Washington and Lee Law Review

Volume 38 | Issue 4 Article 14

Fall 9-1-1981

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Recommended Citation

Fullilove v. Klutznick: Do Affirmative Action Plans Require Congressional Authorization?, 38 Wash. & Lee L. Rev. 1315 (1981).

Available at: https://scholarlycommons.law.wlu.edu/wlulr/vol38/iss4/14

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FULLILOVE V. KLUTZNICK: DO AFFIRMATIVE ACTION PLANS REQUIRE CONGRESSIONAL AUTHORIZATION?

Racial discrimination against minorities has been a persistent judicial concern.[1] Minorities are guaranteed equal rights by the equal protection component of the fifth amendment,[2] and the thirteenth,[3] fourteenth,[4] and fifteenth amendments.[5] To enforce the constitutional rights, Congress has enacted national legislation banning racial discrimination in employment practices,[6] educational opportunities,[7] and voting rights.[8] The United States Supreme Court has recognized that ensuring equal

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[1] *See* Vieira, *Racial Imbalance, Black Separatism, and Permissible Classification by Race*, 67 MICH. L. REV. 1553, 1553 (1969) (state and federal power to classify by race is one of primary constitutional concerns). The Supreme Court's review of practices and statutes which discriminate against racial minorities extends to segregation in public educational systems, Brown v. Board of Education, 349 U.S. 294, 298 (1955); McLaurin v. Oklahoma State Regents, 339 U.S. 637, 638 (1950), to segregation in public railway carriages, Plessy v. Ferguson, 163 U.S. 537, 540 (1896), to discrimination against minorities in state agency grants of licenses to operate a business, Yick Wo v. Hopkins, 118 U.S. 356, 365-66 (1886), to exclusion of a minority from jury duty, Ex parte Virginia, 100 U.S. 339, 340 (1880), and to state prohibition of relationships between interracial couples, Loving v. Virginia, 388 U.S. 1, 2 (1967); McLaughlin v. Florida, 379 U.S. 184, 184 (1964).

[2] The fifth amendment guarantees that "No person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. CONST. AMEND. V.

[3] The thirteenth amendment states that "neither slavery nor involuntary servitude . . . shall exist within the United States . . . " U.S. CONST. AMEND. XIII, § 1. The Supreme Court has determined that Congress may exercise its enforcement powers under § 2 of the thirteenth amendment against acts of private individuals, whether or not state officials sanction those acts. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 438 (1968).

[4] Section 1 of the fourteenth amendment states that "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. AMEND. XIV, § 1. The primary purpose of the fourteenth amendment is to eliminate racial discrimination, but it also offers protection to victims of other types of governmental discrimination. R. O'NEIL, DISCRIMINATING AGAINST DISCRIMINATION 72 (1975) [hereinafter cited as O'NEIL].

[5] The fifteenth amendment expressly confronts the racial discrimination issue by ensuring the "rights of citizens of the United States to vote . . . regardless of race, color, or previous condition of servitude." U.S. CONST. AMEND. XV, § 1. The Supreme Court has authority to review all cases arising under the Constitution and federal laws. U.S. CONST. Art. III, § 2.

[6] Section 703(a) of Title VII of the Civil Rights Act of 1964 provides that it is an unlawful employment practice for an employer to discriminate against any individual with respect to hiring, discharge, or terms of employment. 42 U.S.C. § 2000e-2(a) (1976).

[7] Title VI of the Civil Rights Act of 1964 prohibits discriminatory practices in public education. 42 U.S.C. § 2000d (1976). Section 601 of Title VI bans discrimination against or exclusion of any person on the basis of race, color, or national origin in any program or activity receiving federal funds. *Id.*

[8] The Voting Rights Act of 1965 prohibits state and political subdivisons from using any voting practice that denies the right of any citizen to vote on account of race or color. 42 U.S.C. § 1973 (1976).

opportunity under the laws may require more than prohibition of purposeful discrimination.[9] The Court has supported preferential treatment of minorities and affirmative action plans in an attempt to redress the imbalance of minority participation at all levels of society.[10] Racial classifications are suspect, however, and subject to strict judicial scrutiny.[11] Case law has not delineated consistent standards to govern the constitutionality of racial preferences.[12] Instead, the Supreme Court

