

underrepresentation in broadcasting and "the larger phenomenon" of society-wide discrimination.^{17/}

In so doing, we can be guided by what the Court thought Congress did right when it enacted the contracting preference upheld in Fullilove. There, Congress was said to have had a compelling interest because there was sufficient evidence from which it could conclude that the underrepresentation of minorities in public contracting was "from the existence and maintenance of barriers to competitive access which had their roots in racial and ethnic discrimination." Fullilove, 448 U.S. at 478 (plurality opinion) (emphasis added). This evidence went well beyond the "amorphous" societal discrimination that is "ageless in its reach into the past."^{18/} Instead, the evidence underlying the contracting preference in Fullilove highlighted pervasive and systematic effects of societal discrimination in an isolated, discrete industry. Likewise here, Congress can draw on ample available evidence documenting that society-wide discrimination has created pervasive and systematic barriers to competitive access for minorities in the ownership of radio and television media.

^{17/} Shurberg, 876 F.2d at 914 (opinion of Judge Silberman).

^{18/} Croson, 109 S. Ct. at 723 (quoting Bakke, 438 U.S. at 307 (opinion of Powell, J.)).

a. Barriers to Entry of Minorities

The FCC has determined that the central barrier to entry into broadcasting is an economic one, the need for substantial risk capital.^{19/} This barrier in turn has had a disproportionate affect on minorities that is largely attributable to the entire range of racial discrimination. In any event, however, a disproportionate percentage of minorities lack the experience and track record in managing substantial enterprises that would provide them with access to capital. In the final analysis, moreover, control over an enterprise lies with those who supply significant portions of the capital at risk. And most minorities, even those relatively well-off, simply do not have such capital. It is such barriers that account for the low percentage of minority participation in all industries, not just broadcasting.

I call to your attention some of the more remarkable findings in a highly publicized survey that summarizes and interprets a large body of data concerning the plight of black Americans. That survey, entitled A Common Destiny: Blacks in American Society (1989), published only this summer, shows that, "[o]verall, the net worth position of black households is very

^{19/} Amendment of Section 73.3555, 100 F.C.C.2d 17, 19-20 (1984).

limited in comparison with whites," in large part, because "more black families have been persistently, not just temporarily, poor" *Id.* at 294.^{20/} In terms of comparative business performance, the study observed that "black businesses [are] primarily small-scale enterprises concentrated in a narrow range of low-revenue activities." *Id.* at 180. As late as 1969, the study shows, 94% of black businesses were sole proprietorships and 84% had no paid employees, *id.*, while as recently as two years ago, black-owned businesses had only 1/3 of 1% of total U.S. sales. *Id.* at 181.^{21/}

Not all minority ethnic groups have fared as badly. Asian Americans (and particularly Japanese and Chinese) are often held out as "model minorities" who, despite massive discrimination, have outstripped the majority in levels of income and education. But that success has come only in the decades since 1950, and even today they face significant barriers to economic achievement beyond a sheer lack of financial capital.

^{20/} The comparative household net worth of Hispanics is also far below that of nonminority Americans. See Statistical Abstract of the United States 1989, Table 747.

^{21/} As of 1982, exactly the same proportion of Hispanic-owned enterprises (84%) had no paid employees. See 1982 Survey of Minority-Owned Business Enterprises (Bureau of the Census, MB82-2), Tables 1 and 8. Some 89.4% of the 13,000 odd business enterprises owned by Native Americans (Aleuts, Eskimos and American Indians) had no paid employees. 1982 Survey of Minority-Owned Business Enterprises (Bureau of the Census, MB82-3), Table 1.

The overwhelming majority of Asian-owned business enterprises are small. In 1982, 81% had no paid employees.^{22/} Some 67% of those with paid employees had less than five.^{23/} Plainly, Asian Americans have not yet been able to join the mainstream of American business.^{24/}

While there are undoubtedly a wealth of factors underlying these patterns, the continuing effects of racial discrimination play a central role.^{25/} Indeed, Congress so found when it enacted the minority set-aside program upheld in Fullilove. And it is likewise apparent that those effects account

^{22/} See 1982 Survey of Minority-Owned Business Enterprises (Bureau of the Census, MB82-3), Table 1. The figures for Japanese-owned and Chinese-owned enterprises were 73.3 % and 86%, respectively. *Id.* In contrast, 68% of all business enterprises had no paid employees. Statistical Abstract of the United States 1986, Tables 874 & 876; County Business Patterns, 1982: U.S. Summary (Bureau of the Census).

^{23/} See 1982 Survey of Minority-Owned Business Enterprises (Bureau of the Census, MB82-3), Table 8, for data on enterprises owned by Asians, American Indians and Pacific Islanders as a whole. Asian-owned enterprises accounted for at least 85% of the total (see *id.*, Table 1). For the country at large, enterprises with less than 5 employees were 53.7% of those with paid employees. See County Business Patterns, 1982: U.S. Summary (Bureau of the Census).

^{24/} See Daniels, Asian America 317-44 (1988).

^{25/} See A Common Destiny, at 5 (the "legacy of discrimination and segregation" continues to affect attempts by black Americans to "remov[e] barriers" to competitive access).

for the negligible percentages of minority ownership in the broadcasting and cable media.

And these economic patterns are by no means the only legacy of discrimination. Political participation, housing, education, health care, as well as the aspirations and self-concept of minorities and nonminorities were and are affected by society-wide discrimination. Discrimination is a complex and pervasive factor in all of our lives.

It cannot seriously be argued that the low percentage of minorities in radio and television ownership is by their choice -- that racial minorities are disproportionately attracted to fields other than broadcasting and cable.^{26/} In fact, minority ownership percentages in all industries are low.^{27/} Only in Transportation and Public Utilities, Retail Trade and Services did minorities account for more than 5% of the total in 1982,^{28/} and the attraction of those fields plainly stemmed primarily from low

^{26/} Judge Silberman made such a suggestion in Shurberg. See 876 F.2d at 915 (opinion of Judge Silberman).

^{27/} As of 1982, minority-owned enterprises constituted 5.8% of the country's 14,546,000 business units, 2.8% of the 4,633,960 with paid employees and 1.3% of the 2,146,924 with 5 or more paid employees. See the sources cited in notes 21-23, supra.

^{28/} As of 1982, the minority ownership figures for Transportation and Public Utilities (which includes, e.g., taxi services), Retail Trade and Services were 7.7% (90% of which had no paid employees), 7.55% (80% of which had no paid employees) and 6.46% (67% of which had no paid employees). See the sources cited in notes 21-23, supra.

capital requirements (together, in some cases, with an advantage for minority-owned firms in attracting customers of the same ethnic group).^{29/}

The case of the supposed "model minorities" is, I suggest, highly instructive. As of 1982, the overwhelming majority of businesses owned by Chinese Americans and Japanese Americans were tiny enterprises engaged in Retail Trade or Services (or, in the case of Japanese Americans, Agricultural Services).^{30/} It would be absurd to suggest that this pattern is simply due to some special affinity of Chinese Americans, or of Japanese Americans for the ownership of small businesses. Whatever the cultural factors at work, discrimination against these minorities has clearly played an important role in shaping the business opportunities available to them.

^{29/} See A Common Destiny, at 180-83, 314-15.

^{30/} Retail Trade and Services accounted for 74.4% of Chinese-owned firms and 63.6% of Japanese-owned firms. See 1982 Survey of Minority-Owned Business Enterprises (Bureau of the Census, MB82-3), Table 1. An additional 10% of the Japanese-owned firms were enterprises in Agriculture -- mainly Landscape and Horticulture -- with no paid employees. Id. For the country as a whole, Retail Trade and Services accounted for 56.5% of all firms. See Statistical Abstract of the United States 1986, Table 876.

b. The Maturity of the Broadcasting Industry

There is yet another factor that accounts for the low percentage of minority ownership in radio and television. By the 1970s, when the FCC adopted its minority preference policies, the industry was already a mature one, and the frequency spectrum, particularly for AM radio and VHF television stations, already well saturated.^{31/} New licensing was largely confined to FM radio and UHF television stations, primarily in smaller markets.^{32/} There was limited opportunity for any prospective broadcaster -- minority or nonminority -- to own a radio or television station by any means other than through the purchase of existing stations.^{33/}

^{31/} As of the end of June 1973, licenses for 765 of (66.6%) of the 1,149 commercial television stations that existed in mid-1989 had already been awarded. See 39 FCC Ann. Rep./Fiscal Year 1973, at 194 & 197. As for VHF stations, 521 (91.4%) of the 570 authorized today had been licensed by the middle of 1973. *Id.* The situation with regard to radio stations was not materially different. Of the 10,209 AM and FM radio stations authorized by the FCC as of the middle of this year, 6,994 (68.5%) had been handed out by the middle of 1973, while some 4,434 (85%) of the AM stations had likewise been awarded at that time. *Id.*

^{32/} From 1974 through 1984, the FCC authorized 364 new UHF and 38 new VHF stations (including "low power" TV stations), along with 1,377 new FM and 469 new AM stations. See 41 FCC Ann. Rep./Fiscal year 1975 at 95; 51 FCC Ann. Rep./Fiscal year 1985 at 35.

^{33/} Displacement of an existing broadcaster in favor of a competing applicant who files at the time of license renewal has always been extraordinarily rare. See, e.g., *Central Florida Enterprises, Inc. v. FCC*, 598 F.2d 37 (D.C. Cir. 1978), cert. dismissed, 441 U.S. 957 (1979). Occasions when an existing

(continued...)

But that method of entering the industry has, of course, generally been closed off to minorities due to economic barriers.^{34/}

2. The Minority Ownership Policies as Nonremedial Measures: The Contribution to a Diversity of Viewpoint

For the reasons I have outlined, action by the Congress to remedy the effects of society-wide discrimination upon minority ownership in broadcasting and cable is fully warranted. As I have argued, however, that action need not and should not be confined to compensating "victims" or aiding "disadvantaged entities." For the country has a special interest in the diversity of viewpoint

^{33/} (...continued)
authorization has been revoked or otherwise terminated and the relevant frequency has been opened to new applications have been somewhat more common, but still very infrequent. From 1944 through 1984, the FCC revoked or otherwise terminated the licenses or permits of 16 television stations and 101 AM or FM radio stations. See 53 FCC Ann. Rep./Fiscal Year 1987 at 35 and 36. By contrast, from 1981 through 1984 alone, 256 television stations and 2800 AM or FM stations changed hands by assignment or transfer. See *Antitrafficking of Broadcast Licenses*, Hearings before the Subcommittee on Telecommunications and Finance of the House Committee on Energy and Commerce, 100th Cong., 1st Sess. on H.R. 1187, at 104, 163 (1987).

^{34/} The tax certificate device, the only one applicable to cable television, was not extended to minority purchases of cable systems until December 1982. *Minority Ownership of Cable Television Facilities*, 52 Rad. Reg. 2d (P&F) 1469 (1982). At that point, there were some 6,000 operating cable systems, 67% of the 9,000 now operating. See *Television & Cable Factbook* at C-375 (1989). At the time the FCC acted, there were some 15,000 cable franchises outstanding, of which only 45 were held by members of racial minority groups. See 52 Rad. Reg. 2d at 1471.

and perspective in the services provided by those media, and all of us are harmed by the loss of the special contribution to that diversity that minority owners can make.

Radio and television, as I have suggested, play an enormous role in American life. More households have radio and television sets than have telephones.^{35/} Americans spend major portions of their time with these media, and derive much of their information about the world from their services.^{36/} It is a matter of high national importance that the programming and editorial decisions governing those services reflect the diversity of the country as a whole.

Our diversity is one of the great strengths of this country. The different racial, ethnic and cultural heritages that are reflected in our population are a source of enrichment for all of us. In that sense we are not a melting pot but a democracy that values these backgrounds as equally valuable and deserving of respect.

^{35/} Some 99% of all households have radio sets (Radio Facts 1986-87, Radio Advertising Bureau, p.3); 98% have television sets. 57 Television Cable Factbook (1989) at C-331. Only 93.3% of households have telephones. See Telephone Subscribership in the U.S., FCC Common Carrier Bureau, Industry Analysis Division (Aug. 1989).

^{36/} See Broadcasting-Cablecasting Yearbook 1988, at A-2.

This is a limited concept. I do not mean to suggest that the FCC should seek to allocate a certain percentage of its licenses to, for example, members of various political parties. The diversity rationale that I advance does not stand alone, but exists in tandem with the rationale of remedying the continuing effects of discrimination. That is why I find the categories of remedial and nonremedial somewhat misleading. My diversity rationale, therefore, does not extend further than those minority groups that were victims of society-wide and pervasive discrimination.

The FCC has long sought to encourage a diversity of viewpoints in radio and television service by diversifying the ownership of broadcast media, at both the local and the national level. "The vitality of our system of broadcasting," it has said, "depends in large part on the introduction into this field of licensees who are prepared and qualified to serve the varied and divergent needs of the public," and the "operation of broadcast stations by a large group of diversified licensees" will "maximize diversification of program and service viewpoints."^{37/} Its thesis has been that "news communicated to the public is subject to selection, to editing, and that in addition there may be diversity

^{37/} Multiple Ownership of AM, FM & Television Broadcast Stations, 18 F.C.C. 288, 291 (1953).

in method, manner and emphasis of presentation."^{38/} Placing "the power to control what the public hears and sees" in many hands is therefore expected to produce a greater diversity of editorial perspective.^{39/}

Acting on this thesis, the FCC has limited the radio and television stations that any one party may own, and has restricted the cross-ownership of broadcast stations and media such as newspapers and cable in any given area. The Supreme Court has held that these policies "promote free speech" and "further . . . 'the system of freedom of expression.'"^{40/}

The barriers to minority ownership I have discussed frustrate the full achievement of this diversity goal. Given those barriers, race-neutral policies promoting ownership diversity do not of themselves provide anything like a real chance for racial minorities to make the distinctive contribution to viewpoint diversity they could otherwise make. The minority ownership policies, which seek to overcome those barriers, are

^{38/} Scripps-Howard Radio, Inc. v. FCC, 189 F.2d 677, 683 (D.C. Cir.), cert. denied, 342 U.S. 830 (1951).

^{39/} Multiple Ownership of Standard, FM & Television Broadcast Stations, 22 F.C.C.2d 306, 310 (1970).

^{40/} FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775, 801, 802 (1978).

thus a complementary part of the larger effort to achieve viewpoint diversity.

a. Legal Objections to Diversity Rationale

A variety of objections have been raised to the use of minority ownership preferences for this purpose. It has been suggested that only "remedial" objectives can qualify as a "compelling interest" under the "strict scrutiny" approach.^{41/} As I have shown, however, the minority ownership policies are "remedial." They seek to remedy the continuing effects of society-wide discrimination in the broadcasting and cable fields. The source of this "remedial only" argument is Justice O'Connor's statement in Croson that race-conscious government actions create a risk of "stigma" unless they are "strictly reserved for remedial settings."^{42/} This stigma rationale seems wholly inapposite to ownership. Moreover, Justice O'Connor had earlier recognized unequivocally that at least some nonremedial purposes are valid.^{43/} As Chief Judge Wald pointed out in Shurberg, "a brief, ambiguous reference in a case involving a quite different plan" does not suggest that Justice O'Connor has "now abandoned

^{41/} See Shurberg, 876 F.2d at 919-20 (opinion of Judge Silberman).

^{42/} Croson, 109 S. Ct. at 721.

^{43/} Wygant, 476 U.S. at 286 (O'Connor, J., concurring).

[nonremedial] rationale[s] entirely."^{44/}

The principal instance in which the Supreme Court has recognized a nonremedial justification is the Bakke case, in which the Court not only struck down an admissions plan for a state medical school that set aside a specified number of positions for minority applicants, but also (as is often overlooked) reversed a lower court injunction requiring the school to follow an entirely color-blind approach. Justice Powell's pivotal opinion held it vital to the educational mission that university students have "wide exposure to the ideas and mores of [other] students as diverse as this Nation of many peoples,"^{45/} and declared that race could be taken into account as one factor affecting the desired diversity. He expressly analogized this state interest to the First Amendment interest in a diversity of control and viewpoint in mass media.^{46/}

Judicial opponents of the minority ownership policies argue that this recognition of the diversity goal was limited to the higher education setting, as if it could be cordoned off as

^{44/} Shurberg, 876 F.2d at 942 (dissenting opinion of Chief Judge Wald).

^{45/} Bakke, 438 U.S. at 313.

^{46/} Id. at 314-15.

the only context in which diversity is a valid goal.^{47/} That argument seems to me to put the issue exactly backwards. If the diversity goal has any legitimacy as a basis for race-conscious action (and I think it plainly does), the pursuit of that goal cannot be confined behind ivy-covered walls. Its most important application lies in the media, to which the country at large -- including millions who may otherwise have little contact with minorities in their daily lives -- has access.

b. Factual Objections to Diversity Rationale

It is further argued that there is inadequate factual basis for the belief that minority ownership leads to the presence of minority viewpoints and perspectives in radio and television service -- that any assumption to this effect is the product of unthinking, constitutionally offensive reliance upon racial stereotypes.^{48/} The discussion of this point has often been confused by an assumption that the goal of the minority ownership policies is to produce programs addressed to the tastes and interests of racial minorities.^{49/} That, I suggest, is plainly

^{47/} See, e.g., Shurberg, 876 F.2d at 919-20 n.27 (opinion of Judge Silberman).

^{48/} See id. at 922-23 (opinion of Judge Silberman); Winter Park, 873 F.2d at 361 (Williams, J., concurring in part and dissenting in part).

^{49/} See, e.g., Shurberg, 876 F.2d at 922-23 (opinion of (continued...))

wrong. The diversity sought by those policies is for the benefit of the country as a whole -- not just minorities.^{50/} It may be reflected in programs that appeal to minority tastes, but it is also important in programs that appeal to everyone. And there is substantial factual basis for the belief that such diversity can be better achieved if there are greater opportunities for minorities to acquire positions of power and leadership in the broadcast and cable media.

Consider, for example, the case in which a minority owner participates actively, on a daily basis, in the editorial decisions of his or her station or cable system. There is nothing unthinking or stereotypical in the view that membership in a minority group gives one a set of distinctive viewpoints and perspectives.^{51/} Those viewpoints and perspectives must

^{49/} (...continued)
Judge Silberman); Winter Park, 873 F.2d at 358-61 (Williams, J., concurring in part and dissenting in part).

^{50/} See West Michigan, 735 F.2d at 610, 614; Shurberg, 876 F.2d at 942-44 Shurberg, (opinion of Chief Judge Wald).

^{51/} See Bakke, 438 U.S. at 314 (opinion of Powell, J.) ("medical student[s] with a particular background -- whether it be ethnic, geographic, culturally advantaged or disadvantaged -- [have their own distinct] experiences, outlooks, and ideas"); see also A Common Destiny, at 200; H. Schuman, C. Steeh & L. Bobo, Racial Attitudes in America: Trends and Interpretations 143, 162 (1985). Even opponents of racial preferences concede this point. See After Lucas, Wall St. Journal, Aug. 14, 1989, at A8 col. 1 (arguing that President Bush's nominee to head Civil Rights Division would have brought unique minority perspectives to job). Indeed, some insist upon the importance of the differing cultures (continued...)

necessarily affect the editorial decisions of such a minority owner. Like any other owner, he will no doubt respond to the imperatives of running a business and meeting a payroll.^{52/} But there is more than one way to respond to marketplace imperatives. If marketplace forces make the personal qualities of owners irrelevant to the conduct of the media they own, it is hard to understand why the FCC, in an era of unprecedented deregulation and reliance upon the marketplace, continues to concern itself with the "character" of its broadcast licensees.^{53/}

Where the minority owner does not participate actively in daily decisions, the link between his minority status and the service to the public is less direct. But his power to affect those decisions is nonetheless real. Minority owners, for example, are more likely to entrust day-to-day decisionmaking to other minorities. As of September 1986, there were 14 black or Hispanic General Managers of television stations in the United States. Half of those 14 were at stations owned or controlled by

^{51/} (...continued)
of ethnic groups. See T. Sowell, The Economics and Politics of Race 244 (1983); T. Sowell, Ethnic America 280-86 (1981).

^{52/} Cf. Shurberg, 876 F.2d at 923 (opinion of Judge Silberman) ("it is not at all apparent why a station owner, be she minority or nonminority, would make programming decisions according to her personal tastes rather than in response to the demands of the marketplace.").

^{53/} See Policy Regarding Character Qualifications in Broadcast Licensing, 102 F.C.C. 2d 1179, recon. denied, 1 FCC Rcd. 421 (1986).

minorities.^{54/} Similarly, as of 1980, there were some 64 radio stations that engaged primarily in Spanish-language broadcasting. Only a fourth of those stations were owned by Hispanics, but over 80% of the Hispanic-owned stations employed a majority of Hispanics in management positions; only a third of the stations owned by Anglos filled a majority of their management positions with Hispanics.^{55/}

Even where minority ownership does not involve the placing of an owner or other minority person in direct editorial control, it necessarily affects the outlook and conduct of those who occupy that position. I urge you to consider, in this regard, the long-standing research studies showing that contact with minority persons of equal or higher status and authority has the effect of dispelling prejudicial preconceptions among nonminority persons.^{56/} There is every reason to believe that lessened prejudice is accompanied by an increased sensitivity to minority perspectives and viewpoints. Moreover, the objective of dispelling racial prejudice is itself a thoroughly compelling

^{54/} National Association of Broadcasters, Minority Broadcasting Facts 9-10, 55-57 (1986).

^{55/} See Schement and Singleton, The Onus of Minority Ownership: FCC Policy and Spanish-Language Radio, J. Comm. at 78, 80-81 (Spring 1981).

^{56/} See, e.g., Amir, "The Role of Intergroup Contact in Change of Prejudice and Ethnic Relations," in Towards the Elimination of Racism 264-67 (1976).

goal, which is closely related to the goal of achieving viewpoint diversity.

Opponents of the minority ownership policies argue that the radio or television audience does not know the identity of the owner and hence that minority ownership cannot have such a prejudice-dispelling effect.^{57/} I rather doubt the premise; I think that many people know who owns the stations or cable systems that serve them. But the question is immaterial. If the audience does not know, the manager, the program director, the sales manager and the news director surely do. So do the major advertisers, program suppliers, networks and others who deal with the station or system, as well as its competitors and colleagues in the market and the industry as a whole. All of these individuals and institutions are forced to deal with minority persons on terms of equal or (in the case of employees) inferior status and authority. It is entirely reasonable to expect increased respect for and understanding of minority viewpoints and perspectives.

There have for many years been complaints that the radio and television media not only fail to convey minority viewpoints and perspectives, but portray the world primarily from a majority

^{57/} See Winter Park, 873 F.2d at 357-58 (Williams, J. concurring in part and dissenting in part).

perspective and, in so doing, convey to their audiences a stereotypical view of minorities and an inaccurate view of race relations.^{58/} I am not here to argue the rights and wrongs of those complaints, or to suggest that government at any level can constitutionally seek to dictate the elimination of racial stereotypes or the accurate portrayal of race relations in media programs.^{59/} For the reasons I have suggested, however, minority ownership of radio and television media can work to break down prejudicial preconceptions about minorities and increase sensitivity to minority perspectives among those who exercise editorial power in those media.

There is, to be sure, no easy way to measure any of these effects upon the diversity of radio and television service

^{58/} See, e.g., U.S. Civil Rights Commission, Window Dressing on the Set: Women and Minorities in Television at 48 (1977) (hereinafter "Window Dressing on the Set"); U.S. Civil Rights Commission, Window Dressing on the Set: an Update (1979); National Commission on Working Women of Wider Opportunities for Women, Unequal Picture: Black, Hispanic, Asian and Native American Characters on Television (1989). See also the studies cited in Wimmer, The Future of Minority Advocacy before the FCC, 41 Fed. Comm. L.J. 133, 140-41 nn.24-29 (1989). While such complaints have focused largely on prime time television entertainment, they have been raised as well in connection with news programming. See, e.g., Storer Broadcasting Co., 60 F.C.C.2d 1097, 1103 (1976).

