictions could bear the expense, even if data theoretically could be collected.

280. *Coral Constr. Co. v. King County*, 729 F. Supp. 734 (W.D. Wash. 1989); *Cone Corp. v. Hillsborough County*, 723 F. Supp. 669 (N.D. Fla. 1989).

281. For post-*Croson* decisions invalidating state or local set-asides, see *Harrison & Burrowes Bridge Constructors, Inc. v. Cuomo*, 743 F. Supp. 977 (N.D.N.Y. 1990); *Contractors Ass'n v. City of Philadelphia*, 735 F. Supp. 1274 (E.D. Penn. 1990); *Milwaukee County Pavers Ass'n v. Fiedler*, 731 F. Supp. 1395 (W.D. Wis. 1990); *Main Line Paving Co. v. Board of Educ.*, 725 F. Supp. 1349 (E.D. Penn. 1989); see also *Michigan Road Builders Ass'n v. Milliken*, 834 F.2d 583 (6th Cir. 1987), *aff'd*, 489 U.S. 1061 (1989) (invalidating Michigan's law setting aside portion of business contracts for minority and women business enterprises).

minority businesses as a justification for set-asides.²⁸² It offends common sense to assume that business discrimination does not occur when discrimination can be documented so easily in social and other economic activities, but the Supreme Court apparently has adopted this assumption.²⁸³ In *Fullilove v. Klutznick*,²⁸⁴ the Court focused on the continuing effects of historical discrimination.²⁸⁵ In all of the discussion of prior discrimination only one of five opinions made even a passing reference to the possibility that discrimination might continue to occur.²⁸⁶

In that opinion Justice Stevens recognized the relevance of racial prejudice to business decisions.²⁸⁷ Although he identified four possible policy justifications for minority business set-asides,²⁸⁸ he overlooked the relevance of continuing discrimination as an additional justification. He could have added a fifth justification, that set-asides are a *preventive*. Set-asides stymie discrimination that might otherwise occur in the selection by government prime contractors of subcontractors. They also compensate for the effects of discrimination in the private sector which limit the ability of MBEs to gain the experience and capability to perform in the public sector. Rather than viewing set-asides as an additional and unnecessary remedy, had the true extent of MBE exposure to unremedial discrimination been recognized, the Court could

282. It is as if the absence of illegal discrimination has been defined as equal opportunity. This legitimizes unconscious or covert discrimination that current doctrine, requiring stringent proof of intent, permits to continue. See Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988); Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978).

283. Justice Blackmun has wondered "whether the majority still believes that race discrimination—or, more accurately, race discrimination against non-whites—is a problem in our society, or even remembers that it ever was." *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 662 (1989) (Blackmun, J., dissenting).

284. 448 U.S. 448 (1990).

285. *Id.* at 458-63.

286. In that instance Justice Stevens wrote, "It is unfortunately but unquestionably true that irrational racial prejudice persists today and continues to obstruct minority participation in a variety of economic pursuits, presumably including the construction industry." *Id.* at 544 (Stevens, J., dissenting).

287. *Id.* at 539-40.

288. Four different . . . justifications . . . have been advanced: first, that the 10% set-aside is a form of reparation for past injuries to the entire membership of the class; second, that it is an appropriate remedy for past discrimination against minority business enterprises that have been denied access to public contracts; third, that the members of the favored class have a special entitlement to 'a piece of the action' when government is distributing benefits; and fourth, that the program is an appropriate method of fostering greater minority participation in a competitive economy. *Id.* at 536 (Stevens, J., dissenting).

have viewed set-asides as perhaps the only viable means of correcting this discrimination.

C. Business Is Not Employment

*City of Richmond v. J.A. Croson Co.*²⁸⁹ epitomizes a style of judicial decisionmaking that divorces abstract principle from factual context.²⁹⁰ In extending to the business context principles developed to deal with employment discrimination, the Court failed to recognize several important distinctions.

The Court's focus on past discrimination to the exclusion of current discrimination created the false impression that the beneficiaries of business set-asides occupy a position analogous to the beneficiaries of employment hiring goals. Such an analogy ignores a crucial difference. Statutes prohibit discrimination in public or private employment,²⁹¹ but despite the many congressional acts banning racial and gender discrimination in public accommodations,²⁹² employment, voting,²⁹³ and housing,²⁹⁴ none explicitly bars discrimination in business transactions between two commercial entities. In the employment context even when courts bar affirmative action goals, the ongoing discrimination violates Title VII or section 1981 and victims can obtain relief.²⁹⁵ The imposition of hiring goals merely extends the class afforded relief to individuals not previously identified as victims. But as demonstrated earlier, victims of business discrimination have essentially no chance of obtaining relief.