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[9] *See* Franks v. Bowman Transportation Co., Inc., 424 U.S. 747, 761 (1976) (Congress has authority to prohibit discriminatory conduct that occurred prior to effectiveness of Act); Albemarle Paper Co. v. Moody, 422 U.S. 405, 422 (1975) (thrust of Title VII is to remedy consequences of employment practices regardless of employer's discriminatory intent); Lau v. Nichols, 414 U.S. 563, 568 (1974) (agency may prohibit practices having discriminatory effects even absent purposeful design to discriminate). *See also* NAACP v. Allen, 493 F.2d 614, 617 (5th Cir. 1974) (notwithstanding defendant's motive or intent to discriminate, present effects of past discrimination warranted remedial relief).

[10] *See* United Jewish Organizations of Williamsburgh, Inc. v. Carey, 430 U.S. 144, 162 (1977) (legislative reapportionment along racial lines to create black majority voting districts not unconstitutional); Lau v. Nichols, 414 U.S. 563, 568 (1974) (school district must give preferential treatment to students with English language deficiency). Preferential treatment for minorities is the basis for a claim of reverse discrimination. *See* O'NEIL, *supra* note 4, at 72.

Judicial and legislative enactment of affirmative action programs demonstrates governmental acknowledgement that merely to cease and desist from harmful or proscribed activity is not enough to provide equal protection of the laws. *See* Sowell, *Weber and Bakke, and the Presuppositions of "Affirmative Action,"* 26 WAYNE L. REV. 1309, 1310 (1980). The emphasis of affirmative action recently has tended to shift from equality of opportunity toward statistical parity. *Id.* at 1313. The Supreme Court has held that public school systems have an affirmative duty to remedy *de facto* segregation in their school districts. Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 15 (1971); Green v. County School Board of New Kent County, 391 U.S. 430, 437-38 (1968).

[11] Korematsu v. United States, 323 U.S. 214, 216 (1944). The suspect classification standard developed in response to practices using racial distinctions that discriminated against minorities. *See* Wright, *Color-Blind Theories and Color-Conscious Remedies*, 47 U. CHI. L. REV. 213, 241 (1980) [hereinafter cited as Wright]; Brest, *Forward: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 16 (1976) [hereinafter cited as Brest]. In Plessy v. Ferguson, 163 U.S. 537 (1896) (Harlan, J., dissenting), Justice Harlan advocated an absolute ban on laws and practices affording disparate treatment to individuals solely on the basis of race. *Id.* at 559. Justice Harlan stated that the Constitution is color-blind and will not tolerate the consideration of a person's color in determining the civil rights of citizens. *Id.* Nevertheless, the Supreme Court has established that a racial classification may be upheld if it serves a permissible governmental interest independent of racial discrimination. Loving v. Virginia, 388 U.S. 1, 11 (1967); *see* McDaniel v. Barresi, 402 U.S. 39, 41 (1971) (use of racial classification permissible to eliminate segregated school system). Proponents of affirmative action and racial preference maintain that courts should not invoke the strict scrutiny standard in reviewing a program aimed at aiding rather than oppressing disadvantaged racial minorities. *See* Brest, *supra*, at 19; Reid, *Assault on Affirmative Action: The Delusion of a Color-Blind America*, 23 HOWARD L.J. 381, 399 (1980).

[12] *Compare* Fullilove v. Klutznick, 448 U.S. 448, 479-80 (1980) (Congress may enact legislation with racial preference as remedial measure) *and* United Steelworkers of America v. Weber, 443 U.S. 193, 208 (1979) (agreement between private employer and union to favor black employees held constitutional) *with* Regents of the University of California v. Bakke, 438 U.S. 265, 310 (1978) (public medical school admissions board cannot implement racial

has decided the question of constitutionality on a case-by-case basis. When confronting the question, the Court has first inquired whether the objective of eliminating discrimination is within the power of the body enacting the racial classification.[13] The next inquiry is whether a remedy using racial or ethnic criteria is a permissible means for eliminating discrimination.[14]