^{59/} The FCC has (quite properly, in my view) refused to engage in any such attempt. See Window Dressing on the Set, *supra* note 58, at 172 (FCC Comments); Minority Ownership of Broadcasting Facilities, 68 F.C.C.2d 979, 981 (1978). See also Storer Broadcasting Co., 60 F.C.C.2d at 1103.

viewpoints. As the Supreme Court has noted, "'diversity and its effects are . . . elusive concepts, not easily defined let alone measured without making qualitative judgments objectionable on both policy and First Amendment grounds.'"^{60/} But the difficulty of measurement does not make the effect any less real or the factual basis for believing it will occur any less sound. Many important decisions must rest, in the end, upon human judgment, informed by the totality of the facts available.

I think, in short, that the minority ownership policies clearly meet the "compelling interest" requirement, as measures designed to redress the continuing effects of society-wide discrimination and to promote viewpoint diversity in the broadcast and cable media. A finding to this effect by Congress, for which there is ample factual basis, would not conclusively resolve the issue in the courts, which must make the ultimate constitutional decision. But such a finding would be entitled to substantial judicial deference.

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FCC v. NCCB, 436 U.S. at 796-97.

C. Narrowly Tailored Analysis

Of course, it is not enough for Congress merely to have established these two related interests -- remedying the effects of past (and present) discrimination and promoting diversity by seeking a greater expression of minority viewpoints and perspectives. In addition, the means chosen to achieve these ends must be "narrowly tailored."

Before addressing whether or not the minority preferences are narrowly tailored, let me make a preliminary comment. Every minority owned company that seeks to acquire a broadcast license must satisfy the various qualifications, including financial qualifications, that the FCC requires of all of its licensees.^{61/} There are no goals or quotas that are associated with the FCC minority preference policies. If there is no minority that can meet the FCC's requirements, the policies have no effect. Said another way, the minority preference policies depend entirely on there being otherwise qualified minorities available; they do nothing to increase those numbers.

I would like to address the three most significant aspects of the narrowly tailored criteria that I think apply to

^{61/} Minorities that seek cable television franchises must likewise meet the requirements of franchising authorities.

these policies and which must be satisfied: (1) who should be the beneficiaries of these policies, (2) the consideration of race-neutral means to achieve these same ends, (3) the burden these policies place on nonminorities.

1. The Beneficiaries

There are two concerns here: (a) can all members of those minority groups that have been victims of society-wide discrimination that has caused their underrepresentation in radio and television ownership benefit from these policies or must well-off minorities be disqualified from being beneficiaries, and (b) should these preferences operate generally throughout the United States or should they be limited geographically to only those areas where there is a local history of discrimination. These concerns were expressed to some extent in Croson, Shurberg, and in the dissent in Winter Park where the issue was whether the preferences should be waived if the beneficiaries were allegedly not themselves "victims" of discrimination. Here, however, those concerns stem, in large part, on a fundamental misunderstanding as to what is being remedied by the FCC minority preference policies.

While is undoubtedly the case that racial discrimination affected poor minorities more obviously than more

well-off minorities, it is undeniable that virtually all minorities were affected. Discrimination on the basis of race is not equivalent to discrimination on the basis of economic class, though there is clearly overlap. And, sadly, racial discrimination continues today and pervades many of our attitudes and expectations, and to some extent our actions. Whether they are so-called "fat cats" or are less well-off minorities, the FCC minority preference policies seek to overcome the barriers that all minorities confront due to discrimination and to include their voices among those that have access to radio and television.

It is important to realize that what is being sought here are viable owners of radio stations, television stations, or cable franchises. These entities must have financial resources to enable them to be in a position to purchase a radio or television station, and if they are successful in acquiring a radio or television station, they must have financial stability in order to have an impact on the industry at large.

With respect to the question of geographic scope, the minority preference policies address discrimination that is nation-wide. In a very real sense we, as a nation, have national attitudes toward race. Most of these are not conscious attitudes. It matters little that someone comes from Montana or Texas or Alaska or Washington D.C. We have much common history.

Significantly, the beneficiaries of these policies are not just the minorities that become licensees, but also the audiences that will be able to hear a new and different viewpoint and perspective. Radio and television stations do not exist as isolated stations scattered across the country. There is a nationwide industry. Getting into the business is getting into the business, wherever that is.

2. Race-Neutral Alternatives

The Supreme Court requires that before a racial preference can be employed there must have been "consideration of the use of race-neutral means to increase minority business participation." Croson, 109 S. Ct. at 728. Here, there has been more than mere consideration of race-neutral alternatives; there is a long history of the actual operation of race-neutral alternatives designed specifically to achieve diversity among the owners of radio and television licenses. The FCC's "multiple-ownership" rules limit multiple owners and are designed "to achieve the public interest goal of promoting diversity of viewpoints."^{62/} Those rules were instituted well before the minority ownership policies were adopted, and the record is clear that they resulted in no appreciable increase in the number of

^{62/} See Amendment of Section 73.3555, 4 FCC Rcd. 1741, 1743 (1989).

minority owners of radio or television licenses. Congress can certainly rely on this experience in concluding that resort to a racial means was necessary. This is especially so when the results under that preference are taken into account, for in the decade since the adoption of these policies the number of minority licensees has virtually doubled.^{63/}

3. Burden on Nonminorities

The degree of the burden that a racial preference places on nonminorities is also relevant to determining whether the preference is narrowly tailored. It is clear, however, that the use of a race-based measure necessarily requires some nonminorities to bear some degree of burden.^{64/} Neither the comparative preference nor the tax certificate raise any serious concerns on this count. In neither preference are nonminorities excluded from competing for licensees. In the case of the comparative hearing enhancement, race is only one "plus factor" in the FCC's decision-making process. See Winter Park, 873 F.2d at 354.^{65/} Similarly, in the tax certificate situation, there is no

^{63/} Needless to say, the race-neutral alternative of reviewing the program content of all broadcasters to determine their sensitivity to minority views would raise serious First Amendment problems.

^{64/} Wygant, 476 U.S. at 281.

^{65/} Even Judge Silberman recognized that "since race is
(continued...)

foreclosure of nonminorities from competing for licenses. In fact, the overwhelming majority of stations sold after the implementation of this policy were sold without benefit of tax certificates and were sold to nonminorities.^{66/} The availability of a tax certificate is primarily of benefit to the minority purchaser, and in any event is only one factor taken into account by the nonminority seller.

The distress sale policy cannot be so easily squared with this factor. It is undeniable that it operates to foreclose all nonminorities from the market for stations that are under threat of losing their licenses in a designated hearing that does not include a competing applicant. True, the absolute number of such stations -- thirty-eight since the implementation of the policy -- is so small as to argue strongly that the impact that this policy has on nonminorities is of no constitutional

^{65/} (...continued)
only one consideration among many in the comparative license practice challenged in Winter Park, it is distinguishable from the distress sale policy. . . . " Shurberg, 876 F.2d at 907-08 (opinion of Judge Silberman). But see Winter Park, 873 F.2d at 368 (Williams, J. concurring in part and dissenting in part) ("I am unpersuaded that the multi-factored approach in this case -- if that is what it really is -- saves the minority preference scheme.").

^{66/} Since 1978 tax certificates have been granted for sale of 18 television stations and 168 radio stations. "Minority Ownership List," FCC Consumer Assistance and Small Business Division, Office of Public Affairs, August 1989. From just 1981-86, 555 television stations were sold, and from just 1981-85 some 3842 radio stations were sold. See Antitrafficking of Broadcast Licenses, at 104, 163.

significance. This would especially appear to be the case since nonminorities are "free to compete for the vast majority of licensee opportunities available." Shurberg, 876 F.2d at 951 (dissenting opinion of Chief Judge Wald). This argument was rejected by the majority in Shurberg, however, and whatever I may believe to be the better argument, that is not presently the law in the D.C. Circuit.

Furthermore, Congress may not have the same power with regard to a judicial decision that a race-based measure places an unconstitutional burden on nonminorities as it does with regard to a judicial decision that it had not adequately established the interests on which it was predicating the minority policies. In the latter case Congress can, as I suggest it should, better establish the remedial and diversity interests that are served by these policies. With regard to the impact of the distress sale policy on nonminorities, however, it is unclear whether Congress can override the judgment of the D.C. Circuit. That is not to say that there are not ways in which the distress sale policy could be revised to avoid this problem. I have not undertaken to suggest ways in which that could be accomplished in my testimony.^{67/}

^{67/} There are other aspects of the narrowly tailored analysis that I have not discussed. For example, the minority ownership policies should not be completely open-ended. That is, there should a clear time limit on the program or, alternatively, periodic review of the effectiveness and continued need for the programs. Congressional oversight hearings should suffice. While
(continued...)

CONCLUSION

In addressing matters of racial discrimination there is no branch of government that has greater powers than the Congress. Cities and states may be restricted to seeking to remedy the effects of discrimination in their jurisdictions; Congress can look at our entire society. A federal court may have limited remedial powers; Congress has broad legislative powers. The Congress has broad fact finding powers, vast remedial powers, and given its unique role, a special obligation to see that discrimination and its effects are rooted out. Our democracy is dependent on communications and the competition of ideas and viewpoints. In a fundamental way, the lack of minority ownership in broadcasting undermines the diversity that is our strength. Ensuring that this diversity is fostered is at least as important a governmental interest as rooting out the continuing effects of discrimination.

^{67/} (...continued)

Congress has set no goals or numerical targets, it should have some base line from which it can judge the success of the program. At this point, where the numbers of minority owners are so small, and given the modest approach taken by these policies, this does not require much analysis. But these are only minor points that are raised by these policies, and therefore I have chosen to address in some detail only the major ones.

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METRO BROADCASTING V. FCC MEMO, BRIEF

Divider Title: _____

METRO BROADCASTING V. FCC, 497 U.S. 547 (1990)

This is the case in which the Supreme Court reviewed the constitutionality of the FCC's comparative hearing preference and the distress sale policy. Payton was counsel of record on an amicus brief that was filed by the National Lawyers' Committee for Civil Rights Under Law in support of the FCC, which was defending the policies at the Supreme Court. (The Justice Department opposed the policies.) Payton's brief only addressed the comparative hearing preference -- it did not address the distress sale policy.

Repeating many of themes that he sounded in his congressional testimony, Payton's brief defended the comparative hearing preference both as a remedial measure, and as a nonremedial measure designed to promote diversity. Again borrowing from the testimony, the brief also argued that the preference was narrowly tailored.

In his testimony, Payton had recommended that Congress make additional findings to provide further support for the need to remedy the effects of discrimination in broadcasting. Because Congress had not made any such findings by the time that briefs were due, Payton's amicus brief argued that the existing record was sufficient. In particular, the brief placed much weight on that portion of Justice O'Connor's opinion in Croson in which she suggested that Congress can mandate race-conscious measures without making findings of the same degree and precision as state and local governments. The brief stressed that for decades, Congress had repeatedly legislated in the area of civil rights, and thus had made a host of findings on the effects of racial discrimination. Moreover, the brief emphasized that Congress' civil rights experience was complemented in Metro Broadcasting by its familiarity with the workings of the radio and television industry. Payton argued that prior congressional findings in the areas of civil rights and broadcasting had to be considered as part of the evidentiary support for Congress' decision to order the FCC to retain the policies.

In its brief, the FCC only defended its affirmative action policies as nonremedial measures that were intended to promote diversity in broadcasting. In the end, the Supreme Court only addressed that justification for the policies. Thus, it did not take up the remedial issues that were addressed in Payton's brief. By a 5-4 vote, the Court did accept the key argument that the FCC and all of its amici (including Payton) had made: congressionally-mandated affirmative action programs are subject to a lower standard of review than the programs of state and

local governments. Applying intermediate scrutiny rather than strict scrutiny, the Court upheld the FCC's policies.³

³ Justice Brennan wrote the majority opinion. Joining him in the majority were Justices White, Marshall, Blackmun, and Stevens. Justice O'Connor wrote a dissenting opinion. The other dissenters were Chief Justice Rehnquist, and Justices Kennedy and Scalia.

No. 89-453

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

METRO BROADCASTING, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

BRIEF OF LAWYERS' COMMITTEE
FOR CIVIL RIGHTS UNDER LAW AS
AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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remedy the consequences of discrimination in our society. Moreover, the choice of means is a peculiarly legislative function; while a court must review a race-conscious measure to ensure that it is narrowly tailored to meet its objective, the court should not substitute its judgment for the considered judgment of Congress. Indeed, this Court has stated: "We are mindful that '[i]n no matter should we pay more deference to the opinion of Congress than in its choice of instrumentalities to perform a function that is within its power.'" ⁴²

In this case, Congress' choice of means satisfies any reasonable application of the narrowly tailored test. Three general principles governing the narrowly tailored inquiry here deserve mention.

First, some burden on nonminorities is permissible. The dissent below, however, appears to endorse the "unique opportunity" approach taken by Judge Silberman in the *Shurberg* case, which also is currently before this Court.⁴³ Under that approach, it is unacceptable for a nonminority to be denied a particular license—a "unique opportunity

⁴² *Fullilove*, 448 U.S. at 480 (opinion of Burger, C.J.) (quoting *National Mutual Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 603 (1949)). See also *Fullilove*, 448 U.S. at 480 (opinion of Burger, C.J.) ("stress[ing] the limited scope of the Court's [narrowly tailored] inquiry" in cases involving "the legislative authority of Congress"); *id.* at 515 n.14 (Powell, J., concurring) (narrowly tailored analysis "vari[es] with the nature and authority of [the] governmental body"). Notwithstanding these basic tenets, which figure prominently in the opinions of Chief Justice Burger and Justice Powell in *Fullilove*, the Department of Justice makes the bold assertion that "deference is not appropriate in deciding whether the particular remedy chosen by Congress is 'narrowly tailored'" Brief of U.S. at 15. What is most startling is that the Department of Justice claims that the opinions of Chief Justice Burger and Justice Powell support this proposition.

⁴³ *Shurberg Broadcasting of Hartford, Inc. v. FCC*, 876 F.2d 902, 943 (D.C. Cir. 1989), cert. granted sub nom. *Astroline Communications Co. v. Shurberg Broadcasting of Hartford, Inc.*, 110 S. Ct. 715 (1990).

to own a broadcasting station"—because of a minority preference given to a competitor. *Shurberg*, 876 F.2d at 917. Judge Silberman claimed that the minority preference at issue in *Shurberg* was unconstitutional because "[i]t is a Hartford station Shurberg wants and, after all is said and done, he has been absolutely denied an opportunity to compete for one merely because of his race." *Id.* at 918. Similarly, the dissent below complained that "[h]ere, as in *Shurberg*, Metro was denied a comparative hearing on the only new license currently being offered in the Orlando area." *Winter Park*, 873 F.2d at 368 (Williams, J., dissenting).

This approach goes overboard in its attempt to protect the interests of nonminorities. In any case involving a minority preference, the plaintiff will always be able to claim that he did not get a particular thing that he wanted because of the preference. For example, some non-minority contractors undoubtedly lost out on contracts as a result of the minority preference program approved in *Fullilove*. But, as the Court declared in *Fullilove*: "It is not a constitutional defect in this program that it may disappoint the expectations of nonminority firms. When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such a 'sharing of the burden' by innocent parties is not impermissible."⁴⁴

Here, the burden shared by nonminorities is acceptable. The minority preference is only one consideration in the comparative hearing process, and does not automatically preclude nonminorities from acquiring broadcast licenses. Moreover, a broadcast license does not have the sort of personal value that demands utmost protection. Unlike the layoffs of individual teachers at issue in *Wygant*, no one's likelihood is at stake. Nor does the minority pref-

⁴⁴ *Fullilove*, 448 U.S. at 484 (opinion of Burger, C.J.). See also *Wygant*, 476 U.S. at 280-81 (plurality opinion) ("[a]s part of this Nation's dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy").

erence policy upset anybody's "firmly rooted expectation[s],"⁴⁵ since it affects only those who are competing for broadcast licenses, not those who already own them. Finally, ownership of a broadcast license has always been considered a privilege; Congress and the FCC may deny licenses or place restrictions on license owners as required by the public interest.⁴⁶ The failure to obtain such a privilege could hardly be deemed a substantial burden.

Second, the narrowly tailored test should not require that minority preferences benefit only minorities who are shown to be actual "victims" of discrimination.⁴⁷ Such a requirement would be illogical in a case such as this, where the minority preference serves a goal beyond remedying discrimination. But even where a minority preference is purely remedial, the "victims only" requirement conflicts with this Court's recognition that minority preferences need not be designed to remedy individual cases of discrimination. Justice O'Connor observed in *Wygant*:

[T]he Court has forged a degree of unanimity; it is agreed that a plan need not be limited to the remedying of specific instances of identified discrimination for it to be deemed sufficiently 'narrowly tailored,' or 'substantially related,' to the correction of prior discrimination⁴⁸

As this statement acknowledges, and as Congress has recognized, group remedies can be appropriate because

⁴⁵ *Johnson v. Transportation Agency*, 480 U.S. 616, 638 (1987).

⁴⁶ See generally *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386-92 (1969).

⁴⁷ Some courts have imposed such a requirement. See, e.g., *Shurberg*, 876 F.2d at 912 (opinion of Silberman, J.); *Main Line Paving Co. v. Philadelphia Bd. of Educ.*, 725 F. Supp. 1349, 1361 (E.D. Pa. 1989); see also *Winter Park*, 873 F.2d at 368 (Williams, J., dissenting).

⁴⁸ *Wygant*, 476 U.S. at 287. Cf. *Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 482 (1986) (under Title VII, court-ordered race-conscious relief need not be limited to actual victims of discrimination).

racial and ethnic discrimination is designed to and has in fact oppressed and stigmatized groups. Decades of egregious discrimination against black people, for example, has affected all black people. When a black person benefits from a minority preference, black people as a group move one step closer to overcoming the effects of that discrimination. Requiring beneficiaries of minority preferences to prove that they personally have been victims of discrimination simply misses the point of what minority preferences are trying to remedy.

The argument that minority applicants for broadcast licenses are well-off and do not need preferences misses the mark for the same reason. As a group, minorities are still underrepresented in the pool of qualified applicants for broadcast licenses, as a result of discrimination. Congress determined that without preferences, some minority applicants will win licenses, but minorities as a group will still be greatly underrepresented among broadcast owners, and diversity will suffer. Only the extra push that a preference provides will make up the ground lost by past discrimination.

Third, Congress must have some discretion in its consideration of race-neutral alternatives. As we have argued, Congress has unique power and competence to remedy the consequences of society-wide discrimination, and to decide that race-conscious measures are appropriate. Of course, where the goals of a race-conscious measure clearly may be adequately served by race-neutral means, the race-conscious measure should not be preferred. But when the efficacy of race-neutral alternatives is not so clear, Congress should not be stripped of its discretion to choose how best to implement its remedial policies.⁴⁹ In such situations, Congress certainly should not be required to exhaust race-neutral alternatives before proceeding with race-conscious action; indeed, such a requirement

⁴⁹ See *Fullilove*, 448 U.S. at 508 (Powell, J., concurring) (Congress should not be required to choose the least restrictive means of implementing its goals).

was not even imposed on state and local governments in *Croson*. See 109 S. Ct. at 728.

In this case, Congress reasonably determined that the minority preference in comparative proceedings was necessary. The policy was adopted only after ten years of unsuccessful regulatory efforts to rectify the acute underrepresentation of minority owners in broadcasting.⁵⁰ This informed judgment of Congress was reasonable. It is entitled to deference by this Court.

CONCLUSION

For the reasons stated herein, the decision of the court of appeals should be affirmed.

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⁵⁰ See *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 F.C.C.2d 979, 979-80 (1978). Because of First Amendment restrictions, direct regulation of programming content would be unconstitutional.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-453

METRO BROADCASTING, INC.,
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On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

BRIEF OF LAWYERS' COMMITTEE
FOR CIVIL RIGHTS UNDER LAW AS
AMICUS CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS CURIAE*

The Lawyers' Committee for Civil Rights Under Law is a nonprofit organization established in 1963 at the request of the President of the United States to involve leading members of the bar throughout the country in a national effort to insure civil rights to all Americans. Through its national office in Washington, D.C., and its several affiliate Lawyers' Committees, such as the Washington, D.C., Lawyers' Committee for Civil Rights Under Law, the organization has over the past 27 years enlisted the services of thousands of members of the private bar in addressing the legal problems of minorities and the poor in voting, education, employment, housing, mu-

nicipal services, the administration of justice, and law enforcement.¹

SUMMARY OF ARGUMENT

Racial and ethnic discrimination continues to impose significant barriers to the opportunities of minorities throughout our society. Congress has unique power and competence to identify and remedy the effects of this society-wide discrimination, and should be given latitude to utilize racial preferences where it concludes they are appropriate. This congressional power stems in large measure from the Reconstruction era amendments, which gave Congress preeminent authority over matters of race and entrusted Congress to enforce the constitutional guarantees of equality.

In this case, Congress has confronted the tangible present-day effects of society-wide discrimination on the vitally important broadcast industry. It has concluded that this discrimination has resulted in the virtual absence of minorities from the ranks of owners of broadcast licenses, which in turn has practically excluded minority viewpoints from the airwaves. In addition to the interest in remedying discrimination for its own sake, Congress has a substantial interest in promoting a diversity of perspectives in broadcasting. And, Congress has good reason to believe that a minority preference policy in awarding broadcast licenses will in fact enhance diversity in broadcasting. This diversity interest further supports Congress' use of racial preferences.

Congress' action is entitled to substantial deference by this Court. Although there must be judicial review of the factual support underlying any race-based measure, here that review must take into account Congress' wealth of experience in addressing the problems of discrimination and its familiarity with the realities and complexities of

¹ The parties have consented to the filing of this brief. Letters of consent are on file with the Clerk of the Court.

the broadcasting industry. Similarly, while the minority preference should be narrowly tailored to its objectives, Congress must have leeway in its choice of means. It should be permitted to employ group remedies that do not require its beneficiaries to prove they are "victims" of discrimination, and that place some burden on nonminorities without upsetting firmly rooted expectations.

ARGUMENT

This case concerns the power of Congress to respond to problems caused by racial and ethnic discrimination in our society. The Lawyers' Committee for Civil Rights Under Law believes that Congress has unique competence to identify these problems and must be given the necessary latitude to address them. This principle was at the core of a series of landmark decisions more than two decades ago in which this Court upheld sweeping federal legislation designed to combat society-wide discrimination against racial and ethnic minorities.² It was also this principle that guided this Court's decision in *Fullilove v. Klutznick*, 448 U.S. 448 (1980), upholding Congress' de-

² See *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 442-43 (1968) (42 U.S.C. § 1982 intended to address society-wide racial discrimination that was "herd[ing] men into ghettos and mak[ing] their ability to buy property turn on the color of their skin"); *Katzenbach v. Morgan*, 384 U.S. 641, 652-53 (1966) (section 4(e) of Voting Rights Act designed to guarantee equal rights to all Americans); *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966) (Voting Rights Act deemed appropriate response to the "insidious and pervasive evil" of racism); *Katzenbach v. McClung*, 379 U.S. 294, 301 (1964) (characterizing the racial discrimination prohibited by Title III of 1964 Civil Rights Act as a problem of "nationwide scope"); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 257 (1964) (describing society-wide discrimination as "a moral problem" with "disruptive effects"); see also *Oregon v. Mitchell*, 400 U.S. 112, 133 (1970) (opinion of Black, J.) (since racial and ethnic discrimination is "a serious national dilemma that touches every corner of our land," Congress has power to "deal with [this problem] with nationwide legislation").

termination that in order to redress the lingering effects of past racial and ethnic discrimination on public contracting, it was necessary to take the race and ethnicity of contractors into account.

This principle of congressional competence carries even greater force in this case, because here Congress is addressing the consequences of past racial and ethnic discrimination in an area of vital national concern—broadcasting—over which it traditionally has exercised broad oversight.³ Congress has concluded that the virtual absence of minorities from the ranks of owners of broadcast licenses is a result of past society-wide discrimination, and has limited the diversity of perspectives conveyed over the nation's airwaves.⁴ The preference granted to minorities in comparative licensing proceedings reflects a considered response on the part of Congress to this deeply vexing problem.⁵ We urge the Court to uphold it.