An implicit but important motivation for recourse to hiring goals is that absent a numerical goal, a recalcitrant employer cannot be trusted to stop discriminating.²⁹⁶ This aspect of affirmative action goals gains an enhanced significance for business set-asides because the actual vic-

289. 488 U.S. 469 (1989).

290. For an insightful literary analysis of the Scalia concurrence and Marshall dissent in *Croson*, see Ross, *The Richmond Narratives*, 68 TEX. L. REV. 381 (1989).

291. Civil Rights Act of 1964, Title VII, 42 U.S.C. §§ 2000e to 2000e-17 (1988); see 42 U.S.C. § 1981 (1988).

292. 42 U.S.C. §§ 2000a to 2000a-6 (1988).

293. 42 U.S.C. §§ 1971, 1973 to 1973bb, 1973aa-1a, 1973aa-6 (1988).

294. Civil Rights Act of 1968 (The Fair Housing Act), Pub. L. No. 90-284, §§ 801-819, 82 Stat. 73, 81-89 (1968) (codified at scattered sections of titles 18, 25, 28 and 42 U.S.C.).

295. I realize that a suit to benefit a single claimant may not be cost effective.

296. See, e.g., *United States v. Paradise*, 480 U.S. 149 (1987) (Alabama Department of Public Safety repeatedly failed to comply with court orders addressing the Department's discriminatory promotion practices; court upheld a one black for one white promotion requirement); *Local 28 of Sheet Metal Workers' Int'l Ass'n v. E.E.O.C.*, 478 U.S. 421 (1986) (Local 28 continued to discriminate against nonwhites in violation of court order; court upheld a 29% nonwhite membership goal as appropriate).

tims of discrimination by local government prime contractors have no remedy beyond the prophylactic impact of a procurement set-aside.²⁹⁷

Another difference that makes inapposite the analogy of employment to business is that a hiring goal theoretically accomplishes its objective by fiat. Since courts base employment goals on the availability of minorities in the labor market and employers usually do not control access by minorities to the relevant labor pool, so long as the court sets the goal appropriately, the employer usually can achieve the required proportion of minority hires. Individual employees generally do not depend for their continued existence on sources of income apart from their employment. On the other hand, few business firms, minority or otherwise, rely wholly on a single government customer. Any procurement goal exceeding the existing very small MBE market share depends in part on the erosion of racial barriers to private commercial transactions. Otherwise, the increased MBE capacity achieved by the set-aside may be unable to be maintained permanently because the same prime contractors that discriminate in public procurement subcontracting also, through their subcontracting in the private sector, control access by minorities to the contracts necessary for their long term survival and growth. Complete relief requires something more than judicial or legislative fiat affecting only the public sector. There must be a corresponding change in private behavior in the marketplace.

Stigmatization has often been cited as a consequence of racial classification, providing the basis for some opposition to their use.²⁹⁸ By treating set-asides as just another variety of affirmative action this argument has been extended to them.²⁹⁹ Whatever the dubious historical merits of this argument,³⁰⁰ it ignores the fact that many larger minority firms employ nonminorities in a wide variety of roles.³⁰¹ Since customers of MBEs might find themselves dealing with nonminority employees, their opinion of the firm will depend upon the performance of these employees. Does the Court fear that stigmatization will extend

297. For an alternative approach designed to prevent discrimination by prime contractors in the procurement of local governments which are supportive of minority business development initiatives, see Suggs, *Rethinking Minority Business Development Strategies*, *supra* note 4. Unfortunately, this approach would not work in jurisdictions indifferent or hostile to minority business development.

298. Steele, *A Negative Vote on Affirmative Action*, N.Y. Times, May 13, 1990, (Magazine) at 46, 48, 53.

299. *Croson*, 488 U.S. at 493-94.

300. This argument fails to account for the long history of stigmatization antedating by centuries the advent of affirmative action in the late 1960s. It assumes that the broadly held notions of racial inferiority disappeared with the passage of the Civil Rights Act of 1964, and then revived only with the appearance of affirmative action in the late 1960s.

301. For purposes of set-aside eligibility, the definition of an MBE considers only a firm's ownership and control. The racial make-up of its employees is immaterial.

to these nonminority employees as well or that a firm can be stigmatized as an abstract legal entity independent of its employees?