In *Fullilove v. Klutznick*,[15] the Supreme Court rejected a constitutional challenge to congressional legislation requiring preferential treatment of minority-owned businesses through a racial quota system.[16] The challenged legislation was the Public Works Employment Act of 1977.[17] Section 103(f)(2) of the Act conditions state and local government receipt of public works grants upon the grantee's assurance that at least 10% of the amount of each grant will be expended on contracts with minority business enterprises (MBEs).[18] While public contracts normally are awarded to the lowest bidder, the set-aside provision[19] operates to grant public works contracts to the lowest bidder that complies with the 10% set-aside goal.[20] The administrative program promulgated pursuant to the Act imposes upon grantees and their prime contractors an affirmative duty to seek out and employ available, qualified, and bona fide MBEs.[21] The MBE provision requires a grantee to offer a public works

preference program) *and* Central Alabama Paving, Inc. v. James, 499 F. Supp. 629, 636 (N.D. Ala. 1980) (Department of Transportation regulations establishing a racial preference classification violative of equal protection guarantees).

[13] *See* Fullilove v. Klutznick, 448 U.S. 448, 473 (1980); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 305 (1978).

[14] *See* Fullilove v. Klutznick, 448 U.S. 448, 480 (1980) (inquiring whether Congress may enact racial quota to combat discrimination); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 305 (1978) (Court must decide whether use of racial classification is necessary to accomplish elimination of discrimination in medical school admissions); United Jewish Organizations v. Carey, 430 U.S. 144, 162 (1977) (reviewing state use of numerical quotas in reapportioning voting districts along racial lines); Swann v. Bd. of Educ., 402 U.S. 1, 16 (1971) (determining whether federal court may use mathematical ratios to eliminate segregation in public school system); Wright, *supra* note 11, at 240.

[15] 448 U.S. 448 (1980).

[16] *Id.* at 491-92.

[17] Public Works Employment Act of 1977, PUB. L. NO. 95-28, 91 Stat. 116, 42 U.S.C. § 6701 et seq. (1976 & Supp. II 1978).

[18] 42 U.S.C. § 6705(f)(2) (Supp. II 1978). A privately-owned business in which minority groups own at least 50% of the stock, or a publicly-owned business in which minority groups own at least 51% of the stock, is a "minority business enterprise." *Id.* United States citizens who are Negroes, Spanish-speaking, Orientals, Eskimos, Indians, and Aleuts qualify as minority group members under the Public Works Act. *See id.*

[19] The 10% set-aside provision requires a grantee of federal funds to award 10% of the funds received under the grant to minority businesses. 42 U.S.C. 6705(f)(2); *see* text accompanying note 18 *supra*.

[20] *See* 123 CONG. REC. H1437-38 (Feb. 24, 1977) (remarks of Reps. Mitchell and Roe).

[21] 42 U.S.C. § 6706 (Supp. II 1978); 13 C.F.R. part 317 (1978); Local Public Works Program, ECONOMIC DEVELOPMENT ADMINISTRATION, U.S. DEPARTMENT OF COMMERCE, ROUND II, GUIDELINES FOR 10% MINORITY BUSINESS PARTICIPATION IN LPW GRANTS (1977) [hereinafter cited as GUIDELINES]. An MBE is "available" to work on a project if the project is located in

contract only to a prime contractor committed to employing MBEs in at least 10% of the subcontracting work.[22] Since the objective of the MBE provision is to overcome longstanding barriers to minority participation in public contracting opportunities,[23] the set-aside provision favors a higher MBE bid so long as the higher price reflects inflated costs resulting from past disadvantage and discrimination.[24] The administrative program therefore authorizes the Economic Development Agency to waive the minority participation requirement where a high minority business bid is not attributable to the present effects of past discrimination.[25]

The plaintiffs in *Fullilove* were non-minority associations of construction contractors and subcontractors.[26] The complaint alleged that enforcement of the Public Works Act's MBE requirement caused economic injury to the non-minority business plaintiffs.[27] In addition, the plaintiffs asserted that the MBE 10% set-aside provision violated the equal protection clause of the fourteenth amendment and the equal protection element of the due process clause of the fifth amendment.[28] A plurality of the *Fullilove* Court held that the interference with the business opportunities of non-minority firms caused by the 10% set-aside program did not render the Act constitutionally defective.[29] The Court rejected the alleged equal protection violation on the grounds that the 1977 Act ensured equal protection of the laws by providing minority businesses an equal opportunity to participate in federal grants.[30]