³ See *FCC v. League of Women Voters*, 468 U.S. 364, 376-77 (1984) (Court has "long recognized" that Congress must have ability to regulate "scarce and valuable resource" of broadcast licenses and "seek to assure that the public receives . . . a balanced presentation of information on issues of public importance"); *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 103 (1973) (Court must review challenges to broadcast regulation mindful of Congress' extensive role in "the development of our broadcast system [for] over [a] half century").

⁴ Some defenders of the minority preference policy have argued that its objective is not to remedy the effects of past discrimination, but rather to serve the "non-remedial" objective of promoting a diversity of perspectives in broadcasting. While the policy does have this diversity objective, see *infra* Part II, its "non-remedial" elements cannot be divorced from the remedial elements. For if not for past discrimination, there would be no need to take affirmative steps to increase minority ownership of broadcast licenses as a means of increasing the diversity of perspectives to which the television and radio audience is exposed.

⁵ Congress clearly has acted here. After holding a series of hearings between 1982 and 1987 on minority ownership of broadcast licenses, Congress ordered the FCC to continue granting a minority

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I. CONGRESS MAY USE MINORITY PREFERENCES TO REMEDY THE PRESENT EFFECTS OF SOCIETY-WIDE DISCRIMINATION ON BROADCASTING

A. Congress Must Be Allowed to Remedy the Consequences of Society-Wide Discrimination Through Race-Conscious Measures

Our nation still suffers from the legacy of racial discrimination. In many sectors of our society, the gaps between minorities and nonminorities are enormous.⁶ While other factors also may be at work, society-wide discrimination is responsible, in large part, for our failure to resolve what in 1944 Gunnar Myrdal labeled the "American

preference in comparative proceedings. That directive, which came in the 1987 appropriations bill, passed both the House of Representatives and the Senate, and was signed into law by the President. See Pub. L. No. 100-202, 101 Stat. 1329-31 (1987). Congress issued similar directives to the FCC in the 1988 and 1989 appropriations bills. See Pub. L. No. 100-459, 102 Stat. 2186, 2216-17 (1988); Pub. L. No. 101-162, 103 Stat. 1020 (1989). Together, the three measures demonstrate that the minority preference policy is one that is mandated by Congress.

⁶ The evidence of continuing discrimination-related disparities between the races is by now disturbingly familiar: Minorities are disproportionately trapped in the cycle of poverty and crime that grips our inner cities; their educational achievements lag far behind those of nonminorities; and they are far more likely to feel alienated from, and disillusioned with, our nation's political and social institutions. See, e.g., B. Blauner, *Black Lives, White Lives: Three Decades of Race Relations in America* (1989); C. Wilkinson, *American Indians, Time and the Law: Native Societies in a Modern Constitutional Democracy* (1987); W. Wilson, *The Truly Disadvantaged: The Inner City, the Underclass and Public Policy* (1987); *The Mexican American Experience: An Interdisciplinary Anthology* (R. de la Garza ed. 1985); Committee on the Status of Black Americans, *A Common Destiny: Blacks in American Society* (1989); American Council on Education and the Education Commission of the States, *One-Third of a Nation: A Report of the Commission on Minority Participation in Education and American Life* (1988); U.S. Dept. of Commerce, *Statistical Abstract of the United States*, Tables 634, 747 (1989).

Dilemma.”⁷ Congress must be permitted to address the present-day consequences of past society-wide discrimination, through race-conscious measures if appropriate.

1. Past society-wide discrimination has concrete effects today that Congress must have latitude to address

Where society-wide discrimination has resulted in specific identifiable problems—in this case, a virtual absence of minority broadcasters and an accompanying lack of diversity in broadcasting—it is not an “amorphous” concept that is “ageless in its reach into the past.”⁸ Rather, it is a concrete, tangible phenomenon that continues to haunt us. In view of the formidable barriers that society-wide discrimination still poses to the opportunities of minorities, “Congress properly may—and indeed must—address directly the problems of discrimination in our society,” and in some situations must be able to do so through race-conscious means.⁹

⁷ G. Myrdal, *An American Dilemma: The Negro Problem and Modern American Democracy* (1944). As a report released by the National Research Council only last year conclusively demonstrates, Myrdal’s label is, unfortunately, still an apt one. See *A Common Destiny*, *supra* note 6, at 5 (“legacy of discrimination and segregation” continues to hinder attempts by black Americans to “remov[e] barriers” to full participation in society). That report also reveals the persistence of the problems that were described in the seminal 1968 Report of the National Advisory Commission on Civil Disorders [hereinafter “Kerner Commission Report”]. See also K. Karst, *Belonging to America: Equal Citizenship and the Constitution* ch. 9 (1989) (past discrimination is contributing factor to the condition of minorities who constitute a disproportionate percentage of the marginalized poor in America).

⁸ *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706, 723 (1989) (quoting *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 307 (1978) (opinion of Powell, J.)).

⁹ *Fullilove*, 448 U.S. at 499 (Powell, J., concurring). See *id.* at 482 (opinion of Burger, C.J.) (“[w]e reject the contention that in the remedial context Congress must act in a wholly ‘color-blind’ fashion”).

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Like this case, *Fullilove* involved congressional action to remedy a problem in an important industry, public contracting, caused by the continuing effects of past discrimination. In adopting the race-conscious measure at issue there, Congress concluded that existing race-neutral procurement practices were resulting in the "perpetuation of the effects of prior discrimination which had impaired or foreclosed access by minority businesses to public contracting opportunities." 448 U.S. at 473 (opinion of Burger, C.J.).¹⁰ Notably, these were "barriers to competitive access which had their roots in racial and ethnic discrimination, and which continue today, even absent any intentional discrimination or other unlawful conduct." *Id.* at 478 (opinion of Burger, C.J.). Because race-neutral action only reinforced a racially skewed system of contracting, Congress decided that race-conscious action was appropriate to overcome the legacy of discrimination.

Last term's decision in *Croson* reaffirmed that Congress may predicate race-conscious action on the need to cure the identified present-day consequences of past society-wide discrimination. The plurality declared that while state and local governments may use race-conscious measures only to remedy identified discrimination in particular sectors and industries within their jurisdictions, Congress may do so to "redress the effects of society-wide discrimination."¹¹

¹⁰ See *Fullilove*, 448 U.S. at 505-06 (Powell, J., concurring) (past discrimination, which was not "identified with . . . exactitude," had effects that were being perpetuated by present procurement practices); *id.* at 520 (Marshall, J., concurring) ("present effects of past racial discrimination" continued to impair access of minority businesses to public contracting opportunities); see also *Croson*, 109 S. Ct. at 718 (plurality opinion) (Congress' action in *Fullilove* was predicated on belief that the "effects of past discrimination had impaired the competitive position of minority businesses").

¹¹ *Croson*, 109 S. Ct. at 719. This reaffirmation of *Fullilove* is not acknowledged by the Department of Justice. Nowhere does it come to grips with the fact that, unlike the City of Richmond,

While it may be true that in the short run the use of racial and ethnic preferences to remedy the effects of past society-wide discrimination "carries a danger of stigmatic harm,"¹² in the long run minority preferences are designed in part to overcome stigma. Stigma is, after all, an intended product of discrimination: "[I]t is hardly consistent with the respect due to these States, to suppose that they regarded . . . as fellow-citizens and members of the sovereignty, a class of beings whom they had thus stigmatized; whom, as we are bound, out of respect to the State sovereignties, to assume they had deemed it just and necessary thus to stigmatize, and upon whom they had impressed such deep and enduring marks of inferiority and degradation." *Dred Scott v. Sandford*, 60 U.S. (19 Howard) 393, 416 (1857).¹³ Stigma continues to this day. In employing minority preferences, Congress has concluded that ultimately, stigma can only be overcome by more minorities performing in positions of consequence and thereby breaking down stereotypes and dispelling prejudices that were formed by stigma in the first place.

Congress may tackle society-wide discrimination through race-based measures. Instead, the Department of Justice injects the *Croson* limitations on state and local government action into this case and condemns Congress for failing to have identified discrimination with the degree of particularity that this Court required of the City of Richmond. The questions that the Department of Justice poses—whether there was any evidence of prior discrimination against minorities by the FCC or in the broadcasting industry—are the wrong ones to be asking here. See Brief of the United States as *Amicus Curiae* Supporting Petitioner at 20-21 [hereinafter "Brief of U.S."].

¹² *Croson*, 109 S. Ct. at 721. Here, though, there is very little danger of stigmatic harm, since minorities must meet basic financial qualifications and the other qualifications for a broadcast license are unrelated to "merit."

¹³ See also *Brown v. Board of Educ.*, 347 U.S. 483, 494 (1954) ("To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone").

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2. *The Constitution gives Congress the unique power to address the consequences of society-wide discrimination*

Congress has unique power to remedy the consequences of society-wide discrimination, and its judgments about how to exercise that power are entitled to deference. Congress' special authority in matters of race derives, in large part, from the positive grant of legislative power that it enjoys pursuant to the Thirteenth, Fourteenth and Fifteenth Amendments, all of which were adopted during the post-Civil War Reconstruction era.¹⁴

As this Court stated in *Croson*, the Reconstruction era amendments "worked a dramatic change in the balance between congressional and state power over matters of race."¹⁵ The amendments firmly established that Congress is the political institution uniquely competent to address society-wide problems related to racial discrimination, problems of national dimension. Having lived through the discord of the Civil War, the architects of the amendments were suspicious of local government when it came to race, and thus "limit[ed] the power of the states and enlarg[ed] the powers of Congress" so as to unify the nation again. *Ex parte Virginia*, 100 U.S. 339, 345 (1879).

Consequently, as this Court has recognized, "in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guaran-

¹⁴ As Chief Justice Burger pointed out in *Fullilove*, Congress may also address the effects of society-wide discrimination under its Commerce and Spending Powers. *Fullilove*, 448 U.S. at 475-76.

¹⁵ *Croson*, 109 S. Ct. at 719. *See id.* at 736 (Scalia, J., concurring) (Congress' powers "concerning matters of race were explicitly enhanced by the Fourteenth Amendment"); *see also United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144 (1977) (under Fifteenth Amendment Congress can compel states to take action to ensure guarantees of full citizenship).

tees." *Fullilove*, 448 U.S. at 483 (opinion of Burger, C.J.). Congress' remedial power is not restricted to situations where state action has violated the Constitution. The enforcement provisions of the Reconstruction era amendments not only authorize Congress to ensure that states comply with the principles of equality, but also to "define situations . . . that threaten [those] principles . . . and to adopt prophylactic rules to deal with those situations." ¹⁶

These prophylactic rules may be race-based. In *Fullilove*, Congress had determined that the existing government contract procurement system perpetuated the effects of past discrimination and denied minorities equality under the law. This Court held that Congress could pre-

¹⁶ *Croson*, 109 S. Ct. at 719. See *Katzenbach v. Morgan*, 384 U.S. at 648-50; see also *City of Rome v. United States*, 446 U.S. 156, 177 (1980) (Congress could adopt rule barring certain state conduct with respect to voting as a means of promoting purposes of Fifteenth Amendment, even where state arguably had not violated the Amendment).

Nevertheless, the Department of Justice insists that "unlawful" state action must be implicated before Congress can legislate under section 5 of the Fourteenth Amendment, and from there argues that there is no such action here since broadcast licensing only involves the federal government, not the states. Brief of U.S. at 18 n.10. But even assuming that unlawful state action is required, the Department of Justice's argument is wrong, for it was states that perpetrated and tolerated much of the society-wide discrimination that is to be remedied here. In any event, the question of the existence of state action—lawful or unlawful—is academic. Congress clearly can address problems of race relations under the Thirteenth Amendment and the Commerce Clause, both of which apply to purely private as well as state action. See *Fullilove*, 448 U.S. at 475 (opinion of Burger, C.J.) (approving remedial legislation that affected private conduct under Congress' Commerce Power); *Norwood v. Harrison*, 413 U.S. 455, 470 (1973) (private discrimination subject to remedial legislation under section 2 of Thirteenth Amendment). Furthermore, Congress may be able to remedy private discrimination under section 5 of the Fourteenth Amendment. See *United States v. Guest*, 383 U.S. 745 (1966); *Katzenbach v. Morgan*, 384 U.S. at 652-53.

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The shifting of power to government after the republican political and others.¹⁸ Madison's factionalism, particularly the democratic process.¹⁹ His solution rises above the fray of national dimensions, checks and balances, factions and even o

¹⁷ See *Fullilove*, 448 U.S. at 483; also *UJO v. Carey*, 430 U.S. 147, 154 (1977) (to act on the basis of race).

¹⁸ See L. Tribe, *Am* (Reconstruction era a national government with more liberties than local governments/*Constitutional Law* reconstruction era amendments "at the creation of republican political institutions" at 736 (Scalia, J., concurring in the result, federal and state (or the substance of the Constitution and governmental theory)).

¹⁹ The Federalist No. 10 (1787) (1961). See also R. D. Sunstein, *Interest Groups* 29, 39-45 (1985).

²⁰ See The Federalist No. 10 at 322-23 (J. Madison).

scribe a race-conscious remedy even absent proof of unlawful discrimination by the states.¹⁷ In this case, as we will show in Part IB, the existing broadcast licensing system also perpetuates the effects of past society-wide discrimination. Here too, Congress has the power to use racial preferences to address the problem.

The shifting of power from the states to the national government after the Civil War embodied in part the republican political theory expounded by James Madison and others.¹⁸ Madison feared that parochial interests and factionalism, particularly at the local level, would subvert the democratic process and the proper operation of government.¹⁹ His solution was a national legislature that would rise above the fray of local factions and deliberate matters of national dimension. It would, of course, operate with checks and balances so as to limit the power of its own factions and even of its majority.²⁰ The House of Repre-

¹⁷ See *Fullilove*, 448 U.S. at 478 (opinion of Burger, C.J.); see also *UJO v. Carey*, 430 U.S. at 155 (Congress could require states to act on the basis of race to secure Fifteenth Amendment guarantees).

¹⁸ See L. Tribe, *American Constitutional Law* 2-7 (2d ed. 1988) (Reconstruction era amendments reflected Madison's theory that national government would be more likely to protect individual liberties than local government); Ackerman, *Constitutional Politics/Constitutional Law*, 99 Yale L.J. 453, 508-09 (1989) (Reconstruction era amendments, which "gave a new primacy to our national institutions" at the expense of local ones, carried out intention of republican political theorists); see also *Croson*, 109 S. Ct. at 736 (Scalia, J., concurring) ("[a] sound distinction between federal and state (or local) action based on race rests not only on the substance of the Civil War Amendments, but upon social reality and governmental theory").

¹⁹ The Federalist No. 10, at 77-78 (J. Madison) (C. Rossiter ed. 1961). See also R. Dahl, *Democracy and Its Critics* 218 (1989); Sunstein, *Interest Groups In American Public Law*, 38 Stan. L. Rev. 29, 39-45 (1985).

²⁰ See The Federalist No. 10, at 82-83; The Federalist No. 51, at 322-23 (J. Madison) (C. Rossiter ed. 1961).

sentatives and the Senate would act as checks on each other; together, they would "discern the true interests of the[] country," and promulgate legislation expressing the national will without sacrificing justice to "temporary or partial considerations."²¹

Over the past three decades, Congress has identified a national interest—indeed a commitment—in eradicating discrimination and its effects. Through a wide array of legislation, it has acted to fulfill that commitment.²² The

²¹ The Federalist No. 10, at 82. See also *Brown v. Hartlage*, 456 U.S. 45, 56 n.7 (1982) ("[i]n the extended republic of the United States, and among the great variety of interests, parties and sects which it embraces, a coalition of a majority of the whole society could seldom take place on any other principles than those of justice and the general good") (quoting The Federalist No. 51, at 325). In *Croson*, Justice Scalia stressed that it is consistent with the republican vision of government to trust Congress on matters of race. He explained:

[R]acial discrimination against any group finds more ready expression at the state and local level than at the federal level. To the children of the Founding Fathers, this should come as no surprise. An acute awareness of the heightened danger of oppression from political factions in small, rather than large, political units dates to the very beginning of our national history.

109 S. Ct. at 737 (Scalia, J., concurring).

²² See, e.g., Civil Rights of 1957, Pub. L. No. 85-315, 71 Stat. 634 (codified at 5 U.S.C. § 535(19) *et seq.*); Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified at 42 U.S.C. §§ 2000a *et seq.*); Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified at 42 U.S.C. §§ 1971 *et seq.*); Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 81 (codified at 18 U.S.C. §§ 231 *et seq.*); Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified at 42 U.S.C. §§ 2000 *et seq.*); Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641; Emergency School Aid Act of 1978, Pub. L. No. 95-561, 92 Stat. 2252 (codified at 20 U.S.C. § 3191-3207); Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (codified at 42 U.S.C. §§ 1971 *et seq.*); Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. No. 100-17, 101 Stat. 132; Fair Housing Act Amendments of 1988, Pub. L. No. 100-430, 102

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B. Congress Had Sufficient Factual Support for the Minority Preference Policy

This Court has made it clear that race-based remedial action must have sufficient factual support. In this case that requirement is satisfied, as Congress had ample basis to believe that historical patterns of discrimination have resulted in an almost complete absence of minorities as owners of broadcast licenses.

Although judicial review of the factual support for race-based action must always be searching, where Congress has acted appropriate deference is in order,²³ even when fundamental rights are at stake.²⁴ While Congress may not simply presume that society-wide discrimination has had effects that need to be remedied, the facts on which Congress predicates its action need not be found with the same specificity and precision that this Court demands of states and cities, and need not be compiled in formal findings.²⁵ Moreover, when considering the record underly-

Stat. 1619; *see also* 42 U.S.C. § 1981; 42 U.S.C. § 1982; 42 U.S.C. § 1983.

²³ Mindful that an act of Congress was at issue in *Fullilove*, Chief Justice Burger acknowledged that this Court was assuming "the gravest and most delicate duty that [it] is called on to perform," *Fullilove*, 448 U.S. at 472 (quoting *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (Holmes, J.)), and he called for "appropriate deference." *Id.* at 472. *See also Morrison v. Olson*, 108 S. Ct. 2597, 2626 (1988) (Scalia, J., dissenting) (the "harmonious functioning of the [political] system demands that [this Court] ordinarily give some deference, or a presumption of validity" to federal legislation).

²⁴ *See CBS v. Democratic Nat'l Comm.*, 412 U.S. at 102 (Court must approach its review of First Amendment challenge to congressional action with "great delicacy"). *Cf. Hampton v. Mow Sun Wong*, 426 U.S. 88, 103 (1976) (Court generally presumes that overriding national interest will justify discriminatory rule that is "expressly mandated by the Congress or the President").

²⁵ *See Fullilove*, 448 U.S. at 502 (Powell, J., concurring) (Congress' role as promulgator of "national rules for the governance of

ing any federal statute, this Court looks beyond the formal legislative history, taking into account all relevant information that was at Congress' disposal when it acted.²⁶

This approach is particularly appropriate here, since Congress was not operating on a blank slate. It has legislated repeatedly in the area of race relations and "made national findings that there has been societal discrimination in a host of fields." *Croson*, 109 S. Ct. at 727. Beginning with the Civil Rights Act of 1957, which created both the United States Civil Rights Commission and the Civil Rights Division of the Department of Justice, and continuing to the present, Congress has passed significant legislation addressing the problems of racial discrimination that have affected the country.²⁷ This legislation is routinely the subject of oversight hearings and is regularly amended better to achieve its purposes.²⁸ This long, difficult, and frustrating process has made Congress aware of what has worked, what has not worked, and what needs to be tried. It has acquainted Congress with those areas of our society that are especially unaffected by mere antidiscrimination measures. It should be un-

our society simply does not entail the same concept of record-making that is appropriate to a judicial or administrative proceeding"); *id.* at 478 (opinion of Burger, C.J.) ("Congress, of course, may legislate without compiling the kind of 'record' appropriate with respect to judicial or administrative proceedings"); *cf. Oregon v. Mitchell*, 400 U.S. at 284 (Stewart, J., concurring in part and dissenting in part) (compared to local legislatures, "Congress may paint with a much broader brush").

²⁶ *Fullilove*, 448 U.S. at 503 (Powell, J., concurring) (Congress' "special attribute lies in its broader mission to investigate and consider all facts and opinions that may be relevant to the resolution of an issue").

²⁷ See *supra* note 22.

²⁸ See, e.g., Equal Opportunity Act of 1972, *supra* note 22 (extending reach of Title VII of 1964 Civil Rights Act); Voting Rights Act Amendments of 1982, *supra* note 22 (extending reach of Voting Rights Act of 1965); Fair Housing Act Amendments of 1988, *supra* note 22 (extending reach of Fair Housing Act of 1968).

necessary for Congress to redocument the fact and history of discrimination every time it contemplates enacting another law.²⁹

Congress' experience in addressing the problems of racial discrimination was complemented in this case by its familiarity with the workings of the broadcasting industry. When it directed the FCC to continue implementing the minority preference policy in comparative proceedings, Congress already knew that most of the licenses were initially awarded—at bargain basement rates—at a time when minorities were effectively excluded from the bidders' table by discrimination that was pervasive and officially sanctioned in many parts of the country.³⁰ It already knew that today the central barrier to enter broadcasting is an economic one, the need for substantial risk capital. It already knew that this barrier has had a disproportionate impact on minorities largely attributable to society-wide discrimination. And, Congress also knew that because the broadcasting industry is a mature one, and the frequency spectrum already well saturated, the most inexpensive way to acquire a license is through the comparative hearing process.³¹

²⁹ See *Fullilove*, 448 U.S. at 503 (Powell, J., concurring) (in light of the "information and expertise that [it has] acquire[d] in the consideration and enactment of earlier legislation," Congress should not be required "to make specific factual findings with respect to each legislative action" it takes in the area).

³⁰ See *Bakke*, 438 U.S. at 393-94 (opinion of Marshall, J.) (in all walks of life, "[t]he enforced segregation of the races continued into the middle of the 20th century" and was not "limited solely to the Southern States").

³¹ The Department of Justice asserts that approximately 9% of all existing broadcast licenses change hands in any given year. Brief of U.S. at 21 n.12. But unlike at the outset of FCC licensing, radio and television stations today are not being given away for almost nothing; they are sold at significant premiums that derive from the increased value of broadcast stations over time. Having been excluded from the market when licenses were virtually free,

Viewed against that backdrop, the minority preference in comparative proceedings has sufficient factual support. To ignore Congress' substantial experience in confronting the consequences of racial discrimination and in deciding how best to allocate broadcast licenses is to "blind [one-self] to the realities familiar to the legislators." *Katzenbach v. Morgan*, 384 U.S. at 653.³²

II. THE INTEREST IN PROMOTING DIVERSITY OF PERSPECTIVES IN BROADCASTING FURTHER SUPPORTS THE USE OF MINORITY PREFERENCES IN LICENSING

While Congress has a strong interest in remedying society-wide discrimination for its own sake, there is even a stronger public interest in remedial action that simultaneously serves other important goals. In this case, Congress determined that society-wide discrimination not only has resulted in the virtual absence of minority license owners in the broadcast industry, but that this in turn has had a significant deleterious effect on the diversity of perspectives reflected in broadcasting. The minority preference policy thus serves both the purely "backward-looking" in-

and stations were built at cost, minorities are now being shut out because price tags are prohibitive. The minority preference policy applies only to the allocation of new licenses for new stations, not the licenses for existing stations that are being transferred at exorbitant rates each year. As such, the policy enables minorities to break into the industry on terms comparable to those on which nonminorities entered when broadcast licensing first began.