Another key distinction the Court ignored is that procurement set-asides burden nonminorities less than do employment goals. Set-asides allocate a percentage from a pool of contracts but do not require that the same contracts be set aside from the pool each year. Thus, each year the set-aside affects a different group of nonminority firms. Moreover, employment tends to be for longer periods than most commercial contracts, so the burden of a business set-aside is for a shorter duration. A typical job represents all the income earned by an employee, but most business firms have revenues from many different contracts. As a result a set-aside burden is of lesser consequence for a business than for an employee.

Further mitigating the burden of set-asides is that an MBE can be forty-nine percent owned by nonminorities, can have nonminority employees, can subcontract with non-MBEs, and can buy goods and services from non-MBEs. The burden is further diffused because minorities share it. Many nonminority companies have minority employees, and if they are public companies, some of the beneficial owners of their shares will be minorities, largely through the medium of state and local government pension funds.

These distinctions may be insufficient to sway the *Croson* Court, but the absence of any discussion of these factors suggests how far the Court has divorced itself from the realities that MBEs must confront.

D. Racial Neutrality

The Supreme Court applied strict scrutiny analysis to the legislative racial classification used by the Richmond City Council in *Croson* because "there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics."³⁰² The Court never identified what makes racial politics so abhorrent, unless it is to be understood from a later reference to racial classifi-

302. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989). If the Court is concerned with stigmatization of the firm or its employees, a distinction should be made between the employment and business contexts. A minority employee hired because of a race-specific remedy will of course be a minority, but the employees of an MBE may be of any ethnicity. Thus, it is entirely possible for reluctant nonminority customers to find themselves dealing with nonminority employees of the MBE. Since the performance of the nonminority employee will be the basis for any assessment of the MBE made by the customer, at least in this circumstance, a concern regarding stigmatization is misplaced.

cations that racial politics leads to racial hostility.³⁰³ If that is what the Court meant, then it ignores several centuries of American history. Racial hostility and animus towards blacks existed long before blacks could generally vote or engage in other meaningful political activity.³⁰⁴ The Court is confusing cause with effect.

The Supreme Court utterly fails to realize that its purportedly race neutral decisions can have a racially corrosive effect. It poses the choice as one between a color-blind society and one in which the government impedes this goal through use of racial classifications. It poses a false dichotomy. The real choice is between greater use of racial classifications to promote equity and an adherence to a formal racial neutrality that permits greater levels and wider forms of discrimination to go unremedied. From the minority perspective, the refusal of a government dominated by whites to penalize discrimination, whether by omission or exemption, is a race-conscious decision. Government use of racial classifications for discriminatory purposes did not create the race consciousness of our society. Government use was merely one facet of a pervasive racism that infected American society from its inception.

The real danger lies in the failure of the Court to realize that requiring minorities to accept wider forms and higher levels of private discrimination corrodes faith in the values proclaimed as fundamental. A minority person whose children attend underfunded and inadequate de facto segregated schools and who lives in a segregated neighborhood receiving less than its share of public services does not feel that society is race neutral because this segregation is imposed by private actors without the use of governmental classifications. Whatever the sources of discrimination, public or private, the experience of discrimination itself, when left unremedied by a legal system, creates cynicism and hostility and ultimately undermines the legitimacy of the legal system that excuses it.

303. *Id.* at 493.

304. *See* *Buchanan v. Warley*, 245 U.S. 60, 70, 73-74, 81-82 (1917) (rejecting a claim by the City of Louisville that an ordinance which fostered segregated housing—preventing blacks from living on streets where a majority of whites lived, and vice versa—was needed to prevent racial conflict and possible breaches of the peace); *see also* *Watson v. City of Memphis*, 373 U.S. 526, 535 (1963) (“constitutional rights may not be denied simply because of hostility to their assertion or exercise”); *Cooper v. Aaron*, 358 U.S. 1, 16 (1958) (Little Rock, Ark. officials attempt to avoid school desegregation order; Court held “law and order are not . . . to be preserved by depriving the Negro children of their constitutional rights”). *But cf.*, *Palmer v. Thompson*, 403 U.S. 217 (1971) (Court upheld the closing of segregated public swimming pools, to avoid desegregation, in order to preserve law and order). This decision has been severely criticized by commentators. *Brest*, *Palmer v. Thompson*, *An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95; L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-16 at 1480-82 (2d ed. 1988).