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the MBE's market area and the MBE can perform project services, or supply materials when they are needed. GUIDELINES, *supra*, at 2-7. An MBE is "qualified" to work on a project if it can perform work and supply materials as they are needed. *Id.* The Guidelines recognize that MBEs which are less qualified than non-minority businesses to perform the required work will need technical assistance. *Id.* An MBE is "bona fide" if the minority ownership interests are real and continuing and not created solely to fulfill the 10% MBE requirement. *Id.*

[22] GUIDELINES, *supra* note 21, at 8. After the grantee awards the public works contract to a prime contractor committed to hiring MBEs for at least 10% of the subcontracts, the prime contractor will assume the obligations for fulfilling the 10% MBE goal. *Id.* at 2.

[23] 123 CONG. REC. H1436-37 (Fed. 24, 1977) (remarks of Rep. Mitchell).

[24] ECONOMIC DEVELOPMENT ADMINISTRATION, U.S. DEPARTMENT OF COMMERCE, EDA MINORITY ENTERPRISE TECHNICAL BULLETIN 5 (1977); *see* text accompanying notes 36-38 *infra* (discussing necessity of finding evidence of past discrimination).

[25] GUIDELINES, *supra* note 21, at 15. The absence of sufficient relevant, qualified MBEs in the market where the project is located justifies an administrative waiver. *Id.* at 13. Only the grantee can request a waiver. *Id.* The grantee must show a lack of available, qualified, bona fide MBEs in the area of the public works project by a detailed explanation of efforts to locate and enlist MBEs. *Id.*

[26] 448 U.S. at 455.

[27] *Id.*

[28] *Id.*; *see* notes 2, 4 *supra* (citing relevant parts of fifth and fourteenth amendments).

[29] 448 U.S. at 484-85. The *Fullilove* Court conceded that non-minority businesses might suffer economic injury through loss of contract awards of MBEs, but found that the potential injury was outweighed by the importance of providing equal protection to minority businesses. *Id.*

[30] *Id.* at 479-80.

The *Fullilove* plurality applied a two-step analysis in finding the Public Works Act's set-aside provision constitutional. The Court initially addressed the question whether the Constitution granted Congress the power to enact legislation designed to achieve the objectives stated in the Act.[31] The Court determined that Congress could enact legislation pertaining to the activities of private contractors under its power to regulate interstate commerce.[32] Relying on the legislative history of the Act, the Court found that the historically persistent marked disparity between the number of public contracts awarded to minority and non-minority subcontractors provided a rational basis for Congress to conclude that the subcontracting practices of prime contractors perpetuated the impaired access of minority businesses to public contracts.[33] Congress reasonably could determine that the inequality between minority and non-minority participation in public contracting had an impact on interstate commerce which triggered a valid exercise of congressional power under the commerce clause.[34] The Court found that congressional authority to control discriminatory contract procurement practices of state and local grantees of federal funds arose from Congress'

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[31] *Id.* at 473. *See* 123 CONG. REC. H1436-37 (Feb. 24, 1977) (remarks of Rep. Mitchell) (objective of Public Works Employment Act of 1977 is to ensure minority participation in public works contracts by use of racial quota). Traditionally, the Supreme Court presumes the constitutionality of congressional legislation. 448 U.S. at 472; *e.g.*, Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 102 (1973). The Court has recognized, however, that legislation may not extend beyond the powers of Congress. 448 U.S. at 473; 412 U.S. at 103.