³² The Department of Justice contends that the 1982 amendments to the Communications Act, which authorized the FCC to grant a preference to minorities in the random award of licenses through lotteries, have no bearing on the similar preference granted in comparative proceedings. Brief of U.S. at 19 n.11. Yet the very legislative history of the 1982 amendments that the Department of Justice cites refers back to the reports and studies on which the FCC initially predicated the comparative proceeding preference. See Pub. L. No. 97-259, 96 Stat. 1087, 1094 (1982) (codified at 47 U.S.C. § 309(i)(3)(A)); H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess. 43-45 (1982).

terest of remedying past wrongs and the "forward-looking" interest of promoting diversity in broadcasting. This diversity interest is substantial and further supports the policy.

A. Forward-Looking Interests May Support the Use of Racial Preferences

This Court repeatedly has stated that the use of racial preferences may be justified only by a weighty governmental interest.³³ As the Court's previous decisions indicate, in most cases that interest will be a purely remedial one. However, there is no reason that a forward-looking interest cannot suffice, and the Court has never so held.³⁴

³³ Although that interest must be "compelling" in the case of a state or local government program, see *Croson*, 109 S. Ct. at 721, the precise standard applicable to a congressional program is not clear. In *Fullilove*, Justice Marshall (joined by Justices Brennan and Blackmun) stated that this interest must be "important," 448 U.S. at 519, Justice Powell used "compelling," *id.* at 496, and Chief Justice Burger's plurality opinion stated that the objective served by the program need only be "within the powers of Congress." *Id.* at 473.

³⁴ There is language in *Croson* that could be interpreted as limiting the use of racial preferences to remedial contexts. See *Croson*, 109 S. Ct. at 721 ("[u]nless [racial classifications] are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to politics of racial hostility"). However, because the racial preference at issue in *Croson* was defended only on remedial grounds, the Court had no occasion to and did not decide whether forward-looking justifications might have sufficed. Moreover, construing *Croson* to preclude forward-looking justifications is at odds with Justice O'Connor's acknowledgement that interests other than remedying past discrimination might be sufficiently important to support race-conscious action. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 286 (1986) (O'Connor, J., concurring) ("And certainly nothing the Court has said today necessarily forecloses the possibility that the Court will find other governmental interests which have been relied upon in the lower courts but which have not been passed on here to be sufficiently 'important' or 'compelling' to sustain the use of affirmative action policies").

To the contrary, several Justices have acknowledged that the use of racial preferences might be supported by an important governmental interest other than remedying discrimination.³⁵ These Justices recognized that in some contexts race-conscious action fosters values other than compensating minorities for past discrimination, and can "produce tangible . . . future benefits." *Croson*, 109 S. Ct. at 731 n.1 (Stevens, J., concurring).

This case involves another context in which race is relevant for reasons above and beyond remedying past discrimination. As explained in the following sections, the minority preference at issue serves the important forward-looking interest of promoting the diversity of perspectives reflected in broadcasting.

B. The Promotion of Diversity of Perspectives in Broadcasting Is a Substantial Interest

The promotion of diversity of viewpoints in broadcasting is a substantial governmental interest. It is central to the values embodied in the First Amendment, and has always guided the allocation of broadcast licenses.³⁶

The goal of diversity in broadcasting is at least as important as the goal of diversity in higher education, which Justice Powell, writing in *Bakke*, found sufficiently

³⁵ See *Bakke*, 438 U.S. at 311-15 (opinion of Powell, J.); *Wygant*, 476 U.S. at 286 (O'Connor, J., concurring); *id.* at 313-14 (Stevens, J., dissenting); *Croson*, 109 S. Ct. at 730 & n.1 (Stevens, J., concurring); cf. *United States v. Paradise*, 480 U.S. 149, 167-68 n.18 (1987) (plurality opinion).

³⁶ The "public interest" standard that guides FCC decision-making "necessarily invites reference to First Amendment principles . . . and, in particular, to the First Amendment goal of achieving 'the widest possible dissemination of information from diverse and antagonistic sources.'" *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 795 (1978) (quoting *CBS v. Democratic Nat'l Comm.*, 412 U.S. at 122 and *Associated Press v. United States*, 326 U.S. 1, 20 (1945)).

weighty to support race-conscious admissions policies in public universities. There, Justice Powell concluded that such action would further the strong First Amendment interest in promoting a diverse student body, which he reasoned would enhance a "robust exchange of ideas." 438 U.S. at 313. As important as this interest is, it has direct ramifications only for that portion of our population that attends college. In contrast, the mass media reach almost the entire population. For better or worse, radio and television have a "uniquely pervasive" influence on American life,³⁷ and play a critical role in educating the public and promoting the exchange of ideas. Therefore, Congress has good reasons for attempting to ensure that perspectives reflected through the broadcast media are not limited or distorted by the continuing effects of discrimination.

To the extent that there is any doubt about the importance of diversity in broadcasting, that doubt should be resolved in favor of the choice that Congress has made. While the Constitution may demand that courts conduct a searching inquiry to ensure that a racial preference is supported by a weighty goal, it does not authorize courts to substitute their own judgments for the considered and reasonable judgment of Congress. This is particularly true where, as here, Congress has acted in an area in which it has substantial power and expertise.

C. Congress Had Sufficient Basis to Link Diversity of Ownership With Diversity of Perspectives in Broadcasting

The dissent below argued that the minority preference policy does not support the goal of enhanced diversity in broadcast programming, because there was no "basis for believing that minority ownership would lead to 'minority programming' in some sense that is both intelligible and

³⁷ *Sable Communications of California, Inc. v. FCC*, 109 S. Ct. 2829, 2837 (1989).

permissible.”³⁸ This is incorrect and misses the point of the policy. Congress had every reason to believe that the minority preference policy would, in fact, expand the diversity of perspectives reflected in broadcasting, and not just in programming. For it is not only programming but also perspective—which includes considerations other than simply what show to run or song to play—that is at the crux of the policy.

When the minority preference policy was begun, broadcasting was basically an all-white industry, as it still is to a large extent today. This simple fact has had profound consequences for the diversity of perspectives reflected in broadcasting. The inclusion of minority owners clearly would enhance that diversity. It is not “stereotyping” to acknowledge that different racial and ethnic groups have unique perspectives that may be reflected in programming choices, selection of station managers, presentation of news, solicitation of advertisers, and community relations.³⁹ It is unrealistic to pretend otherwise. While in any particular case the proposition may prove false, in the aggregate the inclusion of minority owners has to make a difference.

The link between diversity in ownership and diversity in perspectives may not lend itself easily to empirical proof, but the Constitution requires only a close relationship between means and ends, not a guarantee.⁴⁰ This is

³⁸ *Winter Park Communications, Inc. v. FCC*, 873 F.2d 347, 358 (D.C. Cir. 1989) (Williams, J., dissenting), *cert. granted sub nom. Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 715 (1990).

³⁹ Cf. T. Sowell, *The Economics and Politics of Race* 244 (1983) (“[t]he most obvious fact about the history of racial and ethnic groups is how different they have been—and still are . . .”).

⁴⁰ In *Bakke*, Justice Powell did not require empirical proof that the admission of minority students to a medical school would in fact enhance the exchange of ideas or enrich the educational experience of the student body. For him, that common sense proposi-

particularly true when what is being reviewed is an act of Congress, which must make predictive judgments of the type at issue here all the time. The judicial task, therefore, should be to ensure that Congress had sufficient reason to believe that the racial preference would serve its purpose so that "there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." *Croson*, 109 S. Ct. at 721. Here, Congress had ample reason to believe that including minority owners in the previously all-white broadcast industry would augment the diversity of viewpoints conveyed in broadcasting.⁴¹

III. THE MINORITY PREFERENCE POLICY SATISFIES ANY REASONABLE APPLICATION OF THE NARROWLY TAILORED TEST

Just as there should be deference to a determination by Congress that an important interest justifies the use of race-conscious measures, there should be deference to the means that Congress selects to serve that interest. For in both cases, Congress has special competence to act to

tion was enough. He explained that "[a]n otherwise qualified medical student with a particular background—whether it be ethnic, geographic, culturally advantaged or disadvantaged—may bring to a professional school of medicine experiences, outlooks, and ideas that enrich the training of its student body and better equip its graduates to render with understanding their vital service to humanity." *Bakke*, 438 U.S. at 314 (opinion of Powell, J.).

⁴¹ Congress did not rely on common sense alone. It had before it federal government findings on the consequences of having a mass media dominated by white ownership. See United States Commission on Civil Rights, *Window Dressing on the Set: Women and Minorities in Television 2* (1977) ("a mass medium dominated by whites will ultimately fail in its attempts to communicate with an audience that includes blacks"); *Kerner Commission Report*, *supra* note 7, at 203 ("The media report and write from the standpoint of a white man's world. . . . This may be understandable, but it is not excusable in an institution that has the mission to inform and educate the whole of our society").

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

BRENDA PATTERSON,
v. *Petitioner,*
MCLEAN CREDIT UNION,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

BRIEF OF 66 MEMBERS OF THE
UNITED STATES SENATE AND 118 MEMBERS OF THE
UNITED STATES HOUSE OF REPRESENTATIVES
AS *AMICI CURIAE* IN SUPPORT OF PETITIONER †

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-107

BRENDA PATTERSON,
v. *Petitioner,*
MCLEAN CREDIT UNION,
Respondent.

On Writ of Certiorari to the
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BRIEF OF 66 MEMBERS OF THE
UNITED STATES SENATE AND 118 MEMBERS OF THE
UNITED STATES HOUSE OF REPRESENTATIVES
AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*¹

Amici curiae are a bipartisan congressional group of 66 members of the United States Senate and 118 members of the United States House of Representatives.² *Amici* have a dual interest in this Court's reconsideration of the interpretation of Section 1981, 42 U.S.C. § 1981, adopted in *Runyon v. McCrary*, 427 U.S. 160 (1976). First, *amici* have an institutional interest in the stability of statutory precedents. That concern is particularly compelling here because this Court is calling into question

¹ Both petitioner and respondent have consented to the filing of this brief. Letters of consent are on file with the Clerk of the Court.

² Individual *amici* are listed beginning on the inside front cover.

the validity of its interpretation of Section 1981, long after the Congress has accepted that interpretation and acted affirmatively to build upon it.

Second, *amici* have a significant interest here because of their role in enacting legislation to eradicate the evils of racial discrimination. Such discrimination, as this Court has recognized, is contrary to "fundamental public policy,"³ and its elimination has become, particularly over the past three decades, a paramount national goal. Section 1981, as interpreted by this Court, furthers that policy. It covers a range of conduct that other statutes do not reach, such as the racial discrimination in private school admissions at issue in *Runyon*.

The interests of *amici* would be adversely affected by the overruling of *Runyon*. The legislative effort necessary to restore this Court's original interpretation would likely be fractious and divisive, since corrective legislation would, in all likelihood, compel the Congress to address numerous peripheral questions concerning the scope and application of Section 1981.

For these institutional reasons, *amici* urge this Court not to overturn *Runyon's* interpretation of Section 1981 as prohibiting intentional racial discrimination in the making and enforcing of private contracts. *Amici* take no position on whether Section 1981 should apply to the particular facts of this case.

SUMMARY OF THE ARGUMENT

This Court's interpretation of Section 1981 in *Runyon v. McCrary* as prohibiting private discrimination in the making and enforcing of contracts should not be overturned. Section 1981, as interpreted in *Runyon*, is an essential component of the statutory framework barring discrimination by private parties. It affords a broad-based remedy for intentional racial discrimination that

³ *Bob Jones Univ. v. United States*, 461 U.S. 574, 594 (1983).

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complements other more specific statutes. Overturning *Runyon* and forcing the Congress to revisit this area would not only impose significant, unnecessary burdens on the legislative process, but could threaten the repose that the Nation has obtained on the issue of racial discrimination. Adherence to *stare decisis* is essential if the unique interplay between the Congress and the Court that has existed in the development of civil rights law is to be maintained.

The Congress' primary role in lawmaking under the Constitution dictates that any change in the meaning of a statute be effected legislatively rather than judicially. In exercising its constitutional power to legislate, the Congress must be able to rely on the stability of the Court's interpretations of its statutes. For this reason, *stare decisis*, as this Court has repeatedly recognized, operates with its greatest strength where a statutory interpretation, such as *Runyon*, is concerned.

There are no special circumstances present here that would justify departing from *stare decisis* and this customary institutional relationship between the Congress and the Court. First, *Runyon* was not based on an incomplete analysis. Rather, it was the culmination of a series of decisions in which the Court thoroughly analyzed the legislative history of Section 1981 and considered the arguments for and against the applicability of Section 1981 to private conduct. Second, *Runyon* was not a sport in the law, nor have subsequent legal developments undercut its vitality. Instead, *Runyon* has been accepted as well-settled law by this Court, by the Executive, and by the Congress. Third, *Runyon's* interpretation of Section 1981 is a straightforward rule which has been readily applied by the lower courts and has not proven confusing or unworkable. Fourth, individuals have legitimately relied upon Section 1981's prohibition of private contract-related discrimination since *Runyon*, and that reliance would be frustrated were *Runyon* to be overturned. Fifth, and finally, no relevant factual circumstances,

whether social, economic or otherwise, have changed since *Runyon* was decided.

The case against overturning *Runyon* is particularly strong because the Congress has affirmatively endorsed this Court's construction of Section 1981 as reaching private discrimination. The Court has found congressional approval of a judicial construction of a statute in cases where the Congress has (1) rejected efforts to pass legislation that would have overruled or limited the reach of the judicial interpretation, or (2) failed to change the judicial interpretation in the course of enacting or amending related legislation which reflects the Congress' awareness of that interpretation. Both these circumstances are present here.

At two key junctures, the Congress has made its intent plain. In 1972, when considering amendments to Title VII of the Civil Rights Act of 1964, the Congress addressed and rejected proposals to eliminate recourse to Section 1981 in the area of employment discrimination. In 1976, the Congress enacted the Civil Rights Attorney's Fees Awards Act, which extended to prevailing parties the right to recover attorney's fees in actions brought under Section 1981. The Congress recognized, in considering this legislation, that Section 1981 provides remedies for discrimination by private parties. These actions, explicitly predicated on Section 1981 continuing to have the meaning given to it by this Court, give rise to a virtually conclusive presumption that the Congress has approved *Runyon*.

ARGUMENT

In *Runyon v. McCrary*, 427 U.S. 160 (1976), this Court held that Section 1981 prohibits racial discrimination in the making and enforcement of private contracts. The Court has now requested the parties to brief "[w]hether or not th[at] interpretation . . . should be reconsidered." *Amici* urge the Court not to overrule *Runyon*.

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I. SECTION 1981. AS INTERPRETED BY THIS COURT, IS AN INTEGRAL COMPONENT OF THIS NATION'S CIVIL RIGHTS LAWS.

Runyon is one of the essential civil rights precedents established by this Court over the past twenty years. In 1968, the Court foreshadowed *Runyon* by holding, in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), that Section 1982, 42 U.S.C. § 1982, a related statute, prohibits racial discrimination in private property transactions. Then, in 1975, the Court concluded in *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975), that Section 1981 reaches private discrimination in employment. *Runyon* simply built upon these foundations.

As interpreted in *Runyon*, Section 1981 is an integral component of the statutory framework that the Congress has developed to bar private racial discrimination. Other more detailed statutes afford comprehensive remedies for acts of discrimination by specified private parties, *e.g.*, employers of a certain size, restaurants, and hotels. These statutes often have easier standards of proof and are often enforceable by the Executive Branch.⁴ Section 1981 affords victims of discrimination a complementary, broad-based remedy for many forms of contract-related intentional racial discrimination, including discrimination by parties not covered by other statutes. It is not an exaggeration to say that overturning *Runyon*, and adopting the view that Section 1981 addresses only state statutes and other state actions that disable minorities from making or enforcing contracts, would effectively render Section 1981 a nullity. Under that reading, Section 1981 would bar only conduct that is already prohibited by the Fourteenth Amendment by its own force.

Amici's concern for the viability of *Runyon's* interpretation of Section 1981 is not lessened by the fact that the Congress may legislatively alter a statutory interpreta-

⁴ See, *e.g.*, Civil Rights Act of 1964, Title VII, 42 U.S.C. §§ 2000e et seq.

tion of the Court. Any congressional effort to change a decision of this Court could prove divisive and time consuming, could well be delayed by disagreement over collateral issues, and could confront grave difficulties in addressing the nuances that have arisen from case-by-case elaboration of the statute. But with regard to one of the core civil rights statutes, the costs are far greater. To require the Congress to revisit this issue could jeopardize the closure and repose that we have obtained as a Nation on the issue of racial discrimination. If the Court overturns *Runyon*, intentional racial discrimination that is now illegal could exist for years without remedy, while the Congress debates the scope and details of new legislation.

The experience with this Court's decision in *Grove City College v. Bell*, 465 U.S. 555 (1984), is illustrative. The Court concluded in 1984 that the Congress had intended that statutory provisions prohibiting discrimination in certain federally-funded programs be narrowly construed. Despite overwhelming agreement that *Grove City* should be overturned, it took the Congress a "long and troubled"⁵ four years—in significant part because of disagreements over collateral issues—to enact legislation to accomplish that result.⁶ In the mean-

⁵ 134 Cong. Rec. S2744 (daily ed. Mar. 22, 1988) (statement of Sen. Chafee).

⁶ See Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988). One bill to overturn this Court's decision in *Grove City* was introduced the same day the decision was handed down. 130 Cong. Rec. 3661-62 (1984). Another bill, introduced two months later, 130 Cong. Rec. S4585 (daily ed. Apr. 12, 1984), actually passed in the House of Representatives, but failed in the Senate due to an end-of-session filibuster. 131 Cong. Rec. 2149 (1985) (statement of Sen. Kennedy); S. Rep. No. 64, 100th Cong., 2d Sess. 3 (1988). In the next session of the Congress, legislation to overturn *Grove City* was introduced in both the House and Senate. 131 Cong. Rec. 901 (1985) (House); 131 Cong. Rec. 2151 (1985) (Senate). The Senate bill was never reported out of the

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time, institutions receiving federal funds were free to discriminate on racial or other grounds as long as they did not discriminate in particular federally-funded programs.⁷

Amici wish to make clear that what is at stake here is not legislative convenience, but the vital interaction that has developed between the Congress and the Court in protecting the Nation against the evils of racial discrimination. The doctrine of *stare decisis* is essential to that interaction.

II. *STARE DECISIS* DICTATES CONTINUED ADHERENCE TO THE INTERPRETATION OF SECTION 1981 ADOPTED BY THIS COURT IN *RUNYON v. McCRARY*.

The orderly functioning of our government requires that the Congress be able to rely on the stability of stat-

Committee on Labor and Human Resources. S. Rep. No. 64, 100th Cong., 2d Sess. 3 (1988). In the House, the bill was favorably reported by both the Judiciary and the Education and Labor Committees, H.R. Rep. No. 963, 99th Cong., 2d Sess. Parts 1 and 2 (1986), but was never brought to the full House.

The Civil Rights Restoration Act of 1987 was introduced on February 19, 1987, with 51 senators cosponsoring the bill. 133 Cong. Rec. S2249 (daily ed. Feb. 19, 1987). But it was not until almost a year later that it passed in the Senate, 134 Cong. Rec. S266 (daily ed. Jan. 28, 1988), and several weeks more before it passed in the House. 134 Cong. Rec. H597-98 (daily ed. Mar. 2, 1988). The President vetoed the bill, principally because of concerns that it might impinge upon the affairs of religious institutions and small businesses. Message to the Senate on Civil Rights Legislation, 24 Weekly Comp. Pres. Doc. 353 (Mar. 16, 1988). The Congress overrode the veto and thus, more than four years after *Grove City* was decided, overturned that decision. 134 Cong. Rec. S2765 (daily ed. Mar. 22, 1988) (Senate override); 134 Cong. Rec. H1071-72 (daily ed. Mar. 22, 1988) (House override).

⁷ See 134 Cong. Rec. S2751 (daily ed. Mar. 22, 1988) (statement of Sen. Domenici) ("[F]or the past 4 years, while legislation has been drafted and redrafted and hearings have been held, discrimination against individuals on the basis of race, sex, age, and physical handicap has occurred because of the Supreme Court's decision.").

utory interpretations. Once the Congress has enacted a law, and this Court has interpreted it, the Congress relies on the Court to refine that precedent and apply it to specific cases. But the Congress must be able to assume that a construction of a statute, rendered by this Court after full and fair consideration, is fixed so that the Congress can build upon it if it chooses. Without the exceptional vigor of *stare decisis* in the statutory arena, this partnership between the Congress and the Court would break down. If that happened, the Congress would bear a continuing and onerous burden of having to signal its agreement with each of the Court's statutory interpretations, or face unexpected reversal of those interpretations.

The doctrine of *stare decisis* is a venerable principle of judicial decisionmaking which has been recognized by this Court since the earliest days of the Republic.⁸ It has retained its importance because of the fundamental values it protects and promotes. First, it furthers "the stability and predictability required for the ordering of human affairs over the course of time."⁹ Second, it promotes judicial efficiency by ensuring that today's judges need not rehear every past decision, but can instead "lay [their] own course of bricks on the secure foundation of the courses laid by others who [have] gone before [them]."¹⁰ Finally, in the broadest and grandest sense,

⁸ See, e.g., *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 100 (1807).

⁹ *Williams v. Florida*, 399 U.S. 78, 127 (1970) (Harlan, J., concurring in part and dissenting in part). See also *Helvering v. Hallock*, 309 U.S. 106, 119 (1940) ("[S]tare decisis embodies an important social policy. It represents an element of continuity in law, and is rooted in the psychologic need to satisfy reasonable expectations.").

¹⁰ B. Cardozo, *The Nature of the Judicial Process* 149 (1921). See also *Florida Dep't of Health v. Florida Nursing Home Ass'n*, 450 U.S. 147, 154 (1981) (Stevens, J., concurring); R. Wasserstrom, *The Judicial Decision: Toward a Theory of Legal Justification* 72-73 (1961); K. Llewellyn, *The Bramble Bush* 64-65 (1951).

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it legitimates our system of the rule of law, and the role of the Supreme Court in that system.¹¹ Justice Harlan summed up these considerations for a unanimous Court 18 years ago:

Very weighty considerations underlie the principle that courts should not lightly overrule past decisions. Among these are the desirability that the law furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise; the importance of furthering fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case; and the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments.¹²

Thus, in reconsidering any established rule, this Court must give great weight to these considerations. In this case their proper application is clear. *Runyon* should not be overruled.

¹¹ See, e.g., *Vasquez v. Hillery*, 474 U.S. 254, 265-66 (1986) (*Stare decisis* "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact."); *Florida Dep't of Health v. Florida Nursing Home Ass'n*, 450 U.S. at 154 (Stevens, J., concurring) ("Citizens must have confidence that the rules on which they rely in ordering their affairs . . . are rules of law and not merely the opinions of a small group of men who temporarily occupy high office."); Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 Colum. L. Rev. 723, 749, 752 (1988) ("[S]tare decisis operates to promote system-wide stability and continuity by ensuring the survival of governmental norms that have achieved unsurpassed importance in American society. . . . A general judicial adherence to constitutional precedent supports a consensus about the rule of law, specifically the belief that all organs of government, including the Court, are bound by the law.").

¹² *Moragne v. State Marine Lines, Inc.*, 398 U.S. 375, 403 (1970).

A. The Institutional Relationship Between the Congress and the Court Makes Application of *Stare Decisis* to a Statutory Interpretation Such As *Runyon v. McCrary* Particularly Appropriate.

Runyon is a statutory rather than a constitutional holding. This Court has repeatedly distinguished between constitutional and statutory cases for purposes of *stare decisis*, and has pronounced itself particularly loath to ignore the doctrine of *stare decisis* where an earlier statutory interpretation is at issue, given that "*stare decisis* has more force in statutory analysis than in constitutional adjudication" ¹³ The Court has adhered to that axiom in practice.