IV. The American Experience of Japanese Nontariff Trade Barriers

In the modern era few societies, if any, have freed themselves entirely of the problem of the "color line."³⁰⁵ Social relationships, the sphere in which we customarily look for the influence of discrimination, do not exist separate and independent of economic relationships. One would expect, therefore, that the pernicious influence of race would extend to all facets of American life, including business transactions, and that its influence would not be unique to American society. In the business community race produces a domestic nontariff trade barrier³⁰⁶ between the minority and nonminority business communities.

Another such nontariff trade barrier, one which allegedly denies American firms access to Japanese markets, is currently the subject of extensive debate within our national policy-making apparatus. That debate has at least two parallels to the minority set-aside debate. The first, echoing the Supreme Court's skepticism in *Crosby* about whether intentional discrimination still occurs, questions whether a trade barrier truly exists and whether discriminatory conduct by the Japanese really occurs. The second mirrors the controversy that divided the *Crosby* Court. That controversy concerns whether antidiscrimination legislation can effectively remove trade barriers or whether real redress requires some sort of mandated market share. That part of the trade debate, between "revisionists" and "free traders," asks whether Japanese markets can best be opened to American firms by concentrating on the removal of formal governmental and structural trade impediments,³⁰⁷ as the free traders argue, or only by a system of "managed trade" in which Japan makes firm commitments to assure a specified share of its markets to American firms.

From the perspective of the revisionists,

Japan is run by "Japan Inc.," a partnership of giant export-minded enterprises and Government bureaucrats that defends producers against

305. "The problem of the twentieth century is the problem of the color line, — the relation of the darker to the lighter races of men in Asia and Africa, in America and the islands of the sea." W.E.B. DuBois, *THE SOULS OF BLACK FOLK* 23 (1973).

306. Unlike a tariff, this barrier does not result from explicit government regulations imposing a duty based on the value or other attributes of the product affected.

307. Governmental trade impediments include tariffs and regulations, typically with extraneous purposes like health and safety, that effectively exclude technically nonconforming foreign products which meet substantially equivalent regulations in their home markets. Structural impediments include distribution systems that rely on longstanding personal relationships and cartel behavior that is endemic because of a lack of strong antitrust legislation and enforcement.

the interests of consumers and guarantees that foreigners will never get an even break.

From this perspective, it makes little sense to fight to lower the formal barriers that block imports at the dock. Japan's bureaucratic-industrial complex will always manage to undermine the spirit of open commerce. The only international agreements likely to make a difference are the ones that manage trade, assuring American semiconductor manufacturers a given percentage of the Japanese market, or limiting exports of Japanese cars to so many million a year.³⁰⁸

Increasingly, the American position of "managed trade" has gained adherents. One proponent, Rudiger Dornbush, proposed "an arrangement under which the Japanese would agree to raise imports of manufacturers by 15 percent a year over 10 years."³⁰⁹ The policy of managed trade is reflected more explicitly in a confidential side letter³¹⁰ to the third Japan-United States agreement on semiconductors.³¹¹ "In this side letter the Japanese said that they understood, welcomed, and would make efforts to assist the United States companies in reaching their goal of a 20-percent market share within five years."³¹² Managed trade by any other name is a set-aside in favor of American firms.³¹³

A. Identifying Discrimination

As with the claims of minority firms presented in *Croson* to justify Richmond's set-aside,³¹⁴ American firms have great difficulty identifying specific instances of discrimination. The barriers American firms encounter, though subtle and elusive, nonetheless effectively undermine their ability to gain reciprocal access³¹⁵ to Japanese markets.³¹⁶ Al-

308. Passell, *Does Japan Play Fair*, N.Y. Times, Jan. 31, 1990, at D2, col. 1.

309. Dornbush, *Revisionist Influence Seen in Japan Talks*, N.Y. Times, Nov. 6, 1989, at D2, col. 5.

310. C. PRESTOWITZ, *TRADING PLACES* 65 (1988).

311. OFFICE OF THE U.S. TRADE REPRESENTATIVE, *Arrangement between the Government of Japan and the Government of the United States of America Concerning Trade* (Sept. 1986).

312. C. PRESTOWITZ, *supra* note 310.

313. Despite the hyperbole that terms all set-asides as "quotas," most are of a softer, best efforts variety, since virtually all contain a waiver provision. The crux is reached when the leniency of the waiver-granting process is examined. Generally, grant of a waiver by a jurisdiction responsive to a minority constituency occurs more rarely than in other jurisdictions. The analogy drawn here between "managed trade" and a set-aside is most apt when the minority set-aside is one in a jurisdiction without a strong minority constituency. This is the situation with respect to many federal set-asides imposed on subordinate jurisdictions as a condition of receiving federal funds.

314. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 479-80 (1989).

315. Like the barrier that minority firms confront, the Japanese barrier operates in only one direction; minority markets remain open to majority firms and American markets remain open to Japanese firms.

316. "The policy dialogue between the two countries is now turning to trade impediments that arise from cultural, historical, and structural differences. These are much harder to negotiate than tariff levels or quotas." Spencer, *supra* note 15, at 154-55.

though the Japanese distribution network has been blamed for the difficulty faced by American firms,³¹⁷ few specific discriminatory acts by private Japanese firms have been shown.³¹⁸ Similar complaints are heard about the nebulous barriers confronted by minority firms in domestic markets.³¹⁹ The absence of minority firms often is blamed on their small number, lack of effort, or perceived poor quality. Similarly, the lack of success of American firms in Japan often is blamed on their short-sighted unwillingness to establish a long-term market presence,³²⁰ their failure to understand or adapt to Japanese culture, or the poor quality of their services and products.³²¹ One commentator sums up the Japanese view as looking “at the United States as a country that has grown soft and complacent, that has lost its competitive industrial edge, and that is calling for protection from the pressures of the international marketplace because it is unwilling to deal with its own shortcomings.”³²² Alternative explanations also cite the American firms that have gained a presence in Japanese markets and blame the “absurdly high price-earnings multiples” as the only formidable barriers to foreign ownership.³²³

317. “From the Japanese side, structural changes in the Japanese distribution system and reform of exclusionary business practices and relationships—the American requests—do involve measures the Japanese government wishes to take.” *Id.* at 158.

“I must admit that the distribution system is one of Japan’s biggest headaches today.” Morita & Ishihara, *supra* note 15, at E3795.

318. The U.S. companies had well over half the [semiconductor] market outside Japan, but only about 10 percent within it. The problem [of increasing U.S. sales to a significant share of the Japanese market] was much more subtle than tariffs and other formal trade barriers, which had largely been removed. It arose from several factors: the tight ties between Japan’s manufacturers and their suppliers and distributors, which entail social obligations that go far beyond contractual dealings In effect, like disadvantaged U.S. minorities, we wanted an affirmative-action program that would offset the effects of past discrimination by actively working to increase imported chips.

C. PRESTOWITZ, *supra* note 310, at 50-51.

A separate issue is the existence of tariff and other formal trade barriers involving governmental regulations and approvals. These are constantly a source of friction between the American and Japanese governments.

319. “[A] number of factors, difficult to isolate or quantify, seemed to impair access by minority businesses to public contracting opportunities.” *Fullilove v. Klutznick*, 448 U.S. 448, 461 (1980).

320. In explaining why so few American cars are sold in Japan, the founder and chairman of the Sony Corporation wrote, “They make no effort at all to sell their cars in Japan, and then call Japan unfair because Japan sells too much in the U.S. and that Japan will not buy their products.” Morita & Ishihara, *supra* note 15, at E3789.

321. Address by Rep. Toby Roth, Georgetown University Center for Strategic and Int’l Studies, *reprinted in* 131 CONG. REC. 4035-36 (daily ed. Sept. 12, 1985).

322. Spencer, *supra* note 15, at 154.

323. Passell, *supra* note 308.

In the context of international trade the significance of trade barriers lies in their impact upon the economic health and development of the affected nations. While individual firms voice their particular claims, the national government acts not to make individual firms whole, but to safeguard the national economic well-being. No one calls for victim-specific relief.³²⁴ The policy justification for enactment of a set-aside rests on the same basis: the cumulative toll individual instances of exclusion exact on the economic health of MBEs collectively and of minority communities. Jurisdictions enact set-asides not to redress individual instances of discrimination against particular firms, but to breach the trade barrier that excludes minority firms from the larger business community.

In *Croson* the Supreme Court, in responding to the obvious historical existence of a trade barrier hindering MBEs, recast this prophylactic policy into a remedial one. It required the identification of particular acts of discrimination of significant number and pervasiveness before a minority business set-aside could be enacted by a local government.³²⁵ In adopting this approach, the Court professed to safeguard against the possibility of earlier wrongs being used to justify intervention long past the time when correction would be warranted.³²⁶

The Court was also motivated by the concern that the careless or unnecessary use by government of racial classifications might be viewed as a statement that minorities are racially inferior because without the set-aside mandate they could not compete.³²⁷ The Court's preoccupation with remedy led it to assume that current acts of racial discrimination in commercial transactions could in fact be identified with sufficient specificity.³²⁸ This assumption was utterly unwarranted. In neither international nor domestic trade can such instances be so identified. If they could, American multinational corporations, with all the

324. See *infra* text accompanying notes 337-38.

325. *City of Richmond v. J.A. Croson*, 488 U.S. 469, 509 (1989). It also requires that the set-aside be the most narrowly tailored means to remedy the identified discrimination. *Id.* at 506.