[32] 448 U.S. at 476. The commerce clause empowers Congress to regulate commerce among the states. U.S. CONST. Art. 1, § 8, cl. 3. The *Fullilove* court initially stated that the Public Works Employment Act of 1977 was primarily an exercise of Congress' power under the spending clause. 448 U.S. at 473-74. The spending clause authorizes Congress to provide for the general welfare. U.S. CONST. Art. 1, § 8, cl. 1. The Court reasoned that the spending clause gave Congress authority to further legitimate legislative objectives by conditioning receipt of federal funds upon the recipient's compliance with federal statutory and administrative directives. 448 U.S. at 474. The Court was unsure of the objectives attainable under the spending clause, however, and turned to the regulatory powers of Congress for constitutional support of its holding. *Id.* at 475. The Court reasoned that Congress' power under the spending clause was at least as broad as that under the commerce clause. *Id.* The Court concluded that if the commerce clause enabled Congress to enact the MBE provision, then the spending clause provided similar constitutional authority for the set-aside provision. *Id.*

[33] 448 U.S. at 475. The *Fullilove* Court relied upon the Public Works Act's legislative history to establish the basis for Congress' conclusion that prior discriminatory practices accounted for the lack of effective minority participation in public contract awards. *Id.* at 477. The Act's legislative history revealed 35% unemployment in the minority construction sector. 123 CONG. REC. H1388 (Feb. 23, 1977) (remarks of Rep. Mitchell). In the fiscal year 1976, federal agencies purchased goods and services worth $68 billion, but minority businesses received less than 1% of the federal contract receipts. *Id.* at H1389. The Court did not question the competence of Congress to make a determination that the disparity in minority and non-minority contract awards resulted from present effects of past discrimination. 448 U.S. at 477.

[34] *Id.* at 476.

power to enforce the equal protection guarantees of the fourteenth amendment.[35] The Court explicitly stated that Congress may legislate to remedy discrimination without establishing evidence of specific violations of anti-discrimination laws.[36] The Court noted that judicial and administrative proceedings require a compilation of an extensive record showing evidence of discriminatory conduct.[37] Statistics demonstrating that minority businesses obtained a disparate percentage of public contracts were sufficient to justify Congress' finding that the maintenance of existing contracting practices of state and local governments denied MBE's effective participation in federal public works contracts.[38]

After determining that the congressional objectives behind the Act's set-aside provision were valid, the Court addressed the question whether a remedy employing a racial quota was a constitutional means of accomplishing the Act's objectives.[39] The *Fullilove* plurality explicitly rejected the notion that the Constitution is color-blind and requires absolute racial neutrality in the application of federal and state laws.[40] The Court emphasized that Congress has broad remedial powers to enforce equal protection guarantees.[41] The Court noted that it had upheld previously the authority of federal courts to use racial classifications to redress statutory and constitutional violations of anti-discrimination laws.[42] In addition, the Court referred to its support of state action

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[35] *Id.* at 477.

[36] *Id.* The *Fullilove* Court stated that Congress could enact legislation to remedy racial discrimination without compiling an extensive record of existing discrimination. *Id.* Nevertheless, the Court found that Congress had abundant evidence from which to conclude that non-minority contractors perpetuated the present effects of past discrimination. *Id.*

[37] *Id.* The requirement that courts and administrative agencies establish a record of discriminatory conduct before attempting to redress discrimination stems from the nature of their remedial powers. Both courts and agencies consider only the evidence the particular parties produce in determining whether anti-discrimination laws have been violated. *Id.* at 502-03 (Powell, J., concurring). Congress, on the other hand, combats discrimination on a national scale and should not be required to make specific factual findings of discriminatory conduct. *Id.* Congress relies upon its own information and expertise and facts or opinions from any source in fulfilling its representative role. *Id.*

[38] *Id.* at 477-78. Congress was competent to conclude that the problem of past discrimination in public contracts awards was national in scope. *Id.* at 478. The *Fullilove* Court found no basis for disputing Congress' conclusion that the disparity in contract awards did not result from a lack of capable and qualified minority businesses. *Id.* at 477-78.

[39] The *Fullilove* Court was responding to the plaintiffs' claim that the MBE provision deprived non-minority businesses of public contracting opportunities without due process of law. *Id.* at 455, 473. The Court specified the equal protection component of the due process clause of the fifth amendment as the relevant constitutional guarantee for review of the MBE provision. *Id.*

[40] *Id.* at 482; *see* note 11 *supra*. *See also* Fullilove v. Klutznick, 448 U.S. 448, 522-23 (1980) (Steward, J., and Rehnquist, J., dissenting) (Constitution forbids racial discrimination against people of any race).