One reason for this distinction is that "in the area of statutory construction . . . Congress is free to change this Court's interpretation of its legislation." ¹⁴ Another

¹³ *Monell v. Department of Social Serv.*, 436 U.S. 658, 695 (1978). See also *id.* at 708 (Powell, J., concurring); *id.* at 714 (Rehnquist, J., dissenting) ("[C]onsiderations of *stare decisis* are at their strongest when this Court confronts its previous constructions of legislation."); *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 424 (1986) (A "strong presumption of continued validity . . . adheres in the judicial interpretation of a statute."); *NLRB v. International Longshoremen's Ass'n*, 473 U.S. 61, 84 (1985) ("[W]e should follow the normal presumption of *stare decisis* in cases of statutory interpretation."); *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 60 (1977) (White, J., concurring) ("[C]onsiderations of *stare decisis* are to be given particularly strong weight in the area of statutory construction."); *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977) ("[C]onsiderations of *stare decisis* weigh heavily in the area of statutory construction. . . ."); *Runyon v. McCrary*, 427 U.S. at 175; *Edelman v. Jordan*, 415 U.S. 651, 671 n.14 (1974); *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 257-58 (1970) (Black, J., dissenting); *Erie R.R. v. Tompkins*, 304 U.S. 64, 77 (1938) ("If only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout nearly a century.").

¹⁴ *Illinois Brick Co. v. Illinois*, 431 U.S. at 736. Of course, as the *Grove City* experience illustrates, there are significant costs involved in legislatively overruling a decision of this Court. See *supra* Part I.

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reason that "this Court is surely not free to abandon settled statutory interpretation at any time a new thought seems appealing,"¹⁵ is found in "the deference that this Court owes to the primary responsibility of the legislature in the making of laws."¹⁶ The Congress is vested by Article I of the Constitution with "all legislative powers." The Court properly interprets statutes enacted by the Congress because interpretation is required to decide cases brought before it. However, once rendered, a statutory interpretation becomes "an integral part of the statute."¹⁷ While the Congress is free to overturn a statutory precedent for any reason it sees fit, the judicial branch is not similarly free to reverse precedents whenever judges have second thoughts. In Justice Black's words:

Altering the important provisions of a statute is a legislative function. . . . Having given our view on the meaning of a statute, [the Court's] task is concluded, absent extraordinary circumstances. When the Court changes its mind years later, simply because the judges have changed, in my judgment, it takes upon itself the function of the legislature.¹⁸

¹⁵ *Monell v. Department of Social Serv.*, 436 U.S. at 718 (Rehnquist, J., dissenting).

¹⁶ *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. at 257 (Black, J., dissenting).

¹⁷ *Gulf, Colorado & Santa Fe Ry.*, 275 U.S. 133, 136 (1927).

¹⁸ *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. at 258 (Black, J., dissenting). While the majority in *Boys Markets* overturned a statutory interpretation, it did not disagree with the principle articulated by Justice Black, but differed only on the application of that principle to the facts of the case. See also *Commissioner v. Fink*, 107 S. Ct. 2729, 2737 (1987) (Stevens, J., dissenting) ("The relationship between the courts or agencies, on the one hand, and Congress, on the other, is a dynamic one. In the process of legislating it is inevitable that Congress will leave open spaces in the law that the courts are implicitly authorized to fill. The judicial process of construing statutes must therefore include an exercise of lawmaking power that has been delegated to the courts by Congress. But after the gap has been filled, regardless of whether it is filled exactly as Congress might have

B. There Are No Special Circumstances in This Case That Justify Overruling *Runyon v. McCrary*.

Although the Court does, from time to time, overrule earlier decisions, the mere fact that the Court might have reached a different result had it decided the earlier case has never been thought a sufficient justification for doing so. Instead, "[a]ny departure from the doctrine of *stare decisis* demands special justification."¹⁹ And where a prior statutory precedent is at issue, "[o]nly the most compelling circumstances can justify this Court's abandonment of such firmly established . . . precedents."²⁰ In this case, the factors which the Court heretofore has considered relevant in determining whether such "compelling circumstances" exist do not support overruling *Runyon*.

1. The Interpretation of Section 1981 Adopted in *Runyon v. McCrary* Was Not Based Upon an Incomplete Analysis.

In determining whether to overrule a prior decision, the Court has sometimes taken into account whether the decision fully considered competing arguments.²¹ Here, consideration of this factor clearly counsels in favor of leaving *Runyon* undisturbed.

intended or hoped, the purpose of the delegation has been achieved and the responsibility for making any future change should rest on the shoulders of Congress.").

¹⁹ *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984).

²⁰ *Monell v. Department of Social Serv.*, 436 U.S. at 715 (Rehnquist, J., dissenting). See also *Vasquez v. Hillery*, 474 U.S. at 266 ("[T]he careful observer will discern that any detours from the straight path of *stare decisis* in our past have occurred for articulable reasons. . . . [E]very successful proponent of overruling precedent has borne the heavy burden of persuading the Court that changes in society or in the law dictate that the values served by *stare decisis* yield in favor of a greater objective.").

²¹ See, e.g., *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 766 (1984) (overruling previous decisions interpreting Section 1 of the Sherman Act to reach "intra-enterprise" conspiracies: "[W]hile this Court has previously seemed to acquiesce in the intra-enterprise conspiracy doctrine, it has never explored or analyzed in detail the justifications for such a rule. . . .").

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Runyon's interpretation of Section 1981 as prohibiting private contract-related racial discrimination in education was not an aberration. It evolved from the Court's earlier decisions in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), *Tillman v. Wheaton-Haven Recreation Association, Inc.*, 410 U.S. 431 (1973), and *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975). In both *Runyon* and these prior decisions, the Court fully and carefully considered the competing arguments.

Jones held that Section 1982 reaches private racial discrimination in property transactions. The Court analyzed in detail the Reconstruction-era legislative history, which relates to both Sections 1981 and 1982, to determine whether the statute was intended to reach private, as well as governmental, conduct. 392 U.S. at 422-37. The Court concluded that the Congress "plainly meant to secure" the right to purchase or lease property "against interference from any source whatever, whether governmental or private." *Id.* at 424.²² In *Tillman*, the Court recognized that Section 1981 reached the conduct of a private association that operated a neighborhood swimming pool. In making that determination, the Court again recognized the interrelated legislative histories of Sections 1981 and 1982. The Court concluded that there was "no reason to construe these sections differently" under the facts before it. 410 U.S. at 440. Two years after *Tillman*, the Court unanimously stated in *Johnson* that "it is well settled among the Federal Courts of Appeals—and we now join them—that § 1981 affords a federal remedy against discrimination in private employment on the basis of race." 421 U.S. at 459-60.²³

²² This Court has subsequently affirmed *Jones* on numerous occasions. See, e.g., *Shaare Tefila Congregation v. Cobb*, 107 S. Ct. 2019, 2021 (1987); *Tillman v. Wheaton-Haven Recreation Ass'n, Inc.*, 410 U.S. at 435; *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 235-38 (1969).

²³ The *Runyon* Court described this statement as "the square holding" and the "unequivocal[]" holding of *Johnson*. 427 U.S. at 170 n.8, 172. And the United States characterized the statement

In 1976, the *Runyon* Court, citing *Jones*, *Tillman*, and *Johnson*, concluded that "[i]t is now well established that . . . [Section] 1981 prohibits racial discrimination in the making and enforcement of private contracts." 427 U.S. at 168. Nevertheless, the Court again carefully reviewed the legislative history of Section 1981. *Id.* at 168-71, 174-75. The Court considered and rejected, as "wholly inconsistent" with its earlier precedents, the argument that Section 1981 reached only state-sponsored discrimination. *Id.* at 173. The Court also rejected the argument that Section 1981 prohibits only legal rules that disable minorities from making and enforcing contracts. *See id.* at 194 (White, J., dissenting).

Indeed, the Court has so fully and completely considered the Reconstruction-era legislative history of Section 1981 that, following its decision in *Runyon*, the Court has merely incorporated the prior analyses by reference, rather than "repeat the narrative again."²⁴

Accordingly, *Runyon* cannot be said to be based upon an incomplete analysis or less than full consideration of competing arguments.

2. *The Interpretation of Section 1981 Adopted in Runyon v. McCrary Has Not Been Undercut by Subsequent Legal Developments.*

Another factor the Court has sometimes considered in determining whether to overrule an earlier decision is whether the reasoning of the earlier decision has been undercut by subsequent legal developments. In such cases, the Court is often making explicit what has been implicit

as the "ratio decidendi" of *Johnson*. Brief for the United States as Amicus Curiae at 14, *Runyon v. McCrary*, 427 U.S. 160 (1976) (No. 75-62). *Johnson* was a Section 1981 action against a private defendant. The actual issue before the Court concerned the applicable statute of limitations. The Court would not have reached that issue if Section 1981 did not provide a cause of action for acts of racial discrimination by private parties.

²⁴ *General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 384 (1982).

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for some time. The overruling simply culminates a long process of erosion.²⁵ Similarly, the Court has sometimes revisited a decision found to be wholly inconsistent with prior decisions or inconsistent with a parallel line of authority.²⁶

Runyon's reasoning and holding have not been undercut by subsequent legal developments. No decision rendered by this Court has questioned the continuing vitality of the interpretation of Section 1981 adopted there. On the contrary, this Court has repeatedly and without exception treated *Runyon* as well-settled law.²⁷ The Executive Branch has also consistently supported the interpretation of Section 1981 adopted in *Runyon*,²⁸ and no de-

²⁵ See, e.g., *Andrews v. Louisville & Nashville R.R.*, 406 U.S. 320, 322 (1972) ("Later cases from this Court have repudiated the reasoning advanced in support of the result reached in [the earlier decision]."); *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. at 238 ("[S]ubsequent events have undermined [the] continuing validity [of the earlier decision]."). See also *Puerto Rico v. Branstad*, 107 S. Ct. 2802, 2809 (1987) ("[The earlier decision] is the product of another time. The conception of the relation between the States and the Federal Government there announced is fundamentally incompatible with more than a century of constitutional development.").

²⁶ See, e.g., *Monell v. Department of Social Serv.*, 436 U.S. at 695 (justifying overruling *Monroe v. Pape*, 365 U.S. 167 (1961), in part on ground that *Monroe* "was a departure from prior practice" and inconsistent with a subsequent line of cases "holding school boards liable in § 1983 actions. . .").

²⁷ See, e.g., *Goodman v. Lukens Steel Co.*, 107 S. Ct. 2617, 2620 (1987); *Saint Francis College v. Al-Khazraji*, 107 S. Ct. 2022, 2026 (1987); *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984); *Bob Jones Univ. v. United States*, 461 U.S. at 596; *General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. at 384; *City of Memphis v. Greene*, 451 U.S. 100, 125 n.38 (1981); *Great Am. Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366, 377 (1979); *Cook v. Hudson*, 429 U.S. 165 (1976); *McDonald v. Santa Fe Trail Trans. Co.*, 427 U.S. 273, 285 (1976).

²⁸ See, e.g., Brief for the United States as Amicus Curiae Supporting Petitioner at 10, *Patterson v. McLean Credit Union* (No. 87-107); Brief for the United States at 38, *Goldsboro Christian*

velopments in the Congress have eroded the reasoning of *Runyon*. Indeed, as discussed in Part III, the Congress has convincingly demonstrated that it fully agrees with *Runyon's* interpretation of Section 1981.

Nor is *Runyon* a sport in the law. It is neither out of step with prior decisions, as discussed above, nor inconsistent with any parallel line of authority in this Court.

3. The Interpretation of Section 1981 Adopted in *Runyon v. McCrary* Has Not Proved Confusing or Unworkable in Practice.

A third factor the Court has considered is whether the earlier case has caused confusion or created practical difficulties for the lower courts in applying the law.²⁹ Clearly *Runyon* has not.

Runyon straightforwardly held that Section 1981 reaches private parties who intentionally discriminate on

Schools, Inc. v. United States, reported as *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (No. 81-1); Brief for the Secretary of Commerce at 20 n.6, *Fullilove v. Klutznick*, 448 U.S. 448 (1980) (No. 87-1007); Brief for the United States as Amicus Curiae at 7, *McDonald v. Santa Fe Trail Trans. Co.*, 427 U.S. 273 (1976) (No. 75-260); Brief for the United States as Amicus Curiae at 13, *Runyon v. McCrary*, 427 U.S. 160 (1976) (No. 75-62).

²⁹ See, e.g., *Swift & Co. v. Wickham*, 382 U.S. 111, 124 (1965) (overruling earlier statutory decision that "is in practice unworkable . . . lower courts have . . . sought to avoid dealing with its application or have interpreted it with uncertainty"). See also *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546-47 (1985) (overruling *National League of Cities v. Usery*, 426 U.S. 833 (1976), in part because "a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is 'integral' or 'traditional' had proved 'unworkable in practice'"); *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 108 S. Ct. 1133, 1140-41 (1988) ("A half century's experience has persuaded us . . . that the rule is . . . unworkable and arbitrary in practice. . . . [T]he gulf between the historical procedures underlying the rule and the modern procedures of federal courts renders the rule hopelessly unworkable in operation.").

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the basis of race in the making and enforcement of contracts. Since there has never been any question that Section 1981 also reaches state-sponsored racial discrimination, *Runyon* simply made clear that Section 1981 applies across the board without regard to the identity or position of the actor. Lower courts, following *Runyon*, have not found this general principle to be confusing or unworkable.³⁰ Of course, this Court's guidance may be necessary in fine-tuning that principle and applying it to specific cases such as this one. But that ongoing process is not a reason to overrule a general principle already established.

4. Overruling the Interpretation of Section 1981 Adopted in *Runyon v. McCrary* Would Frustrate Legitimate Reliance Interests.

Another factor this Court has considered is whether "individuals may have arranged their affairs in reliance on the expected stability of the decision." ³¹ Where there has been no legitimate reliance on the decision, the Court may feel less bound by *stare decisis*.

In *Monell v. Department of Social Services*, 436 U.S. 658, 700 (1978), for example, the Court noted that its earlier decision holding municipalities immune from suit under Section 1983, 42 U.S.C. § 1983, could not be legitimately relied upon by municipalities because violations

³⁰ See, e.g., *Wright v. Salisbury Club, Ltd.*, 632 F.2d 309, 312 (4th Cir. 1980); *Manzanares v. Safeway Stores, Inc.*, 593 F.2d 968 (10th Cir. 1979); *Hall v. Pennsylvania State Police*, 570 F.2d 86, 92 (3d Cir. 1978); *Brown v. Dade Christian Schools, Inc.*, 556 F.2d 310, 312 (5th Cir. 1977), *cert. denied*, 434 U.S. 1063 (1978); *Nieto v. UAW, Local 598*, 672 F. Supp. 987, 988-89 (E.D. Mich. 1987); *Miller v. Hall's Birmingham Wholesale Florist*, 640 F. Supp. 948 (N.D. Ala. 1986); *Moye v. Chrysler Corp.*, 465 F. Supp. 1189, 1190 (E.D. Mo.), *aff'd*, 615 F.2d 1365 (8th Cir. 1979); *Hollander v. Sears, Roebuck & Co.*, 450 F. Supp. 496, 499-500 (D. Conn. 1978).

³¹ *Monell v. Department of Social Serv.*, 436 U.S. at 700 (quoting *Monroe v. Pape*, 365 U.S. at 221-22 (Frankfurter, J., dissenting)).

of constitutional rights are "completely wrong" and public bodies cannot arrange their affairs "on an assumption that they can violate constitutional rights indefinitely" In contrast, *Runyon* is a decision which protects against violations of the statute and provides relief for them, rather than shielding violators, and reliance on it is unquestionably legitimate.

Clearly, individuals "have arranged their affairs in reliance on the expected stability of" *Runyon's* ruling that Section 1981 prohibits private racial discrimination in the making and enforcing of contracts. For example, parents have made arrangements to place their children in private schools with the legitimate expectation that Section 1981 ensures that those schools are not now segregated, and will not be segregated in the future. The Congress has also legitimately relied on *Runyon* by enacting legislation predicated on Section 1981 continuing to have the meaning given to it in *Runyon*. See *infra* Part III.

If *Runyon* is overruled, this reliance—by individuals as well as by the Congress—would be frustrated at great social and emotional cost. The very purpose of Section 1981, like all other civil rights laws, is to change behavior and, therefore, expectations. The progress wrought by these laws is considerable and undeniable. The stability of decisions in this area is vital to the success of the Nation's effort to eliminate racial discrimination. Those individuals whose rights are protected by anti-discrimination statutes should be able to rely on settled precedent in arranging their affairs, and those whose conduct is governed by such laws should not be led to expect that they can escape their legal obligations by reversals in statutory interpretations.³²

³² See *Patsy v. Board of Regents*, 457 U.S. 496, 501 n.3 (1982) (refusing to overrule prior cases that had refused to read exhaustion of administrative remedies requirements into Section 1983, in part because "[o]verruling these decisions might injure those § 1983 plaintiffs who had foregone or waived their state administrative remedies in reliance on those decisions").

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5. *There Has Been No Relevant Change in Social, Economic or Other Factual Circumstances Since Runyon v. McCrary.*

Finally, in the constitutional context, the Court has sometimes overruled an earlier decision on the ground that some underlying factual circumstance—social, economic, or otherwise—has changed.³³ In Justice Stewart's words, "[a] substantial departure from precedent can . . . be justified . . . in the light of an altered historic environment."³⁴ So far as *amici* are aware, this factor has rarely, if ever, been applied in the statutory context and, in any event, does not apply to *Runyon*.

No relevant social or economic circumstance has changed since 1976. If there was a "factual circumstance" that influenced the Court's interpretation of Section 1981 in *Runyon*, it was the recognition that "[t]he policy of the Nation . . . in recent years has moved constantly in the direction of eliminating racial segregation in all sectors of society." 427 U.S. at 191 (Stevens, J., concurring). That policy has not changed. Today the nation remains committed to "the fundamental policy of eliminating racial discrimination."³⁵

* * *

In sum, the factors this Court considers in determining whether to apply *stare decisis* overwhelmingly counsel that *Runyon* not be overruled. As the Court stated

³³ See, e.g., *Taylor v. Louisiana*, 419 U.S. 522, 537 (1975) (overruling decision that had upheld the systematic exclusion of women from jury service because "[i]f it was ever the case that women were unqualified to sit on juries or were so situated that none of them should be required to perform jury service, that time has long since passed"); *Brown v. Board of Education*, 347 U.S. 483, 494-95 (1954) (overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896), in part because the insidious psychological effects of segregation on school children "is amply supported by modern authority").

³⁴ *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 634-35 (1974) (Stewart, J., dissenting).

³⁵ *Bob Jones Univ. v. United States*, 461 U.S. at 595.

more than 40 years ago in refusing to overrule the interpretation of another Reconstruction-era civil rights statute adopted in *United States v. Classic*, 313 U.S. 299 (1941):

The construction given § 20 [18 U.S.C. § 242] in the *Classic* case formulated a rule of law which has become the basis of federal enforcement in this important field. The rule adopted in that case was formulated after mature consideration. It should be good for more than one day only. We do not have a situation here comparable to *Mahnich v. Southern S.S. Co.*, 321 U.S. 96, where we overruled a decision demonstrated to be a sport in the law and inconsistent with what preceded and what followed. The *Classic* case was not the product of hasty action or inadvertence. It was not out of line with the cases which preceded. It was designed to fashion the governing rule of law in this important field. We are not dealing with constitutional interpretations which throughout the history of the Court have wisely remained flexible and subject to frequent re-examination. The meaning which the *Classic* case gave to the phrase "under color of any law" involved only a construction of the statute. Hence if it states a rule undesirable in its consequences, Congress can change it. We add only to the instability and uncertainty of the law if we revise the meaning of § 20 to meet the exigencies of each case coming before us.

Screws v. United States, 325 U.S. 91, 112-13 (1945).

The reasoning in *Screws* applies fully here. It is made more compelling by the fact, as *amici* show below, that this Court's interpretation of Section 1981 has been affirmatively approved by the Congress.

III. *STARE DECISIS* APPLIES WITH SPECIAL FORCE BECAUSE THE CONGRESS HAS AFFIRMATIVELY ENDORSED THIS COURT'S INTERPRETATION OF SECTION 1981.

This Court has recognized that the doctrine of *stare decisis* has particular force where the Congress has taken subsequent legislative action consistent with the Court's

interpretation has been the statute. ³⁷ approval of Congress ruled or

³⁶ See, e.g., overruling recent expression in decision considered")

³⁷ See, e.g., (1977) (initially the was aware and] . . . tion. . . . ("[T]hereute] . . . statut[e]. gress 'must given by enactment (1924)).

³⁸ See, e.g., S. Ct. 30 Executive firmative amendmer confirms (tions regarding nan, J.); tion [that has been enacted. . . judicially those decision and them legis. 224, 228 (Act adopted 29 (1959) despite th

interpretation of a statute.³⁶ Thus, where the Congress has reenacted a statute, this Court's prior construction of the statute is presumed to have been adopted by the Congress.³⁷ Likewise, the Court has found congressional approval of a judicial interpretation of a statute in the Congress' rejection of legislation that would have overruled or limited the reach of the judicial interpretation,³⁸

³⁶ See, e.g., *Patsy v. Board of Regents*, 457 U.S. at 501 ("whether overruling [prior] decisions would be inconsistent with more recent expressions of congressional intent" is "particularly relevant" in deciding "whether prior decisions should be overruled or reconsidered"); *Monell v. Department of Social Serv.*, 436 U.S. at 696-99.

³⁷ See, e.g., *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 279 (1977) (where the Congress has reenacted a statute "in substantially the same form," the Court "can safely assume that Congress was aware of the [interpretation given the statute by the Court and] . . . that Congress has ratified th[at] statutory interpretation. . . ."); *Shapiro v. United States*, 335 U.S. 1, 16 (1948) ("[T]here is a presumption that Congress, in reenacting the [statute] . . . was aware of the settled judicial construction of the statut[e]. In adopting the language used in the earlier act, Congress 'must be considered to have adopted also the construction given by this Court to such language, and made it a part of the enactment.'") (quoting *Hecht v. Malley*, 265 U.S. 144, 153 (1924)).

³⁸ See, e.g., *Local 28 of the Sheet Metal Workers v. EEOC*, 106 S. Ct. 3019, 3047 (1986) ("Congress was aware that both the Executive and Judicial Branches had used [race-conscious affirmative action] as a remedy under [Title VII], and rejected amendments that would have barred such remedies. . . . [This] confirms Congress' resolve to accept prevailing judicial interpretations regarding the scope of Title VII") (opinion of Brennan, J.); *Flood v. Kuhn*, 407 U.S. 258, 283-84 (1972) ("[L]egislation [that would have overturned judicial interpretation of statute] has been introduced repeatedly in Congress but none has ever been enacted. . . . We continue to be loath . . . to overturn those cases judicially when Congress, by its positive inaction, has allowed those decisions to stand for so long and, far beyond mere inference and implication, has clearly evinced a desire not to disapprove them legislatively."); *Joint Indus. Bd. v. United States*, 391 U.S. 224, 228 (1968) (refusing to override interpretation of Bankruptcy Act adopted in *United States v. Embassy Restaurant, Inc.*, 359 U.S. 29 (1959), because section of Act interpreted "was left unchanged despite the fact that in every Congress since *Embassy Restaurant*

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as well as in the Congress' failure to change the judicial interpretation in the course of enacting or amending related legislation which reflects the Congress' awareness of the interpretation.³⁹

Here, the Congress has both declined to enact legislation that would have effectively repealed Section 1981 as it relates to employment discrimination, and left *Runyon* untouched in the course of enacting related legis-

bills have been introduced to overrule or modify the result reached in that case").