326. In the school cases, the States were required by court order to redress the wrongs worked by specific instances of racial discrimination. That goal was far more focused than the remedying of the effects of 'societal discrimination,' an amorphous concept of injury that may be ageless in its reach into the past.

University of California Regents v. Bakke, 438 U.S. 265, 307 (1978).

327. *Croson*, 488 U.S. at 493-94. Since this "statement of inferiority" would have been promulgated by a minority-dominated city council, the Court would view this as a concession. A less likely reading would have the Richmond City Council branding as inferior the nonminority owned contractors that historically supplied 99% of its needs and that under the set-aside still supplied 70%.

328. See *supra* text accompanying notes 156-160 for an explanation of the impracticability of identifying specific acts of business discrimination in private commercial transactions.

resources at their disposal, certainly could show individual instances of exclusion from Japanese markets, and our trade problems with Japan long since would have been resolved. The *Croson* principles relegate the victims of business discrimination, whether American multinationals or MBEs, to the cold comfort of an historically ineffectual remedy of antidiscrimination legislation or treaties.

B. Croson and Trade Policy

The comparison of an international trade barrier between two sovereign nations to a racial or ethnic barrier existing within the internal domestic market of the United States has at least one important dissimilarity. If the Japanese government enacted legislation setting aside twenty percent of a particular Japanese market for American firms,³²⁹ this act could not implicate the equal protection clause of the United States Constitution. Yet if allocating economic resources based on race³³⁰ exacerbates stereotyping and racial politics, these harms occur regardless of the presence of international borders, so long as there exists a legacy of racial stereotyping and hostility.³³¹

“Constant Japan bashing in the United States has created a dangerous reaction in Japan: bitter, resentful, nationalistic America bashing. Japanese bookstores are currently offering more than 10 books that claim to prove America’s ‘evil design’ to destroy and eliminate the Japanese challenge.”³³² “Americans now answer in various polls that the ‘Japanese threat’ is more dangerous to the United States than the ‘Soviet threat.’”³³³ American advertisers try to undermine the appeal of Japanese products through commercials that feature ominous references to Japanese militarism or veiled but disparaging comments on Japanese society.³³⁴

329. See *supra* notes 310-312 and accompanying text.

330. While technically “managed trade” would allocate trade based on nationality, at least with respect to Japan-U.S. relations the correlation of nationality with race is very strong. Even if there were no correlation, the history of the Third Reich demonstrates that nationalism can be as pernicious and invidious as racism, if the two are even distinguishable, since both are social constructs rather than scientific terms.

331. Increasing racial hostility also will create domestic repercussions. Asian Americans have already been the targets of racist violence spawned by the trade deficit with Japan. OMI & WINANT, *RACIAL FORMATION IN THE UNITED STATES* 198 N.9 (1986).

332. Ito, *supra* note 15, at 133.

333. *Id.* at 132. For a poll with somewhat broader scope see Oreskes, *Americans Voice Worry on Japan*, N.Y. Times, July 10, 1990, at A7, col 1.

334. See Rothenberg, *Ads that Bash the Japanese: Just Jokes or Veiled Racism?*, N.Y. Times, July 11, 1990, at A1, col. 3; McDowell, *After the Cold War, The Land of the Rising Threat*, N.Y. Times, June 18, 1990, at C13, col. 1 (“Even as the cold war fades into history, American authors and publishers are discovering a new enemy: Japan.”).