[41] *See* 448 U.S. at 483.

[42] *Id.* at 483. The Court in *Fullilove* noted that federal courts have the power to incorporate racial criteria in order to remedy constitutional and statutory anti-discrimination

employing racial criteria in order to comply with federal voting rights legislation, even in the absence of a constitutional violation.[43] The Court reasoned that Congress' constitutional power to declare certain conduct violative of equal protection, combined with its comprehensive remedial powers, gave Congress the authority to compel state action to eradicate that conduct.[44] Furthermore, Congress may enact narrowly-drawn remedial legislation which uses a racial quota and requires parties not guilty of any purposeful discrimination to share the burden of curing the effect of prior discrimination.[45]

Justice Powell, concurring in *Fullilove*, applied the standard enunciated by the *Regents of the University of California v. Bakke*[46] majority to conclude that the 10% MBE set-aside provision was constitutional.[47] Under the *Bakke* text, a racial classification in a remedial measure is unconstitutional unless the classification is necessary to further a compelling governmental interest.[48] A compelling governmental interest does not arise unless the governmental body promulgating the racial preference remedy has the authority to find and has found an actual occurrence of discrimination in violation of a statutory or constitutional mandate against discrimination.[49] If a court finds a compelling governmental interest, the court will proceed to determine whether the racial classification is a permissible means of advancing that interest.[50] The

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violations. *Id.*; *see, e.g.*, North Carolina Board of Education v. Swann, 402 U.S. 43, 46 (1971) (court's use of racial criteria to assign students to schools as means of remedying racial segregation in public schools held constitutional).

[43] 448 U.S. at 483; *see* United Jewish Organizations v. Carey, 430 U.S. 144, 162 (1977) (state may use race as basis for reapportionment of voting districts in order to avoid abridging right to vote).

[44] 448 U.S. at 483-84.

[45] *Id.* at 484; *see* note 71 *infra*. The Court noted that the burden imposed upon non-minority businesses by the 10% set-aside provision was relatively small. *Id.* The program's goal of 10% minimum MBE participation would account for only 0.25% of the annual expenditure for construction work in the United States. Fullilove v. Kreps, 584 F.2d 600, 607 (2d Cir. 1978).

[46] 438 U.S. 265 (1978).

[47] *See* 448 U.S. at 496 (Powell, J., concurring).

[48] *Id.*; 438 U.S. at 308-09. The government has a legitimate interest in remedying the effects of identified discrimination. 448 U.S. at 497. Racial preference is permissible, however, only when violation of a constitutional or statutory anti-discrimination mandate has occurred. *Id.* at 498. A finding of discrimination therefore must precede legislative enactment of remedial statutes using a racial preference. *Id.*

[49] 448 U.S. at 498; 438 U.S. at 309.

[50] *Id.* at 510. Justice Powell concluded that the thirteenth and fourteenth amendments gave Congress the power to select any reasonable remedy consistent with the guarantees of those amendments. *Id.* Justice Powell stated that the judiciary was responsible for reviewing the remedy to determine through a balancing of minority and non-minority interests whether a less intrusive means might fulfill the compelling state interest. *Id.* Justice Powell's "equitable and reasonably necessary" test afforded Congress the discretion necessary to carry out its objectives while preserving judicial review of racial classifications. *Id.*

need to invoke the commerce power or to regulate state and local use of federal funds does not arise unless discrimination exists.[51] Thus, Justice Powell correctly stated that the threshold question in determining whether Congress may remedy discrimination was the authority of Congress to make a valid finding of discrimination.[52] Justice Powell found that Congress was competent to make findings of unlawful discrimination.[53] In addition, Justice Powell found that since Congress had reasonably determined that private and governmental discrimination contributed to the disproportionate percentage of public contracts awarded minority contractors, a compelling governmental interest existed.[54] Since the 10% set-aside was a remedy reasonably necessary to redress identified past discrimination, Justice Powell concluded that the racial quota did not render the MBE provision constitutionally defective.[55]