³⁹ See, e.g., *Monessen S.W. Ry. v. Morgan*, 56 U.S.L.W. 4494, 4496 (June 6, 1988) (where the Congress amended the Federal Employers' Liability Act several times, but never attempted to amend it to provide for prejudgment interest, "'Congress at least acquiesces in, and apparently affirms'" the judicial interpretation that prejudgment interest is not available under the Act) (quoting *Cannon v. Univ. of Chicago*, 441 U.S. 677, 703 (1979)); *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. at 419 ("Particularly because the legislative history reveals clear congressional awareness of [an earlier interpretation of the statute by the Court] . . . the fact that Congress specifically addressed this area and left [the earlier decision] undisturbed lends powerful support to [its] continued viability."); *Patsy v. Board of Regents*, 457 U.S. at 508-09 (Court declined to overturn its earlier decisions holding that exhaustion of administrative remedies was not mandated under Section 1983, in large part because the Congress, in a subsequent enactment of a related statute, had "clearly expressed its belief" that "the no-exhaustion rule should be left standing."); *Lindahl v. OPM*, 470 U.S. 768, 782 (1985); *Herman & MacLean v. Huddleston*, 459 U.S. 375, 385-86 (1983) (The Congress' decision to leave intact one section of securities laws in the course of revising other sections of securities laws "suggests that Congress ratified" judicial interpretation given to that section.); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 381-82 (1982) ("[T]he fact that a comprehensive reexamination and significant amendment of the [Commodity Exchange Act] left intact the statutory provisions under which the federal courts had implied a cause of action is itself evidence that Congress affirmatively intended to preserve that remedy."); *Missouri v. Ross*, 299 U.S. 72, 75 (1936) (The Congress' permitting a provision of Bankruptcy Act interpreted by Court to "stand for many years . . . although amending . . . the Bankruptcy Act in other particulars . . . is persuasive evidence of the adoption by that body of the judicial construction.").

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lation which clearly reflects the Congress' awareness of that interpretation. As this Court stated in *Lindahl v. OPM*, 470 U.S. 768, 782 (1985), the Congress' enactment of related legislation "without explicitly repealing the established [case] doctrine itself gives rise to a presumption that Congress intended to embody [the judicial interpretation in the statute the courts had construed]." That presumption becomes virtually conclusive where, as here, the Congress' actions were predicated on Section 1981 continuing to have the meaning attributed to it by this Court.

Following this Court's decision in *Jones v. Alfred H. Mayer & Co.*, the Congress passed the Equal Employment Opportunity Act of 1972.⁴⁰ In the course of enacting that legislation, both the House and Senate considered proposals to make Title VII and the Equal Pay Act of 1963, 29 U.S.C. § 206(d), the exclusive federal remedies for private discrimination in employment. These proposals, which were ultimately rejected, would have repealed Section 1981 insofar as it prohibits private racial discrimination in employment.

The amendment proposed in the Senate⁴¹ generated substantial objections from those who believed that Section 1981 served as a "valuable protection" for those who might "fall . . . in the interstices of the Civil Rights Act of 1964."⁴² Senator Harrison Williams, the floor manager and one of the original sponsors of the pending bill, objected that "[i]t is not our purpose to repeal existing civil rights laws," and noted that to do so "would severely weaken our overall effort to combat the presence of employment discrimination."⁴³ Specifically recognizing the scope of Section 1981, Senator Williams stated:

⁴⁰ Pub. L. No. 92-261, 86 Stat. 103 (1972). This Act amended Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*

⁴¹ 118 Cong. Rec. 3173 (1972) (Hruska amendment).

⁴² *Id.* at 3370 (statement of Sen. Javits).

⁴³ *Id.* at 3371 (statement of Sen. Williams).

The law against employment discrimination did not begin with title VII and the EEOC, nor is it intended to end with it. The right of individuals to bring suits in Federal courts to redress individual acts of discrimination, including employment discrimination, was first provided by the Civil Rights Acts of 1866 and 1871, 42 U.S.C. sections 1981, 1983. It was recently stated by the Supreme Court in the case of *Jones v. Mayer*, that these acts provide fundamental constitutional guarantees. In any case, the courts have specifically held that title VII and the Civil Rights Acts of 1866 and 1871 are not mutually exclusive, and must be read together to provide alternative means to redress individual grievances.

Mr. President, the amendment of the Senator from Nebraska [Sen. Hruska] will repeal the first major piece of civil rights legislation in this Nation's history. We cannot do that. . . . I believe that to make title VII the exclusive remedy for employment discrimination would be inconsistent with our entire legislative history of the Civil Rights Act. It would jeopardize the degree and scope of remedies available to the workers of our country.⁴⁴

Responding affirmatively to Senator Williams' plea that the Congress not "strip from th[e] individual his rights that have been established, going back to the first Civil Rights Law of 1866,"⁴⁵ the Senate rejected the repealing amendment.⁴⁶

The House Education and Labor Committee similarly rejected an exclusive remedies provision, explaining that

the Committee wishes to emphasize that the individual's right to file a civil action in his own behalf, pursuant to the Civil Rights Act of 1870 and 1871, 42 U.S.C. §§ 1981 and 1983, is in no way affected. . . . [It is] this Committee's belief that the remedies available to the individual under Title VII are co-extensive with the individual's right to sue under the

⁴⁴ *Id.* at 3371-72.

⁴⁵ *Id.* at 3372.

⁴⁶ *Id.* at 3373.

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provisions of the Civil Rights Act of 1866, 42 U.S.C. § 1981, and that the two procedures augment each other and are not mutually exclusive.⁴⁷

The Committee minority also recognized that "charges of discriminatory employment conditions may still be brought under prior existing federal statutes such as . . . the Civil Rights Act of 1866 [O]ur attempt to amend the Committee bill to make title VII an exclusive remedy (except for pattern or practice suits) was rejected."⁴⁸

A substitute bill containing an exclusive remedies provision was proposed in the House during the floor debates.⁴⁹ The sponsor of the substitute explained that "there would no longer be recourse to the old 1866 civil rights act."⁵⁰ Although vigorously opposed,⁵¹ the substitute bill was adopted by a slim majority in the House.⁵² In conference with the Senate, however, the House receded and a compromise version of the bill which contained no exclusive remedy provision became law.⁵³ The Congress thus unequivocally manifested its intent to preserve the scope of Section 1981 by rejecting efforts to eliminate the statute's application to private employment discrimination.

This legislative history played a significant role in persuading this Court in *Runyon* to adhere to its earlier interpretation of Section 1981:

⁴⁷ H.R. Rep. No. 238, 92d Cong., 1st Sess. 18-19 (1971).

⁴⁸ *Id.* at 66.

⁴⁹ 117 Cong. Rec. 31979-80 (1971) (Erlenborn substitute).

⁵⁰ *Id.* at 31973 (statement of Rep. Erlenborn).

⁵¹ Members objected that the substitute bill would "repeal[] the Civil Rights Act of 1866 where it touches upon this field," *id.* at 31978 (statement of Rep. Eckhardt), and would "nullify the Civil Rights Act of 1866 . . . as far as employment discrimination is concerned." *Id.* at 32100 (statement of Rep. Hawkins).

⁵² *Id.* at 32111-12.

⁵³ H.R. Conf. Rep. No. 899, 92d Cong., 2d Sess. 17 (1972).

It is noteworthy that Congress in enacting the Equal Employment Opportunity Act of 1972 . . . specifically considered and rejected an amendment that would have repealed the Civil Rights Act of 1866, as interpreted by this Court in *Jones*, insofar as it affords private-sector employees a right of action based on racial discrimination in employment. . . .

427 U.S. at 174.

In October 1976, after the *Tillman*, *Johnson* and *Runyon* decisions, the Congress again signaled its approval of this Court's interpretation of Section 1981 in enacting the Civil Rights Attorney's Fees Awards Act of 1976.⁵⁴ That Act permits the recovery of attorney's fees in actions against private parties under Section 1981.⁵⁵ The House Judiciary Committee summarized the reach of Sections 1981 and 1982 as follows:

Section 1981 is frequently used to challenge employment discrimination based on race or color. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975). Under that section the Supreme Court recently held that whites as well as blacks could bring suit alleging racially discriminatory employment practices. *McDonald v. Santa Fe Trail Transportation Co.*, — U.S. —, 96 S. Ct. 2574 (1976). Section 1981 has also been cited to attack exclusionary admissions policies at recreational facilities. *Tillman v. Wheaton-Haven Recreation Ass'n, Inc.*, 410 U.S. 431 (1973). Section 1982 is regularly used to attack discrimination in property transactions, such as

⁵⁴ Pub. L. No. 94-559, 99 Stat. 2641 (1976) (codified at 42 U.S.C. § 1988).

⁵⁵ The Congress enacted the Civil Rights Attorney's Fees Awards Act in response to *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975). This Court had concluded in *Alyeska* that the federal courts do not have power to award attorney's fees to a prevailing party in actions brought under Section 1981 (among other statutes), save in certain limited circumstances, absent express authorization from the Congress. The Act was passed after the Congress learned of *Alyeska's* "devastating impact . . . on litigation in the civil rights area." H.R. Rep. No. 1558, 94th Cong., 2d Sess. 3 (1976).

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the purchase of a home. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).⁵⁶

The Committee expressly recognized that Sections 1981 and 1982 and other private discrimination remedies created by the Congress can reach the same private conduct:

With respect to the relationship between Section 1981 and Title VII of the Civil Rights Act of 1964, the House Committee on Education and Labor has noted that "the remedies available to the individual under Title VII are co-extensive with the individual's right to sue under the provisions of the Civil Rights Act of 1866, 42 U.S.C. § 1981, that the two procedures augment each other and are not mutually exclusive." . . . That view was adopted by the Supreme Court in *Johnson v. Railway Express Agency* . . .⁵⁷

The Committee also made clear that, "[a]s with Section 1981 and Title VII, Section 1982 and Title VIII of the Civil Rights Act of 1968 [the Fair Housing Act] are complementary remedies, with similarities and differences in coverage and enforcement mechanism."⁵⁸

The Senate Judiciary Committee considered the Civil Rights Attorney's Fees Awards Act especially necessary because the complementary modern-day remedies for private discrimination provide for attorney's fees. The Committee did not want litigants challenging the same discriminatory practices under the Reconstruction-era statutes to be deprived of such fees. As the Committee explained:

For instance, fees are now authorized in an employment discrimination action under Title VII of the 1964 Civil Rights Act, but not in the same suit brought under 42 U.S.C. § 1981, which protects similar rights but involves fewer technical prerequisites

⁵⁶ H.R. Rep. No. 1558, 94th Cong., 2d Sess. 4 (1976).

⁵⁷ *Id.* at 4 n.8 (quoting H.R. Rep. No. 238, 92d Cong., 1st Sess. 19 (1971)).

⁵⁸ *Id.* at 4 n.9.

to the filing of an action. Fees are allowed in a housing discrimination suit brought under Title VIII of the Civil Rights Act of 1968, but not in the same suit brought under 42 U.S.C. § 1982, a Reconstruction Act protecting the same rights.⁵⁹

By extending the right to recover attorney's fees to suits brought under Sections 1981 and 1982, the Congress ensured that litigants would be financially able to challenge private discrimination under both the Reconstruction-era and modern civil rights statutes.

As this legislative history demonstrates, the Congress' approval of, and its intent to build upon, this Court's interpretation of Section 1981 as reaching discrimination by private parties are unmistakable. The Congress has been fully cognizant of how Section 1981 has been construed by this Court. It has rebuffed legislative efforts to reverse that construction; it has approved and relied on the construction given the statute by this Court; and it has strengthened Section 1981 as a remedy by making attorney's fees available to prevailing parties, thereby encouraging Section 1981's more effective use. Congressional intent could hardly have been more clear if the Congress had reenacted Section 1981 following *Runyon*. However, "[i]n the legal context in which Congress acted, this was unnecessary."⁶⁰

⁵⁹ S. Rep. No. 1011, 94th Cong., 2d Sess. 4 (1976). See also 121 Cong. Rec. 26806 (1975) (statement of Sen. Tunney) (Title VII and Section 1981 "protect[] similar rights").

⁶⁰ *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. at 387.

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CONCLUSION

For the foregoing reasons, this Court should decline to overrule the interpretation of 42 U.S.C. § 1981 adopted in *Runyon v. McCrary*, 427 U.S. 160 (1976).

Respectfully submitted,

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**DEAN v. DC
APPELLATE BRIEF**

Divider Title: _____

IN THE DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 92-CV-737

CRAIG ROBERT DEAN, et al.,

Appellants,

v.

DISTRICT OF COLUMBIA, et al.,

Appellees.

On Appeal from a Decision of the
Superior Court of the District of Columbia

BRIEF FOR THE DISTRICT OF COLUMBIA

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IN THE DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 92-CV-737

CRAIG ROBERT DEAN, et al.,

Appellants,

v.

DISTRICT OF COLUMBIA, et al.,

Appellees.

On Appeal from a Decision of the
Superior Court of the District of Columbia

BRIEF FOR THE DISTRICT OF COLUMBIA

ISSUES PRESENTED

1. Whether the trial court, in upholding the decision of the Clerk of the Superior Court to deny the application by two men for a license to marry, correctly determined that only a man and a woman have the capacity to enter into a marriage under the laws of the District.
2. Whether the trial court correctly rejected the argument that the Human Rights Act gives persons of the same sex the right to marry.
3. Whether the trial court correctly rejected the argument that the due process or equal protection clause of the Constitution gives persons of the same sex the right to marry.

STATEMENT OF THE CASE

The basic facts are undisputed. Appellants are two homosexual men. On November 13, 1990, they applied for a license to marry. The Clerk of the Superior Court denied their application because they were not of the opposite sex. In a memorandum, dated November 19, 1990, to the Director of the Family Division, the Clerk explained:

On November 13, 1990, Mr. Patrick G. Gill and Mr. Craig R. Dean submitted an application for a marriage license to the D.C. Superior Court Marriage Bureau. Title 30-110 of the District of Columbia Code authorizes the Clerk of the Court to grant or deny applications for marriage licenses.

The sections of the District of Columbia Code governing marriage do not authorize marriage between persons of the same sex. Therefore the application for a marriage license in this case is respectfully denied.

App. A, Exhibit A [following p. 17].¹

Appellants then filed an action in the Superior Court for injunctive and declaratory relief on the grounds that the District's marriage laws permitted same-sex marriages and that the Human Rights Act gave them the right to marry. The District moved to dismiss.

The trial court granted summary judgment for the District.² The court rejected appellants' argument that District law permitted same-sex marriages. Noting that the Council, when it

¹"App. A" refers to appellants' amended complaint, filed February 13, 1992. The District has moved to supplement the record with appellants' amended complaint.

²See Super.Ct.-Civ. R. 12(c).

enacted the Marriage and Divorce Act, D.C. Law 1-107, D.C. Stat. 114 (1977), considered such a proposal but declined to adopt it, found their argument that the Council actually made such a change incredible. App. B at 7-8.³ Pointing to various gender-specific references in current law and the Marriage and Divorce Act, dictionary references, decisions of state appellate courts, the common law of the District, and the Bible, the court held that marriage, by definition, requires a male and a female participant. App. B at 21.

The trial court also rejected appellants' argument based on the Human Rights Act, D.C. Law 2-38, D.C. Code § 1-2501 et seq. (1992), holding that the Act could not be read to effect a dramatic change in the gender requirement for marital partners. App. B at 23. The court held that this general act could not be read to amend a specific, controlling law on the subject, the Marriage and Divorce Act, which was enacted by the same Council. App. B at 23. The court pointed out that the legislative history of the Marriage and Divorce Act showed that specific language was proposed to be added to the Act which would have made the Human Rights Act applicable to the Marriage and Divorce Act, but that the proposal was not adopted. App. B at 24. The court considered this "affirmative evidence that the City Council consciously chose not to make the language of the Human Rights

³"App. B" refers to the decision of the trial court, filed on January 2, 1992. The District has moved to supplement the record with this decision. See D.C.App. R. 10(a)(1), (e).

Act applicable to regulation of the marital relationship." App. B at 25.

Appellants then moved for reconsideration, adding the argument that the Clerk's decision denied them their rights under the due process, equal protection, and establishment of religion clauses of the Constitution. The trial court granted the motion for reconsideration, but ruled against them in a decision filed June 3, 1992. App. C.⁴ First, the court held that there was no due process right of persons of the same sex to marry. Noting that no state had sanctioned such marriages, it concluded that it cannot "be seriously contended that the right to enter into such a union is 'deeply rooted in this Nation's history and tradition.'" App. C. at 3. Second, the court rejected appellants' equal protection argument, holding that they were not denied a license because of their sexual orientation but because of "the nature of marriage itself." App. C. at 5. The court found that the primary basis for laws restricting marriage to members of the opposite sex--fostering procreation, which is necessary to the survival of the human race--was not only rational but compelling. App. C. at 8. Third, the court rejected appellants' argument based on the establishment clause as "patently frivolous." App. C. at 11. The court noted that the District's marriage statutes

⁴"App. C" refers to the decision of the trial court, filed June 3, 1992, responding to the points raised in appellants' motion for reconsideration. The District has moved to supplement the record with this decision.

served legitimate secular purposes and did not advance religion.
App. C. at 20-21.

ARGUMENT

Appellants base their argument that persons of the same sex are entitled to marry on (1) isolated provisions of the District's marriage statutes permitting "persons" or "parties" to obtain marriage licenses, (2) the general proscriptions against discrimination based on sexual orientation in the Human Rights Act, and (3) the due process and equal protection clauses of the Constitution, which they assert gives them a fundamental right to marry. However, the concept of marriage under the District's laws has always been limited to the union of persons of the opposite sex; the general language in the Human Rights Act can not reasonably be construed to effect such a dramatic change in the laws; and the courts have never recognized a constitutional right of two persons of the same sex to marry. The decision to make such a fundamental change in the laws is an important question of social policy uniquely within the province of the Council of the District of Columbia, which is vested with the legislative power of the District under our tripartite form of government. D.C. Code § 1-227(a) (1992). It is not a decision that should be made by the courts. Therefore, the trial court correctly upheld the Clerk's denial of appellants' application for a license to marry.

I. THE DISTRICT'S LAWS ONLY PERMIT A MAN
AND A WOMAN TO ENTER INTO A MARRIAGE.

Appellants argue that the Clerk of the Superior Court misinterpreted the District's marriage laws. They note that certain provisions are gender-neutral, speaking in terms of "persons" or "parties," and, therefore, must be interpreted to permit two persons of the same sex to marry. However, an examination of the ordinary meaning of the term "marriage," the District's marriage statutes read as a whole, the common law, and the laws of other jurisdictions in the country--lead inevitably to the conclusion that the concept of marriage under the laws of the District is limited to the union of two persons of the opposite sex.

A. The ordinary meaning of the term
"marriage," in its legal sense, is
limited to the union of a man and a
woman.

As the trial court noted, "the words of a statute are to be construed according to their ordinary sense and with the meaning commonly attributed to them." App. B at 13-14, citing Barbour v. Department of Employment Services, 499 A.2d 122, 125 (D.C. 1985); In re Estate of Shutack, 469 A.2d 427, 429 (D.C. 1983); United States v. Thompson, 347 A.2d 581, 583 (D.C. 1975). The Clerk's interpretation of the term "marriage" is consistent with its ordinary meaning, which, in its legal sense, has always been limited to the union of a man and a woman.

Thus, Black's Law Dictionary (6th ed. 1990) defines "marriage" as the:

Legal union of one man and one woman as husband and wife. Marriage, as distinguished from the agreement to marry and from the act of becoming married, is the legal status, condition, or relation of one man and one woman united in law for life, or until divorced, for the discharge to each other and the community of the duties legally incumbent on those whose association is founded on the distinction of sex. A contract, according to the form prescribed by law, by which a man and woman capable of entering into such contract, mutually engage with each other to live their whole lives (or until divorced) together in state of union which ought to exist between a husband and wife. The word also signifies the act, ceremony, or formal proceeding by which persons take each other for husband and wife.

Id. at 972 (citations omitted; emphasis added). Likewise, Webster's Third New International Dictionary of the English Language Unabridged (1971) defines "marriage" in its primary meaning as:

. . . the state of being united to a person of the opposite sex as husband or wife
. . . the mutual relation of husband and wife
. . . the institution whereby men and women are joined in a special kind of social and legal dependence for the purpose of founding and maintaining a family . . .

Id. at 1384 (emphasis added). Accord, 3A Sutherland, Statutory Construction, § 68.02 (4th ed. 1986) ("Marriage is the legal union of one man and one woman as husband and wife"); 52 Am.Jur.2d "Marriage" § 1 (1970). Although the term can sometimes be used broadly or metaphorically to include other unions, in its legal sense, it has been limited to the union of persons of the opposite sex.

B. The District's statutes relating to marriage limit the meaning of the term to the union of a man and a woman.

Appellants' argument that they are entitled to a marriage license is based on gender-neutral language in D.C. Code §§ 30-110, 30-111 (1988), referring to "parties desiring to marry" and "any person intending to marry." However, the meaning of a statute can not be ascertained from focusing on isolated words or phrases, but only from a reading of the legislative scheme as a whole. See Citizens Association of Georgetown v. Zoning Commission of the District of Columbia, 392 A.2d 1027, 1033 (D.C. 1978) (en banc) ("It is a canon of statutory interpretation that one looks at the particular statutory language within the context of the whole legislative scheme when legislative intent is to be determined."); accord, Thomas v. Department of Employment Services, 547 A.2d 1034, 1037 (D.C. 1988); In re Bicksler, 501 A.2d 1, 5-6 (D.C. 1985); 2A Sutherland, Statutory Construction, § 46.05 (5th ed. 1992).⁵

The District's marriage laws are currently codified in Titles 30 (Marriage) and Title 16, Chapter 9 (Divorce, Annulment, Separation, Support, Etc.), of the D.C. Code. Although the

⁵A literalistic approach to statutory interpretation often leads to absurd results. For example, one could argue, with certain textual support, that the "persons" who can marry are not limited to natural persons, but include corporations and partnerships, since those entities are expressly defined to be included within the definition of "person" under all of the District's statutes. See D.C. Code § 49-204 (1990). Though one may think, metaphorically, of the "marriage" of two such entities--i.e., by merger, they can not receive a marriage license.

statutes use gender-neutral terms such as "person" or "party" where the sex of the individual makes no difference, they also use gender-specific terms such as "husband," "wife," "man," and "woman." Thus, D.C. Code § 16-904(d)(1) (1989) provides that "[m]arriage contracts may be annulled . . . where such marriage was contracted while either of the parties thereto had a former wife or husband living . . ." D.C. Code § 16-911 provides that, during the pendency of a divorce, a court may "require the husband or wife to pay alimony to the other spouse." D.C. Code § 16-912 provides that, when a divorce is granted, the court may "retain to the wife her right of dower in the husband's estate." D.C. Code § 16-913 provides that, "[w]hen a divorce is granted on the application of the husband or wife, the court may require him or her to pay alimony to the other spouse . . ." D.C. Code § 16-916 provides that "[w]henever a husband or wife shall fail or refuse to maintain his or her needy spouse . . ." the court can decree that he or she pay permanent alimony. (Emphasis added.) Similarly, D.C. Code § 30-101 (1988), prohibits the marriage of a "man" with close relations of his "wife," and a "woman" with close relations of her "husband."

Appellants neglect to mention Title 16, Chapter 9, of the D.C. Code and focus only on Title 30. However, these two parts of the Code must be read together. They are clearly in pari materia, forming part of a single statutory scheme: the former provides the requirements for entering the marriage relation and the latter, the requirements for ending this relation.

Although currently located in separate parts of the Code, historically, the statutes relating to marriage and divorce have long been part of the same legislative scheme. The District's first marriage statute was a 1777 Maryland statute, entitled "An Act concerning Marriages." Md. Stat. 1777, ch. 12, 1 Dorsey 130 (1840),⁶ which continued to apply to the part of the District ceded by Maryland after the District was created in 1801.⁷ The District's first divorce statute was enacted in 1860, "An Act to authorize Divorces in the District of Columbia, and for other purposes," the Act of June 19, 1860, ch. 153, 12 Stat. 59.⁸ In 1874, when Congress enacted the Revised Statutes of the District of Columbia, the first enactment of the District's laws as a whole, it placed the laws concerning marriage and divorce in one place--Chapter 22 thereof, entitled "Marriage and Divorce." Rev. Stat. D.C., ch. 22, at 86-89.⁹

⁶Amended by Md. Stat. 1785, ch. 35, Md. Stat. 1790, ch. 20, 1 Dorsey 196, 256 (1840).