Given this state of relations between the United States and Japan, if our society pays more than lip service to the *Croson* policies concerned with stereotyping, notions of inferiority, and the politics of racial hostility, then these same policies must play a major role in the international trade arena as well. Refusing to apply the *Croson* policies because the equal protection clause legally does not apply elevates form over substance. If the *Croson* policies only control when trade barriers victimize minority firms and not when they bar the major nonminority firms, then the charge of hypocrisy can fairly be laid.³³⁵

If United States policymakers see the sheer magnitude of our trade with Japan as justifying this hypocrisy because the economic stakes loom too large to adhere to principled policies, then the hypocrisy is greater than it first appears. As a response to trade barriers, a set-aside for American firms in Japanese markets has less justification than one for minority firms in domestic markets. Japan is only one market of many, leaving markets representing about ninety percent of the world's economic output open to American goods and services.³³⁶ Minority firms excluded from majority markets in the United States, however, have only their own minority markets, which account for less than one percent of the total.³³⁷ Small and undercapitalized, they cannot leapfrog domestic markets to international ones. By force of circumstance, the rest of the world is denied to them. On a relative scale the true cost to the minority community of the *Croson* policies far exceeds the costs imposed on American firms by Japanese barriers. Somehow, lesser barriers hindering major American firms justify "managed trade," while more onerous barriers imposed on weaker firms and a poorer community must be accepted in the name of principle.

The irony should not be overlooked that under *Croson*, minority firms confronted with race-neutral barriers that exclude them because of their small size or inexperience (factors often resulting from a legacy of discrimination) can look only to race-neutral remedies. When the majority's ox is being gored, on the other hand, nationality/race-specific remedies are proposed by American firms in the international arena even though Japanese firms and society have utterly no responsibility for the relatively lower price/earnings multiples of American firms, the quality problems, or other race-neutral factors that exclude American firms from their markets.

335. I recognize that these inconsistent policies emanate from different branches of government. Trade policy is the province of the executive branch, and the courts establish the constitutional limits of race conscious policies.

336. If barriers exist in the rest of the world's markets, the Japanese bear no responsibility for them.

337. R. SUGGS, *MINORITIES AND PRIVATIZATION*, *supra* note 269, at 53.

A second irony is that those who complain about Japanese discriminatory barriers and advocate managed trade do not argue solely for victim-specific relief. Yet as conservatives interpret the equal protection doctrine, and under *Croson*, managed trade—reserving market shares for American firms—is not a race-neutral remedy, and thus must be victim-specific. This failure to be victim-specific is especially glaring because there is no indication that Japanese barriers are directed only at American firms. Managed trade would guarantee American firms access to markets that might otherwise be won by firms from other nations. While the United States may have the political clout vis-a-vis Japan to attempt to compel a system of managed trade, other nations do not. In the context of *Croson*, it would be as if discrimination concededly were directed at firms from all minority groups, but the set-aside granted relief only to one.

One could attempt to distinguish the two situations by arguing that United States minorities can lobby for legislation to prohibit discrimination³³⁸ while American firms confront the government of a sovereign nation. This basis for distinction does not withstand analysis. Attempts to enact domestic antidiscrimination legislation require the cooperation of the white majority responsible for exclusionary barriers, just as treaties would depend on the agreement and acquiescence of the Japanese. Even the potential for coalitions is similar. While minorities often find nonminority allies, some Japanese interests would potentially ally themselves with Americans to open their markets to benefit Japanese consumers.³³⁹ Neither white America nor Japan is monolithic in its attitudes or policies.

At bottom the problem may be that private Japanese firms just refuse to deal with American firms on equal terms.³⁴⁰ If the Japanese government, in a desperate and sincere effort to open its private markets, enacted a set-aside and signed a treaty guaranteeing American firms a specified portion of a certain market,³⁴¹ such action would run afoul of the *Croson* rationale since intentional discrimination has yet to be sufficiently identified. *Croson* would force American firms to continue to rely on nonexistent or ineffectual antidiscrimination legislation or wait for the gradual amelioration produced by neutral market opening measures adopted to dismantle the Japanese network that also excludes many Japanese firms.³⁴² Despite the best efforts of the

338. Of course such legislation would be grossly ineffective. See *supra* Part II.A.

339. Spencer, *supra* note 15.

340. Minority subcontractors have the same complaint about prime contractors.

341. See *supra* note 309-312.

342. "It is those ironclad, intragroup deals that Americans claim are Japan's biggest

Japanese government to remove legal and other formal barriers and to persuade Japanese firms to change their behavior, must American firms accept continued exclusion?³⁴³ *Croson* would dictate such a result.