The *Fullilove* Court's conclusion that the objectives of the MBE provision were within the power of Congress is consistent with existing case law.[56] The Court has acknowledged frequently congressional authority to enact legislation prohibiting discriminatory practices against racial minorities.[57] The Court has upheld the constitutionality of congressional efforts to eradicate both overt discrimination[58] and laws that are facially neutral but have a discriminatory impact on minorities.[59] The

[51] *See* note 48 *supra*. The *Fullilove* Court recognized that discrimination must be present in order for the subcontracting practices of prime contractors to have the impact upon interstate commerce prerequisite to Congress' exercise of its commerce power. 448 U.S. at 475.

[52] *See* 448 U.S. at 498.

[53] *Id.* at 502.

[54] *Id.* at 503. Justice Powell reasoned that the Court's finding of Congressional authority to remedy discrimination in any particular case implied the Court's belief that Congress had the authority to identify discrimination and had identified discrimination, regardless of whether the Court had specifically addressed those two questions. *Id.* at 501.

[55] *Id.* at 516-17.

[56] *See* text accompanying notes 57-63 *infra*.

[57] *E.g.*, Oregon v. Mitchell, 400 U.S. 112, 132 (1970) (1970 Voting Rights Amendments barring literacy tests held constitutional); Katzenbach v. Morgan, 384 U.S. 641, 653 (1966) (Congress has authority to prohibit discriminatory practices of state and federal governments); Katzenbach v. McClung, 379 U.S. 294, 304 (1964) (Civil Rights Act of 1964 prohibiting discrimination in privately-owned businesses affecting interstate commerce held constitutional).

[58] *See* Katzenbach v. McClung, 379 U.S. 294, 304 (1964); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 261 (1964) (Congress may prohibit discriminatory private business activities that obstruct interstate commerce).

[59] *See* City of Rome v. United States, 446 U.S. 156, 177, (1980) (Congress has power to prohibit perpetuation of prior purposeful discrimination even though practices have discriminatory effects only); Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971) (Title VII of Civil Rights Act held constitutional although Act aimed at discriminatory consequences and not at discriminatory intent); Katzenbach v. Morgan, 384 U.S. 641, 652 (1967) (Congress may eliminate facially neutral state law having discriminatory impact on minority voting rights); Louisiana v. United States, 380 U.S. 145, 153 (1965) (state voter registration test having discriminatory effect on racial minority held unconstitutional).

pervasiveness of past discrimination and of the resulting racial imbalance in society has convinced the Court that Congress may act to combat present practices that perpetuate the effects of longstanding barriers to minority participation in economic, social, and political opportunities.[60] If the Court perceives a rational basis from which to conclude that a discrimination problem is national in scope, the Court will reject a challenge to Congress' authority to exercise its anti-discrimination function.[61] A long record of marked disparity between minority and nonminority participation in a particular activity has constituted an adequate evidentiary basis for finding a violation of constitutional or statutory anti-discrimination provisions.[62] Thus, Congress has the authority to employ means to remedy discrimination without a prior judicial case-by-case determination of intentional or other unlawful discrimination.[63]

The distinctiveness of the *Fullilove* result lies in the Supreme Court's sanction of Congress' use of a racial quota as a means of redressing racial discrimination.[64] The Court recognized that a distinction based on race in any legislative, administrative, or judicial decision is subject

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[60] *See* Franks v. Bowman Transp. Co., Inc., 424 U.S. 747, 761 (1976) (congressional legislation may operate to eradicate practices that perpetuate effects of discrimination occurring prior to effective date of enactment); Sedler, *Racial Preference and the Constitution: The Societal Interest in the Equal Participation Objective*, 26 WAYNE L. REV. 1227, 1235 (1980) (fourteenth amendment's broad purpose includes overcoming present effects of long history of racism) [hereinafter cited as Sedler].

[61] *See* Oregon v. Mitchell, 400 U.S. 112, 133-34 (1970); Katzenbach v. Morgan, 384 U.S. 641, 653 (1967); text accompanying notes 34, 35 & 38 *supra*.