⁷The Organic Act of 1801, Act of Feb. 27, 1801, § 1, 2 Stat. 103, D.C. Code vol. 1 at 46 (1991), provided that "the laws of the state of Maryland, as they now exists, shall be and continue in force in that part of said district, which was ceded by that state to the United States"

⁸Until then, no court possessed authority to grant a divorce in the District. See Cheever v. Wilson, 6 D.C. 149 (1866), rev'd on other grounds, 76 U.S. 108 (1870); Hatfield v. Hatfield, 6 D.C. 80 (1866).

⁹Other Acts of Congress incorporated included "An Act to further amend the Law of the District of Columbia in Relation to judicial Proceedings, and preserve Records of Marriages therein," the Act of June 1, 1870, ch. 115, 16 Stat. 146; and "An Act concerning Divorces in the District of Columbia," the Act of June 1, 1870, ch. 116, 16 Stat. 147.

The 1901 Code for the District, the Act of March 3, 1901, ch. 854, 31 Stat. 1189, which consolidated the Revised Statutes and one subsequent Acts of Congress, separated the laws concerning marriage and divorce into two chapters--Chapter 22 (Divorce), 31 Stat. 1345, and Chapter 43 (Marriage), 31 Stat. 1391. But the laws remained part of the same statutory scheme. Indeed, when the first edition of the D.C. Code was published in 1929, the codifiers placed all of the District's statutes relating to marriage (including those relating to divorce, annulment, and separation) in one part, Title 14, entitled "Husband and Wife." See D.C. Code, Title 14 (1929). Although the provisions were placed in different locations in subsequent editions of the Code--the "marriage" sections going to Title 30 and the "divorce" sections going to Title 16--the laws remained part of the same legislative scheme.¹⁰

The provisions upon which appellants rely, D.C. Code §§ 30-110 and 30-111 (1988), are a codification of §§ 1291 and 1292 of the 1901 Code. These, in turn, were taken directly from an 1896 Act of Congress, "An Act To regulate marriages in the District of Columbia," the Act of May 13, 1896, ch. 117, §§ 1, 8,

¹⁰In 1963, Congress, by Pub. L. 88-241, 77 Stat. 478 (1963), enacted into positive law Part II of the D.C. Code (The Judiciary, Titles 11-17), but only made stylistic changes to the provisions relating to marriage. As the House Report notes, "[t]he purpose of this enactment is not to change substantive law, but to put that law in a form that will be more useful and understandable." H.R. Rep. No. 377, 88th Cong., 1st Sess. 2 (1963). Thus, only "changes in phraseology," most of them "minor," were made to the sections of the 1901 Code relating to marriage. See *id.* at A125-A128.

29 Stat. 118, 119. Both the 1896 Act and the pertinent provisions of the 1901 Code use gender-specific terms. Thus, § 6 of the 1896 Act provides "That any person authorized to celebrate the rites of marriage shall be paid by the husband a fee of at least one dollar in each case." 29 Stat. at 118 (emphasis added).

And the 1901 Code, in addition to the numerous gender-specific provisions of Chapter 22 thereof, which are now in D.C. Code, Title 16, Chapter 9 (1989),¹¹ contains provisions with gender-specific language in Chapter 43 thereof--§§ 1283 and 1296--now codified in Title 30 of the D.C. Code. Thus, § 1283, D.C. Code § 30-101 (1988), prohibited the marriage of a "man" with certain close relations of his "wife" and prohibits the marriage of a "woman" with certain close relations of her "husband."¹² And § 1296, D.C. Code § 30-116 (1973),¹³

¹¹Under Chapter 22 of the 1901 Code: Section 966 provided for the voiding of marriages where the marriage was contracted "while either of the parties thereto had a former wife or husband living." Section 975 permitted the court, during the pendency of a divorce, to "require the husband to pay alimony to the wife." Section 976 provided that, "[w]hen a divorce is granted to the wife, the court shall have authority to decree her permanent alimony . . . and may . . . retain to the wife, her right of dower in the husband's estate." Section 977 provided that "[i]f the divorce is granted on the application of the husband, the court may, nevertheless, require him to pay alimony to the wife . . ." Section 980 provided "[w]henver any husband shall fail or refuse to maintain his wife" the court can decree that he pay permanent alimony. (Emphasis added.) See 31 Stat. 1345-1346. They are currently codified in D.C. Code §§ 16-904(d)(1), 16-911, 16-912, 16-913, and 16-916 (1989), respectively.

¹²It is also interesting to note that § 1283 was derived from the 1777 Maryland statute cited above. See D.C. Code Encyclopedia § 30-101 at p. 339 (1968). It is significant that § 12 of the Maryland statute provided "[t]hat all license for

provided that persons who were slaves before emancipation who "had undertaken and agreed to occupy the relation to each other of husband and wife . . . and were cohabiting together as such or in any way recognizing the relations as existing [on July 25, 1866], whether the rites of marriage have been celebrated between them or not, are deemed husband and wife . . ." (Emphasis added.)¹⁴

Moreover, amendments to the marriage laws by Congress and the Council show that both legislatures contemplated marriage as the union of a man and a woman. Thus, in 1965, when Congress, as part of a general revision, amended D.C. Code § 16-904, concerning the grounds for divorce, the House and Senate reports on Pub. L. 89-217, 79 Stat. 889 (1965), in commenting on the provision reducing the residency requirement to six months, stated that "[t]his would provide a remedy to the nonresident wife whose husband has deserted her and established residence in the District of Columbia." H.R. Rep. 89-24, 89th Cong., 1st Sess. 3 (1965); S. Rep. No. 89-638, 89th Cong., 1st Sess. 3 (1965) (emphasis added).

marriage shall be issued by the clerk of the court of that county where the woman shall have her usual residence . . ." (Emphasis added.) Md. Stat. 1777, ch. 12, § 12, 1 Dorsey 133.

¹³This was taken verbatim from "An Act legalizing Marriages and for other Purposes in the District of Columbia," the Act of July 25, 1866, ch. 240, 14 Stat. 236.

¹⁴This was repealed by the Marriage and Divorce Act as obsolete. D.C. Law 1-107, § 113(b), D.C. Stat. 119 (1977).

After Home Rule took effect, the Council revised parts of these statutes by the Anti-Sex Discrimination Act, D.C. Law 1-87, D.C. Stat. 194 (1976), and the Marriage and Divorce Act, D.C. Law 1-107, D.C. Stat. 114 (1977). However, the Council did not alter the basic concept of marriage as being limited to members of the opposite sex. Both acts retained the gender-specific language of the 1901 Code, as enacted into positive law by Congress in 1963.

Thus, the Anti-Sex Discrimination Act amended four of these sections, D.C. Code §§ 16-911, 16-912, 16-913, 16-916, to make them gender-neutral, but, nevertheless, retained the gender-specific terms "husband" and "wife." See D.C. Law 1-87, §§ 14, 15, 16, 19, D.C. Stat. 196-197 (1976).

Likewise, the Marriage and Divorce Act amended D.C. Code §§ 16-904 and 16-911, but left the terms "husband" and "wife" unchanged. D.C. Law 1-107, §§ 102, 108, D.C. Stat. 114-115, 117-118 (1977). As the trial court pointed out, that Act only made a few, minor, changes to Title 30 of the Code. App. B. at 7. Most of its amendments were to Title 16, Chapter 9, of the Code.¹⁵ The basic legislative scheme was not changed. See generally, S. Green & J. Long, The Real and Illusory Changes of the 1977 Marriage and Divorce Act, 27 Cath. L. Rev. 469 (1978).

Appellants, nevertheless, argue that the Marriage and Divorce Act amended the District's laws to permit same-sex

¹⁵The Act amended the following provisions of the D.C. Code: §§ 13-340, 15-712, 16-902, 16-904, 16-905, 16-907, 16-908, 16-909, 16-910, 16-911, 16-914, 16-918, 16-923, 16-2345, 21-104, 30-110, 30-320. See D.C. Code vol. 11 at 239 (1990).

marriages. However, as the trial court showed, Councilmember Arrington Dixon, introduced a version of the Act that would have permitted same-sex "marriages," but the Council as a whole declined to adopt his proposal. App. B. at 2-6. Surely, if the Council had intended such a dramatic, unprecedented change in the law sub silentio, after rejecting the Dixon proposal, it would have said something about it in the legislative history. But appellants can point to nothing indicating an intent to make such a change. Surely, if the Council had intended such a change, it would not have been difficult for it to adopt "statutory language that clearly effected such an intention, or at least conveyed to the reader that this is what the legislature probably intended." Riggs National Bank v. District of Columbia, 581 A.2d 1229, 1237 (D.C. 1990).

That the Council did not make such change is also confirmed by the settled rule of statutory construction that statutes in derogation of the common law are strictly construed. See Campbell v. District of Columbia, 568 A.2d 1076, 1077 (D.C. 1990); Spevacek v. Wright, 512 A.2d 1024, 1027 (D.C. 1986); 2B Sutherland, Statutory Construction, § 50.01 (5th ed. 1992). Common-law marriage, like statutory marriage, has always been restricted to members of the opposite sex. As this Court has noted, "[t]o establish a common-law marriage in the District of Columbia there must be an express mutual present intent to be husband and wife, followed by good faith cohabitation." Johnson v. Young, 372 A.2d 992, 994 (D.C. 1977) (emphasis added.)

Accord, East v. East, 536 A.2d 1103, 1105 (D.C. 1988); McCoy v. District of Columbia, 256 A.2d 908, 910 (D.C. 1969); Lee v. Lee, 201 A.2d 873, 874 (D.C. 1964); United States Fidelity & Guaranty Co. v. Britton, 106 U.S.App.D.C. 58, 61, 269 F.2d 249, 252 (1959); Hoage v. Murch Brothers Construction Co., 60 App.D.C. 218, 50 F.2d 983 (1931). See DeSanto v. Barnsley, 328 Pa.Super. 181, 476 A.2d 952, 955 (1984) (two persons of the same sex can not contract a common law marriage; courts should not expand concept of marriage as this role is for the legislature).

Reading the legislative scheme as a whole, and examining its history and the common law, leaves no doubt that the only "persons" or "parties" that the drafters of the District's marriage laws contemplated could enter into a marriage were persons of the opposite sex.

- C. All state courts that have addressed the issue have interpreted the term "marriage" to have its ordinary meaning, and have rejected the proposition that same-sex marriages were permitted.

State courts interpreting state statutes similar to the District have uniformly interpreted their statutes as restricting marriage to the union of persons of the opposite sex. Thus, in Jones v. Hallahan, 501 S.W.2d 588, 589 (Ky. 1973), the Supreme Court of Kentucky noted:

Kentucky statutes do not specifically prohibit marriage between persons of the same sex nor do they authorize the issuance of a marriage license to such persons.

Marriage was a custom long before the state commenced to issue licenses for that purpose. For a time the records of marriage

were kept by the church. Some states even now recognize a common-law marriage which has neither the benefit of license nor clergy. In all cases, however, marriage has always been considered as the union of a man and a woman and we have been presented with no authority to the contrary. . . . It appears that appellants are prevented from marrying, not by the statutes of Kentucky or the refusal of the County Court Clerk of Jefferson County to issue them a license, but rather by their own incapability of entering into a marriage as that term is defined.

(Emphasis added.) Likewise, in Baker v. Nelson, 191 N.W.2d 185, 185-186 (Minn. 1971), appeal dismissed, 409 U.S. 810 (1972), the Supreme Court of Minnesota noted:

Petitioners contend, first, that the absence of an express statutory prohibition against same-sex marriages evinces a legislative intent to authorize such marriages. We think, however, that a sensible reading of the statute discloses a contrary intent. Minn.Stat. c. 517, which governs "marriage," employs that term as one of common usages, meaning the state of union between persons of the opposite sex. It is unrealistic to think that the original draftsmen of our marriages statutes, which date from territorial days, would have used the term in any different sense. The term is of contemporary significance as well, for the present statute is replete with words of heterosexual import such as "husband and wife" and "bride and groom." . . . We hold, therefore, that Minn. Stat. c. 517 does not authorize marriages between persons of the same sex and that such marriages are accordingly prohibited.

Accord, Singer v. Hara, 11 Wash. App. 247, 522 P.2d 1187 (1974); see also, In re Succession of Bacot, 502 So.2d 1118, 1130 (La. App.), writ denied, 503 So.2d 466 (La. 1987) ("There is not now, nor has there every been in our law a legal mechanism for recognizing marriage between persons of the same sex."); Slayton

v. Texas, 633 S.W.2d 934, 937 (Tex.App. 1982) ("In this state, it is not possible for a marriage to exist between persons of the same sex. They may not marry one another, either with or without the formalities of law."); Jennings v. Jennings, 20 Md.App. 369, 315 A.2d 816, 819 n.7 (1974) ("Maryland does not recognize a marriage between persons of the same sex. Only a marriage between a man and a woman is valid in this State."); Anonymous v. Anonymous, 67 Misc.2d 982, 325 N.Y.S.2d 499, 500 (1971) ("The law makes no provision for a 'marriage' between person of the same sex. Marriage is and always has been a contract between a man and a woman."); Anno., Marriage between Persons of the Same Sex, 63 A.L.R.3d 1199 (1975) ("In all the cases so far discovered which have considered the question whether persons of the same sex may marry each other, the view has been taken that since the marriage relationship has always been the union of a man and a woman as husband and wife, there may be no valid contract entered into between persons of the same sex."); cf. Adams v. Howerton, 486 F.Supp. 1119, 1123 (C.D.Ca. 1980), aff'd, 673 F.2d 1036 (9th Cir.), cert. denied, 458 U.S. 1111 (1982).

Appellants rely on Braschi v. Stahl Associate Co., 74 N.Y.2d 201, 543 N.E.2d 49 (1989), in which the court overturned the eviction of the lifetime homosexual partner of a tenant prior to his death under New York's rental stabilization laws. But that case is inapposite. The court did not hold that the men were "married" in any sense of the word, but simply that the partner was a member of the tenant's "family," as the term was defined in

the administrative regulations. The court utilized broad dictionary definitions of the term "family," which included "a group of people united by certain convictions or common affiliation," and "primarily, the collective body of persons who live in one house and under one head or management." 543 N.E.2d at 54. Given these definitions of "family," it was not surprising that the court held that the term included "adult lifetime partners whose relationship is long term and characterized by an emotional and financial commitment and interdependence." 543 N.E.2d at 54.

However, this expansive definition of "family" applies equally to two adults of the opposite sex who meet the test. Thus, in Lepar Realty Corp. v. Griffin, 151 Misc.2d 579, 581 N.Y.S.2d 521 (N.Y.Sup. 1991), the court held that a man and woman living together with the financial and emotional commitment and interdependence were a "family" even though the man was legally married to another woman. See also, Ramirez v. Lewis, 177 A.D.2d 296, 575 N.Y.S.2d 868 (N.Y.Sup. 1991).

Braschi has not been expanded beyond the rent-control context. Indeed, in In re Estate of Cooper, 149 Misc.2d 282, 564 N.Y.S.2d 684, 687 (N.Y. Sur. 1990), the court flatly rejected the argument that the surviving partner of a homosexual relation could elect against the partner's will as a surviving spouse, distinguishing Braschi. The court noted that to treat homosexual couples living together as spouses "would be impermissible judicial legislating . . ." 564 N.Y.S.2d at 688. In stark contrast to the definition of "family" under the New York

landlord tenant regulations, the concept of "marriage" in the laws of the District, as we have shown, is clearly limited to a relationship between a man and a woman.

In sum, the term "marriage" in the District's laws has always been limited to the union of persons of the opposite sex. Appellants' literalistic interpretation, based on isolated words, is inconsistent with the ordinary meaning of the term, a reading of the legislative scheme as a whole, the common law, and the laws of all of the states. Such a dramatic change in the law can not be made by the courts, but is within the sole province of the legislature. The trial court correctly upheld the Clerk's interpretation of the term to deny appellants' application for a license to marry.¹⁶

II. THE HUMAN RIGHTS ACT DOES NOT GIVE PERSONS OF THE SAME SEX THE RIGHT TO MARRY.

Appellants argue, alternatively, that the Human Rights Act gives them the right to marry each other. The provisions of the Act that they rely on are D.C. Code §§ 1-2511 and 1-2519(a)(1). D.C. Code § 1-2511 states:

Every individual shall have an equal opportunity to participate fully in the economic, cultural and intellectual life, including, but not limited to, in employment, in places of public accommodation, resort or amusement, in educational institutions, in

¹⁶The trial court's decision is further supported by the rule that courts must "defer to an agency's interpretation of a statute it administers unless that interpretation is unreasonable in light of the prevailing law, inconsistent with the statute, or plainly erroneous," Davis v. University of the District of Columbia, 603 A.2d 849, 851 (D.C. 1992) (citing cases).

public services, and in housing and commercial space accommodations.

D.C. Code § 1-2519(a)(1) states:

It shall be an unlawful discriminatory practice to do any of the following acts, wholly or partially for a discriminatory reason based on race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, family responsibilities, physical handicap, matriculation, political affiliation, source of income, or place of residence or business, of any individual:

(1) To deny, directly or indirectly, any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodations . . .

Appellants argue that "marriage" is an aspect of "life," and that they should have an equal opportunity to be married. Specifically, they argue that the Superior Court Marriage License Bureau is a "place of public accommodation" because the term is defined by D.C. Code § 1-2502(24) to include a "public hall"-- i.e., the Superior Court Building. They contend that the Clerk's decision not to give them a license to marry constituted a denial of rights in those accommodations.

Assuming arguendo that this provision applies to governmental functions performed in the Superior Court Building, appellants are protected only to the extent that the Clerk may not deny a license to a homosexual man to marry a woman, or deny a license to a homosexual woman to marry a man, simply because of

their sexual orientation.¹⁷ But the Human Rights Act can not be read to change the basic concept of marriage as it has existed in the District of Columbia since its creation as being limited to the union between persons of the opposite sex.¹⁸

The decision of this Court in National Organization of Women v. Mutual Omaha Insurance Co., 531 A.2d 274 (D.C. 1987), upon which the trial court relies, is on point. In that case, this Court rejected the argument that the Human Rights Act prohibited insurance companies from charging higher premiums for health insurance policies for women than for men. The Court noted:

[T]he statute contains no language purporting explicitly to regulate insurance premium practices. If the Council had intended to effect such a dramatic change in insurance rate-setting practices, it is reasonable to assume that there would have been at least some specific reference to it in the language of the Act or, at least, within its legislative history.

Id. at 276. Similarly, if the Council had intended to effect such a dramatic change in the District's marriage laws, it is reasonable to assume that there would be at least some specific

¹⁷The affidavit of David Clarke, former Chairman of the Council, upon which appellants rely, says no more than this. In any case, testimony by individual legislators, especially non-contemporaneous statements, are not part of the legislative history of a law and are of no utility in determining legislative intent. See 2A Sutherland, Statutory Construction § 48.16 at 366 (5th ed. 1992).

¹⁸See Singer v. Hara, supra, rejecting the argument that denial of marriage license to persons of the same sex violated equal rights provision in state constitution, and noting that "[a]ppellants were not denied a marriage license because of their sex; rather, they were denied a marriage license because of the nature of marriage itself." 522 P.2d at 1196.

reference in the Act or its legislative history. But there is none. Indeed, the Committee Report on the Human Rights Act, upon which appellants rely (and which they append to their brief as Appendix 2), emphasizes the "noncontroversial character" of the purposes of the Act. See Report of the Committee on Public Services and Consumer Affairs, Council of the District of Columbia, on Bill 2-179, "The Human Rights Act of 1977" at 1.¹⁹

Moreover, the legislative history of the Marriage and Divorce Act, which was enacted the same year as the Human Rights Act,²⁰ is contrary to appellants' interpretation. As the trial court noted, specific language was proposed that would have made the Human Rights Act applicable to the Marriage and Divorce Act, but the Council did not adopt this proposal. App. B at 24.

Applying appellants' logic to other classifications protected by the Human Rights Act demonstrates its weakness. Under their reasoning, a married man could invoke the Act's prohibition of discrimination based on "marital status" in D.C.

¹⁹The Report also notes that the measure was simply a reenactment, without substantive change, of Regulation 34, the Human Rights Regulation of 1973, which was adopted by the pre-Home Rule District of Columbia Council, *id.* at 1, and based on the former Council's power to adopt "reasonable and normal police regulations." *Id.* at 2. It is clear that the appointive D.C. Council, whose power was derived from Reorganization Plan No. 3 of 1967, D.C. Code vol. 1 at 126 (1991), whatever the extent of its powers under the police regulations to prevent discrimination, had no authority to amend the District's marriage statutes. Its legislative powers were limited to adopting regulations pursuant to specific statutes listed in § 402 of the Plan, *id.* at 129-156, none of which concerned marriage.

²⁰The Marriage and Divorce Act took effect April 7, 1977; the Human Rights Act took effect December 13, 1977.

Code § 1-2519(a)(1), to claim the right to have a second wife, or a 10-year old child could invoke the prohibition of discrimination based on "age," to claim the right to marry.²¹ Clearly, such dramatic changes in the District's marriage laws,²² like appellants' contention that two persons of the same sex may marry, cannot reasonably be based on the general language of the Human Rights Act.

Appellants rely on Gay Rights Coalition v. Georgetown University, 536 A.2d 1 (D.C. 1987) (en banc), but that case does not help them. In that case, a gay-rights organization brought an action under the Human Rights Act against Georgetown University because the University would not grant it official recognition and denied it services accorded to other student organizations. The Court held that the organization was entitled to such services, but rejected the argument that it was entitled to official recognition because of the University's rights under the first amendment. Whereas Georgetown was concerned only with the interpretation of a single statute and its application to certain discriminatory practices, this case is concerned with the interrelationship of two statutory scheme--the Human Rights Act and the District's marriage statutes. Nothing in Georgetown supports appellants' argument that the general provisions of the

²¹Moreover, under appellants' logic, all age-based restriction in other statutes would be unlawful, including those regulating the sale of alcoholic beverages and the issuance of licenses to operate motor vehicles.

²²See D.C. Code §§ 30-101, 30-103 (1988).

Human Rights Act can effect dramatic substantive changes in areas of law controlled by other statutory schemes.

Therefore, it is not reasonable to interpret the broad language in the Human Rights Act to make such a fundamental changes in one of the most basic laws of society. The trial court correctly held that the Act did not do so.

III. THE PROHIBITION AGAINST PERSONS OF THE SAME SEX FROM MARRYING DOES NOT DEPRIVE APPELLANTS OF DUE PROCESS OR EQUAL PROTECTION.

Appellants argue that they have a constitutional right to marry each other because the Supreme Court has held that marriage is a fundamental right protected under the due process and equal protection clauses.²³ They rely on Loving v. Virginia, 388 U.S. 1, 12 (1967) (interracial marriage); Zablocki v. Redhail, 434 U.S. 374 (1978) (marriage of persons with child-support obligations); and Turner v. Safely, 482 U.S. 78 (1987) (marriage of prisoners). However, these cases addressed the right to marry in the context of the ordinary meaning of the word--the union between persons of the opposite sex, with the possibility of procreation. Nothing in those decisions, or any other decision, suggests that there is a fundamental right of two persons of the same sex to marry.

Thus, in Loving, the Court states:

Marriage is one of the "basic civil rights of man," fundamental to our very

²³Appellants have apparently abandoned their argument based on the establishment of religion clause. In any case, the trial court thoroughly analyzed the issue in its second decision. See App. C at 10-21.

existence and survival. Skinner v. State of Oklahoma, 316 U.S. 535, 541 (1942). . . .

It is clear that the Court relied heavily on the possibility of procreation to support its statement that right of marriage is "fundamental to our very existence and survival." Skinner, a decision invalidating a law requiring the sterilization of habitual criminals, upon which the Loving Court relies for this proposition, begins:

This case touches a sensitive and important area of human rights. Oklahoma deprives certain individuals of a right which is basic to the perpetuation of the race--the right to have offspring.

316 U.S. at 565. And on the page cited by the Loving Court, the Skinner decision states:

. . . We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant groups to wither and disappear. . . .