Conclusion

The Court's rationale in *Croson* was fundamentally flawed. It assumed that MBEs had redress for acts of business discrimination or that such remedies could be enacted. No effective remedy presently exists, nor, given the realities of the business world, can one be constructed. The net result of *Croson* leaves state and local governments unable to compel their own prime contractors to dismantle the market barriers that minority firms encounter. While an alternative proposal³⁴⁴ would permit cooperating jurisdictions to reward firms that dismantle the barriers MBEs confront, this measure relies on market incentives to overcome barriers. The lack of competition³⁴⁵ in some markets may enable some recalcitrant contractors to ignore or actively resist the well-intentioned efforts of some jurisdictions to open up their procurement. Other jurisdictions, probably the majority, show no real interest in eroding these market barriers. Unless minorities exercise significant political influence, their purchasing staffs view efficient procurement as an objective difficult enough to achieve without adding antidiscrimination goals.

At a more basic level, the Supreme Court's obsession with formal equality both blinds it to the concrete factual reality in which its abstractions operate and allows it to tolerate grievous inequality. Its focus and preoccupation in *Croson* with "quotas" allowed it blithely to assume that "[s]tates and local subdivisions have many legislative weapons at their disposal both to punish and prevent present discrimination"³⁴⁶ It made this assumption in the complete absence of any rec-

remaining trade barrier. Such arrangements also exclude many Japanese companies" Sanger, *Rousing a Sleeping Industrial Giant*, N.Y. Times, May 20, 1990, §3, at 1, col. 5.

343. "Mrs. [Carla] Hills [the U.S. trade representative] said that she had 'a bunch of affidavits on my desk' from American companies complaining that price-fixing, group boycotts and market allocation agreements were 'keeping them out of the Japanese market.'" Farnsworth, *Progress in Talks with Japan*, N.Y. Times, Apr. 5, 1990, at D17, col 2.

"Japanese general contractors have been maintaining prices as much as 40% higher in comparison to foreign bidders, due to bid rigging traditions to assure a monopoly on business for themselves." Morita & Ishihara, *supra* note 15, at E3795.

344. See Suggs, *Rethinking Minority Business Development Strategies*, *supra* note 4, at 114-23.

345. The lack of competition may in part result from the long suppression of minority business activity.

346. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494 (1989).

ord of an MBE ever having sued successfully on a claim of business discrimination.³⁴⁷ The result of this adherence to formal abstractions leaves minority entrepreneurs defenseless against discriminatory actions. Much like *Dred Scott*,³⁴⁸ they have no rights that need be respected.

The Court reached this result out of its concern that “[c]lassifications based on race . . . may in fact promote notions of racial inferiority and lead to a politics of racial hostility.”³⁴⁹ The Court failed to consider that continued economic subordination³⁵⁰ of minorities and wrongs left unremedied can generate racial hostilities on their own.

The real test of the policies the Court used to justify its doctrine will come in the international trade arena. There the roles have been reversed. White Americans, once dominant, now find themselves with their confidence undermined, their personal insecurities awakened, their reputations sullied by negative stereotypes, and a subjective certainty that they are being discriminatorily excluded from Japanese markets. Will American trade policy adhere to the principles of free trade, or will it seek recourse to “managed trade”?

If the latter, then the politics of racial hostility we risk engendering pose a far more serious risk. We risk conflict with the world’s most dynamic and second largest economy, conflict with a nation whose culture incorporates a militarism and racism as deep as our own,³⁵¹ and conflict pitting former adversaries from the last World War.

Despite these risks, when the nation’s perceived economic well-being seems deliberately undermined by unfair trade practices, the appeal of “managed trade” as a practical solution may prove irresistible. If

347. In *Fullilove v. Klutznick*, 448 U.S. 448 (1980), Justice Stevens in his dissenting opinion concluded erroneously that Title VI applied to federal procurement, and that “[i]n view of the scarcity of litigated claims on behalf of minority business enterprises during this period, and the lack of any contrary evidence in the legislative record, it is appropriate to presume that the law has generally been obeyed.” *Id.* at 540 (Stevens, J., dissenting).

348. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

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

350. See *supra* notes 40-45 and accompanying text (statistics on discrimination).

351. American recollections of World War II and Japanese concern over protectionism, resource embargoes, dependency on food imports, and resentment from other countries about Japanese trading and investment practices will continue to cloud the relationship. In addition, both countries have an unfortunate history of racism that could make management of the relationship even more difficult than it is already. In Japan, for example, this racism is visible in displays of arrogance about what are perceived to be superior Japanese ways. In the United States racism is suggested by the double standard sometimes applied to Japanese investments in the United States as compared to West European investments.

Spencer, *supra* note 15, at 169.

whites reject *Crosby's* principles rather than accept the subordinate position adherence to them may produce, then to insist, as *Crosby* does, that minority firms accept racial barriers that relegate them to inferior status in the domestic economy is blatantly hypocritical.