316 U.S. at 541.

Likewise, Zablocki, which invalidated a law conditioning marriage of certain persons with child-support obligations on prior court approval, inextricably linked the right to marry with the right to procreate:

It is not surprising that the decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships. As the facts in this case illustrate, it would make little sense to

recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society. The woman whom appellee desired to marry had a fundamental right to seek an abortion of their expected child, or to bring the child into life to suffer the myriad social, if not economic disabilities that the status of illegitimacy brings. Surely, a decision to marry and raise the child in a traditional family setting must receive equivalent protection. And, if appellee's right to procreate means anything at all, it must imply some right to enter the only relationship in which the State of Wisconsin allows sexual relations legally to take place.

434 U.S. at 387 (citations omitted; emphasis added).

Although Turner did not directly address the right to procreate, the Court based its decision on Zablocki and Loving. See 482 U.S. at 94. Nothing in that decision suggests that the right of marriage extended beyond the ordinary meaning of that term--the union of a man and a woman.

That there is no fundamental right for two persons of the same sex to marry is clear from the decision of the Supreme Court in Bowers v. Hardwick, 478 U.S. 186 (1986), upon which the trial court relied. In that case the Court rejected the argument by two homosexual men charged with committing sodomy in the home of one of them that there was a fundamental right under the Constitution to engage in this conduct. The Court, after tracing the decisions of the Court involved with rights of privacy, stated:

Accepting the decision in these cases and the above description of them, we think it evident that none of the rights announced in those cases bears any resemblance to the claimed constitutional right of homosexuals

to engage in acts of sodomy that is asserted in this case. No connection between family, marriage, or procreation on the one hand and homosexual activity on the other hand has been demonstrated, either by the Court of Appeals or by respondent.

478 U.S. at 190-191 (emphasis added). After tracing the history of sodomy laws in the United States, the Court concluded:

. . . Against this background, to claim that a right to engage in such conduct is "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty" is, at best, facetious.

Id. at 194.²⁴

Since there is no fundamental right for two persons of the same sex to marry, and since the governmental interests in fostering procreation are clearly rational, appellants were not deprived of equal protection of the laws. As the trial court noted, appellants were not denied a license because of their sexual orientation but because of "the nature of marriage itself." App. C. at 5.

The constitutional claims similar to those raised by appellants have been rejected by every state court that has addressed them. Thus, in Baker v. Nelson, supra, the Supreme Court of Minnesota, in affirming the denial of a marriage license to two men, rejected arguments under the due process and equal protection clauses:

The institution of marriage as a union of man and woman, uniquely involving the

²⁴Prior to Bowers, this Court upheld the District's sodomy law, D.C. Code § 22-3502 (1989), on similar bases. See United States v. McKean, 338 A.2d 439, 440 (D.C. 1975).

procreation of rearing of children within a family, is as old as the book of Genesis. . . . This historic institution manifestly is more deeply founded than the asserted contemporary concept of marriage and societal interest for which petitioners contend. The due process clause of the Fourteenth Amendment is not a charter for restructuring it by judicial legislation.

191 N.W.2d at 186. Moreover, the court held:

The equal protection clause of the Fourteenth Amendment, like the due process clause, is not offended by the state's classification of persons authorized to marry. There is no irrational or invidious discrimination. . . .

Id. at 187.

In Singer v. Hara, supra, another appeal from the denial of a marriage license to two men, the court stated, in rejecting their equal protection claims:

. . . [A]ppellants do not present a case of sexual discrimination. Appellants were not denied a marriage license because of their sex; rather, they were denied a marriage license because of the nature of marriage itself.

522 P.2d at 1196. The court then articulated the state interest in limiting marriage to persons of the same sex:

There can be no doubt that there exists a rational basis for the state to limit the definition of marriage to exclude same-sex relationships. Although, as appellants contend, other cultures may have fostered differing definitions of marriage, marriage in this state, and elsewhere in the nation, has been deemed a private relationship of a man and a woman (husband and wife) which involves "interests of basic importance to our society." . . .

We do not seek to define in detail the "interests of basic importance" which are

served by retaining the present definition of marriage as the legal union of one man and one woman. The societal values which are involved in this area must be left to the examination of the legislature. For constitutional purposes, it is enough to recognize that marriage as now defined is deeply rooted in our society. Although, as appellants hasten to point out, married persons are not required to have children or even to engage in sexual relations, marriage is so clearly related to the public interest in affording a favorable environment for the growth of children that we are unable to say that there is not a rational basis upon which the state may limit the protection of its marriage laws to the legal union of one man and one woman.

Id. at 1197 (citations omitted; emphasis added).

See also, Phillips v. Wisconsin Personnel Commission, 167 Wis.2d 205, 482 N.W.2d 121, 128-129 (1992) (rejecting equal protection challenges of a state employee whose application for family health insurance coverage for her lesbian companion was denied); Jones v. Hallahan, supra, 501 S.W.2d at 589 ("We find no constitutional sanction or protection of the right of marriage between persons of the same sex.").

In sum, neither the Supreme Court or any other court in the nation has recognized any right under the Constitution of two persons of the same sex to marry. Moreover, all of the cases that have addressed the precise issue have concluded that marriage is limited to the union of a man and a woman.

Any change in this basic social policy should be made by the legislature, not by the judiciary. As the Supreme Court noted in Bowers v. Hardwick, supra:

. . . The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. . . . There should be, therefore, great resistance to expand the substantive reach of [the Due Process] Clauses, particularly if it requires redefining the category of rights deemed fundamental. Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority. . . .

478 U.S. at 194-195. In this regard, it is significant that the Council recently enacted legislation, the Health Care Benefits Expansion Act of 1992, D.C. Law 9-114 [Act 9-118], 39 D.C. Reg. 2861, 4676 (eff. June 11, 1992), which addresses at least some of the concerns raised by appellants as to their legal disadvantages compared to married couples. Any change in the legal meaning of marriage in the District should be left to the Council of the District of Columbia.

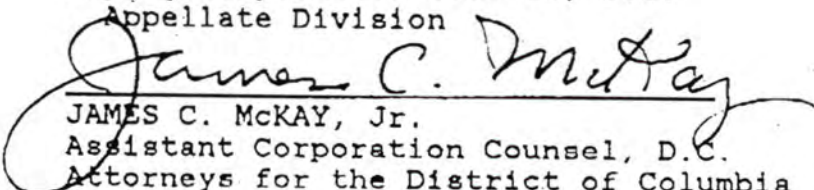
CONCLUSION

The decision of the trial court should be affirmed.

Respectfully submitted,

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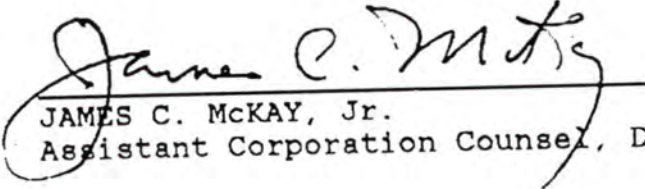
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TESTIMONY ON EXPANSION OF HEALTH CARE BENEFITS TO DOMESTIC PARTNERS

Divider Title: _____

L&O:LNG:lng
92-208-U x-ref. 91-205-D

TESTIMONY

OF

JOHN PAYTON

CORPORATION COUNSEL

OF THE

DISTRICT OF COLUMBIA

BEFORE THE

SUBCOMMITTEE ON FISCAL AFFAIRS AND HEALTH

COMMITTEE ON THE DISTRICT OF COLUMBIA

ON

HOUSE JOINT RESOLUTION 480

A RESOLUTION DISAPPROVING THE HEALTH CARE

BENEFITS EXPANSION ACT OF 1992 (D.C. ACT 9-188)

JUNE 4, 1992

MR. CHAIRMAN, MEMBERS OF THE SUBCOMMITTEE, MY NAME IS JOHN PAYTON, AND I AM CORPORATION COUNSEL OF THE DISTRICT OF COLUMBIA, THE CHIEF LEGAL OFFICER FOR THE DISTRICT. I AM PLEASED TO PRESENT THE VIEWS OF THE MAYOR OF THE DISTRICT OF COLUMBIA ON HOUSE JOINT RESOLUTION 480, A RESOLUTION THAT WOULD DISAPPROVE THE "HEALTH CARE BENEFITS EXPANSION ACT OF 1992," D.C. ACT 9-188. THE ACT WAS PASSED BY THE D.C. COUNCIL ON APRIL 7, 1992 WITH THE SUPPORT OF THE MAYOR.

OF THE

IN YOUR MAY 20, 1992 NOTICE OF THE HEARING ON THIS JOINT RESOLUTION, MR. CHAIRMAN, YOU STATED THAT THE SUBCOMMITTEE WILL REVIEW D.C. ACT 9-188 "USING THE THREE CRITERIA USED HISTORICALLY BY THE HOUSE DISTRICT OF COLUMBIA COMMITTEE AND CONGRESS. THESE CRITERIA ARE: DOES THE COUNCIL ACT VIOLATE THE U.S. CONSTITUTION; DOES THE COUNCIL ACT VIOLATE HOME RULE; OR DOES THE COUNCIL ACT VIOLATE THE FEDERAL INTEREST." I WILL ADDRESS THESE THREE QUESTIONS TODAY. AS I WILL EXPLAIN MORE FULLY, IT IS THE POSITION OF THE MAYOR THAT THE HEALTH CARE BENEFITS EXPANSION ACT OF 1992 DOES NOT VIOLATE THE U.S. CONSTITUTION, IS CONSISTENT WITH HOME RULE, AND DOES NOT IMPINGE ON A FEDERAL INTEREST.

THE HEALTH CARE BENEFITS EXPANSION ACT OF 1992. ALTHOUGH THE FOCUS OF TODAY'S HEARING IS NOT THE MERITS OF THE ACT, IT IS HELPFUL BRIEFLY TO DESCRIBE THE PURPOSES OF THE ACT IN ORDER TO EVALUATE IT IN TERMS OF THE THREE CRITERIA USED BY THE SUBCOMMITTEE. THE HEALTH CARE BENEFITS EXPANSION ACT OF 1992

COVERS THREE AREAS: (1) AUTHORIZATION FOR DISTRICT GOVERNMENT EMPLOYEES TO TAKE CERTAIN KINDS OF LEAVE AND PURCHASE SELF-FINANCED HEALTH INSURANCE FOR DOMESTIC PARTNERS; (2) VISITATION RIGHTS AT HOSPITALS IN THE DISTRICT FOR DOMESTIC PARTNERS; AND (3) DEDUCTIONS FROM INCOME FOR DISTRICT TAX PURPOSES OF

EXPENDITURES BY PRIVATE EMPLOYERS FOR HEALTH INSURANCE FOR THE "HEALTH CARE BENEFITS EXPANSION ACT OF 1992," D.C. ACT 9-186 DOMESTIC PARTNERS AND THEIR FAMILY MEMBERS. UNDER THE ACT, THE ACT WAS PASSED BY THE DISTRICT COUNCIL ON APRIL 7, 1992 WITH THE PERSONS WOULD REGISTER WITH THE MAYOR AS DOMESTIC PARTNERS. A SUPPORT OF THE MAYOR. DOMESTIC PARTNER MUST BE AT LEAST 18 YEARS OF AGE, BE COMPETENT

TO CONTRACT, AND NOT BE MARRIED. A PERSON MAY HAVE ONLY ONE IN YOUR MAY 20, 1992 NOTICE OF THE HEARING ON THIS JOINT DOMESTIC PARTNER. DOMESTIC PARTNERS MUST HAVE A RELATIONSHIP RESOLUTION, MR. CHAIRMAN. YOU STATED THAT THE SUBCOMMITTEE WILL CHARACTERIZED BY MUTUAL CARING AND THE SHARING OF A RESIDENCE.

ONCE TWO PERSONS REGISTER WITH THE MAYOR AS DOMESTIC PARTNERS, EACH BECOMES A "FAMILY MEMBER" OF THE OTHER FOR PURPOSES OF THE ACT, WHICH WOULD ENTITLE THEM TO THE FOLLOWING BENEFITS ESTABLISHED BY THE ACT:

(1) A DOMESTIC PARTNER WHO IS A DISTRICT GOVERNMENT EMPLOYEE AND IS ENROLLED IN THE DISTRICT OF COLUMBIA EMPLOYEES HEALTH BENEFITS PROGRAM WOULD BE ALLOWED TO PURCHASE, AT THE EMPLOYEE'S OWN EXPENSE, FAMILY HEALTH INSURANCE COVERAGE THAT WOULD COVER THE DOMESTIC PARTNER AND THE PARTNER'S FAMILY MEMBERS.

(2) A DOMESTIC PARTNER WOULD BE ENTITLED TO VISIT THE OTHER PARTNER WHEN THE LATTER IS A PATIENT IN A HEALTH CARE FACILITY IN

THE DISTRICT OF COLUMBIA.

(3) FOR THE PURPOSES OF DISTRICT OF COLUMBIA INCOME AND FRANCHISE TAX LIABILITY, A DEDUCTION FROM GROSS INCOME WOULD BE ALLOWED TO CORPORATIONS, FINANCIAL INSTITUTIONS, UNINCORPORATED BUSINESSES, AND PARTNERSHIPS FOR "ALL HEALTH INSURANCE PREMIUM

EXPENDITURES FOR DOMESTIC PARTNERS AND FAMILY MEMBERS OF THE ACT, THE ACT WAS PASSED BY THE D.C. COUNCIL ON APRIL 1, 1997 WITH THE EMPLOYEES OF THE DISTRICT OF COLUMBIA. THE FULL-TIME EMPLOYEES WHO ARE A SUPPORT OF THE MAYOR. DISTRICT OF COLUMBIA RESIDENTS. THE ACT DOES NOT REQUIRE THE

INSURANCE COVERAGE FOR DOMESTIC PARTNERS, BUT IT ALLOWS A DEDUCTION FOR THOSE BUSINESSES THAT CHOOSE TO PROVIDE THIS BENEFIT FOR THEIR EMPLOYEES.

I WILL NOW EVALUATE THE ACT IN THE CONTEXT OF THE THREE CRITERIA USED BY THE SUBCOMMITTEE.

CONSTITUTIONALITY. D.C. ACT 9-188 DOES NOT SUFFER FROM ANY CONSTITUTIONAL INFIRMITY. THE ACT FALLS INTO THE GENERAL CATEGORIES OF PERSONNEL AND SOCIAL AND ECONOMIC WELFARE LEGISLATION. THEREFORE, DUE PROCESS AND EQUAL PROTECTION CHALLENGES TO SUCH LEGISLATION ARE REVIEWED UNDER THE RATIONAL RELATIONSHIP TEST. SUCH LEGISLATION DOES NOT VIOLATE THE CONSTITUTIONAL GUARANTEES OF EQUAL PROTECTION AND DUE PROCESS IF THE OBJECTIVES ARE CONSTITUTIONALLY PERMISSIBLE AND IF THE LAW AND THE CLASSIFICATIONS CONTAINED THEREIN BEAR SOME RATIONAL RELATIONSHIP TO THE ACHIEVEMENT OF THOSE PERMISSIBLE OBJECTIVES.

VILLAGE OF BELLE TERRE V. BORAAS, 416 U.S. 1, 8 (1974). LEAVE AND HEALTH INSURANCE BENEFITS FOR DISTRICT GOVERNMENT EMPLOYEES, REGULATION OF PATIENT RIGHTS AT DISTRICT HOSPITALS, AND DEDUCTIONS FROM INCOME FOR PURPOSES OF DISTRICT TAXES ARE CONSTITUTIONALLY PERMISSIBLE SUBJECTS OF LEGISLATION. THE COUNCIL OF THE DISTRICT OF COLUMBIA HAS LEGISLATED REPEATEDLY ON THESE SUBJECTS SINCE THE ADVENT OF HOME RULE, AS CONGRESS DID BEFORE THAT. THEREFORE, THE CLASSIFICATIONS SET FORTH IN DISTRICT 9-188, WHICH ARE ESTABLISHED PRIMARILY BY THEIR DEFINITIONS CONTAINED IN SECTION 2, BEAR A RATIONAL RELATIONSHIP TO THE ACHIEVEMENT OF THE STATED PURPOSES OF THE ACT, NAMELY, TO EXPAND HEALTH INSURANCE COVERAGE, REDUCE DISCRIMINATION, AND PROVIDE OTHER BENEFITS. THESE DEFINITIONS DO NOT INCLUDE ANY CONSTITUTIONALLY SUSPECT CLASSIFICATIONS. IN THIS REGARD IT IS RELEVANT TO NOTE THAT OTHER JURISDICTIONS HAVE ADOPTED LAWS OR ORDINANCES THAT HAVE PROVISIONS SIMILAR TO SOME OR ALL OF THOSE CONTAINED IN D.C. ACT 9-188.¹ THEREFORE, D.C. ACT 9-188 SATISFIES THE FIRST TEST OF CONGRESSIONAL REVIEW, NAMELY D.C. ACT 9-188 DOES NOT VIOLATE THE CONSTITUTION OF THE UNITED STATES.

HOME RULE. D.C. ACT 9-188 IS CONSISTENT WITH HOME RULE. IN SECTION 404(a) OF THE DISTRICT OF COLUMBIA SELF-GOVERNMENT AND GOVERNMENTAL REORGANIZATION ACT OF 1973 (HEREINAFTER REFERRED TO AS "THE HOME RULE ACT"), CONGRESS CONFERRED UPON THE COUNCIL OF

¹ AMONG THESE JURISDICTIONS ARE MADISON, WISCONSIN; SEATTLE, WASHINGTON; AND SAN FRANCISCO, BERKELEY, SANTA CRUZ AND WEST HOLLYWOOD, CALIFORNIA.

THE DISTRICT OF COLUMBIA GENERAL LEGISLATIVE POWER EXCEPT AS LIMITED BY OTHER PROVISIONS OF THE HOME RULE ACT AND BY THE CONSTITUTION. INCLUDED IN THAT GRANT OF GENERAL LEGISLATIVE POWER IS THE POWER TO ESTABLISH A PERSONNEL SYSTEM FOR DISTRICT GOVERNMENT EMPLOYEES COVERING, INTER ALIA, HEALTH INSURANCE. SEE SECTION 422(3) OF THE HOME RULE ACT, D.C. CODE § 1-242(3). THE PRINCIPAL LIMITATIONS ON THE LEGISLATIVE POWER OF THE COUNCIL ARE SET FORTH IN SECTION 602(a) OF THE HOME RULE ACT, D.C. CODE IS 1-232(a) CT D-C28 ACT 9-188 DOES NOT VIOLATE ANY OF THOSE LIMITATIONS, NOR DOES IT VIOLATE ANY OTHER LIMITATION SET FORTH IN THE HOME RULE ACT. THEREFORE, D.C. ACT 9-188 PASSES THE SECOND TEST OF CONGRESSIONAL REVIEW BECAUSE IT DOES NOT VIOLATE THE HOME RULE ACT, BUT RATHER IS WITHIN THE LEGISLATIVE AUTHORITY OF THE COUNCIL AS CONFERRED BY CONGRESS IN THE HOME RULE ACT.

FEDERAL INTEREST. D.C. ACT 9-188 DOES NOT INTRUDE UPON ANY FEDERAL INTEREST. UNDER SECTION 602(a) OF THE HOME RULE ACT, THE COUNCIL IS PROHIBITED FROM IMPOSING ANY TAX ON PROPERTY OF THE UNITED STATES OR ENACTING ANY ACT WHICH CONCERNS THE FUNCTIONS OR PROPERTY OF THE UNITED STATES. D.C. ACT 9-188 DOES NOT VIOLATE THESE RESTRICTIONS, NOR DOES IT IN ANY WAY ADVERSELY AFFECT ANY FEDERAL INTEREST. RATHER, ITS PROVISIONS RELATE TO MATTERS WHICH ARE PURELY LOCAL IN NATURE. SECTION 8 OF THE ACT EVEN GOES SO FAR AS TO MAKE CLEAR THAT IT IS NOT CONFERRING ANY RIGHTS ON DISTRICT GOVERNMENT EMPLOYEES WHO ARE ENROLLED IN THE FEDERAL EMPLOYEE HEALTH BENEFITS PROGRAM. ACCORDINGLY, D.C. ACT 9-188

PASSES THE THIRD TEST OF CONGRESSIONAL REVIEW BECAUSE IT DOES NOT
IMPINGE ON A FEDERAL INTEREST.

IN SUM, D.C. ACT 9-188 IS CONSTITUTIONAL, IS WITHIN THE
LEGISLATIVE AUTHORITY OF THE COUNCIL UNDER THE HOME RULE ACT, AND
DOES NOT ADVERSELY AFFECT ANY FEDERAL INTEREST. THEREFORE, HOUSE

JOINT RESOLUTION 1400 SHOULD BE REJECTED BY THIS SUBCOMMITTEE. ARE
SET FORTH IN SECTION 602(a) OF THE HOME RULE ACT, D.C. CODE § 1-
233(a). MR. CHAIRMAN, MEMBERS OF THE SUBCOMMITTEE, ON BEHALF OF

MAYOR SHARON PRATT-KELLY, I WOULD LIKE TO THANK THE SUBCOMMITTEE
FOR ALLOWING ME TO EXPRESS HER VIEWS ON THIS MATTER. SHE SAYS THE

SECOND TEST OF CONGRESSIONAL REVIEW BECAUSE IT DOES NOT VIOLATE

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O'DONNELL: MEMO

Divider Title: _____

O'DONNELL CONSTRUCTION CO. V. DISTRICT OF COLUMBIA, 963 F.2D 420 (D.C. Cir. 1992), and 815 F. Supp. 473 (D.D.C. 1992)

As Corporation Counsel, Payton was on the briefs in this case, which involved a constitutional challenge to D.C.'s Minority Contracting Act. The Act required each D.C. agency to set-aside 35% of its construction contracts to minority businesses. The stated purpose of the Act was to remedy the effects of past discrimination against minority contractors in the allocation of public contracts in D.C. The plaintiff was a white-owned construction company; it argued that Act discriminated against white contractors on the basis of race.

The D.C. Circuit held that plaintiff was entitled to a preliminary injunction, because it was likely to succeed on the merits of its suit.⁴ Applying Croson, the court said that the factual predicate of the Act was insufficient: the statistical disparities on which the District relied failed to demonstrate that there had been discrimination against minority contractors in the District's allocation of public contracts or in the local construction industry. Thus, the District did not have a compelling interest in allocating contracts on the basis of race. In terms of the narrowly tailored inquiry, the court also took issue with the Act because it contained no end date, and therefore the District had no way of measuring when the discrimination had been remedied.

The D.C. Circuit's decision was handed down on May 5, 1992. It remanded the case back to Judge Penn of the District Court, who had denied plaintiff's motion for a preliminary injunction. On remand, Judge Penn granted the preliminary injunction on June 18, 1992. Then, on December 22, 1992, Judge Penn held that the Act was unconstitutional and permanently enjoined the District from enforcing it. In so doing, Judge Penn essentially conducted the same analysis that the D.C. Circuit had conducted in ruling that a preliminary injunction was appropriate.

In addition, Judge Penn struck down a separate District affirmative action program in contracting, the Disadvantaged Business Enterprise program. (The D.C. Circuit did not address that program in its decision.) Under that program, the District established a goal of awarding 37% of certain federally-funded contracts to disadvantaged business enterprises -- DBE's. Because minority businesses were presumed to be DBE's, the program necessarily involved race-based decisionmaking. Judge Penn determined that the District's 37% DBE goal was outside the

⁴ Judge Randolph wrote the opinion for the court. Judge (now Justice) Ruth Bader Ginsburg wrote a separate, short concurring opinion.

bounds of the congressionally-authorized goal of 10%. Accordingly, Judge Penn concluded that the District's DBE program was not subject to the more lenient Fullilove and Metro Broadcasting standards of review for the affirmative action programs of Congress. Instead, the Croson rules applied, and under those rules, Judge Penn said that the District's DBE program was not supported by adequate findings of past discrimination against DBE's and was not narrowly tailored.