[62] *See* International Brotherhood of Teamsters v. United States, 431 U.S. 324, 339-40 n.20 (1977) (evidence of racial imbalance to prove discrimination not precluded under Title VII of Civil Rights Act of 1964); Louisiana v. United States, 380 U.S. 145, 148-50 (1964) (disproportionate percentage of registered black voters justified judicial finding that state law requiring interpretation of Constitution clause prior to voter registration had effect of discriminating against blacks).

[63] South Carolina v. Katzenbach, 383 U.S. 301, 327-28 (1966).

[64] *See* 448 U.S. at 480; Comment, *Federal Efforts to Assist Minority Construction Contractors: The Need for Comprehensive Planning*, 14 U.C.D. L. REV. 125, 141 (1980) [hereinafter cited as *Federal Efforts*]. Prior to *Fullilove*, several lower courts had sustained the constitutionality of the MBE provision of the Public Works Employment Act of 1977. *See* Constructors Association of Western Pennsylvania v. Kreps, 573 F.2d 811, 817-18 (3d Cir. 1978); Rhode Island Chapter, Associated General Contractors of America, Inc. v. Kreps, 450 F. Supp. 338, 349 (D.R.I. 1978); Carolinas Branch, Associated General Contractors of America, Inc. v. Kreps, 442 F. Supp. 392, 399 (D.S.C. 1977). *See also* Associated General Contractors of Massachusetts v. Altshuler, 490 F.2d 9, 20 (1st Cir. 1973), *cert. denied*, 416 U.S. 957 (1974) (state legislature requiring maintenance of fixed percentage of racial minorities among contractor employees held constitutional). *But see* Associated General Contractors of California v. Secretary of Commerce, 441 F. Supp. 955, 966 (C.D. Cal. 1977), *vacated and remanded for consideration of mootness*, 438 U.S. 909 (1978), *on remand*, 459 F. Supp. 766 (C.D. Cal.), *appeal docketed sub nom.*, Armistead v. Associated General Contractors of California, No. 78-1107 (conditioning grant of federal funds on race under MBE provision of Public Works Employment Act of 1977 for purpose of remedying discrimination not permissible governmental objective).

to strict judicial scrutiny.[65] Nevertheless, the *Fullilove* Court's decision to sustain congressional authority to redress discrimination through racial preference is a sound result. A racial classification may pass constitutional muster if it is necessary to further a permissible government objective.[66] The Court has permitted legislative and administrative enactment of remedial measures that provide preferential treatment to minorities for the purpose of redressing identified discrimination.[67] Furthermore, the Court has upheld the legality of a private, voluntary, race-conscious affirmative action plan that employs a racial quota.[68] Given the broad remedial powers of Congress[69] and judicial support of racial classifications in private, administrative, and state legislative remedial measures,[70] the Court's refusal to deny relief merely because racial quota requirements may burden individuals not guilty of any discrimination is consistent with existing case law.[71]

While both the *Fullilove* plurality opinion and Justice Powell's concurring opinion emphasized that the Court was reviewing congressional power to prohibit discrimination, neither opinion explicitly gave Congress the exclusive authority to remedy discrimination by means of a racial quota.[72] Nevertheless, at least one judicial decision has interpreted the *Fullilove* holding to restrict to Congress the power to require disparate treatment on the basis of race. In *Central Alabama Paving, Inc. v James*,[73] the United States District Court of Alabama held that

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[65] 448 U.S. at 472; *see* Korematsu v. United States, 323 U.S. 214, 216 (1944).

[66] *See* United Jewish Organizations v. Carey, 430 U.S. 144, 167-68 (1977); Board of Educ. v. Swann, 402 U.S. 43, 46 (1971); Loving v. Virginia, 388 U.S. 1, 11 (1967).

[67] *See* Lau v. Nichols, 414 U.S. 563, 568 (1974) (administrative remedy for discrimination in public education); Katzenbach v. Morgan, 384 U.S. 641, 652-53 (1966) (federal legislative remedy to ensure minority voting rights).

[68] *See* United Steelworkers of America v. Weber, 433 U.S. 193, 208 (1979).

[69] National Mutual Insurance Co. v. Tidewater Transfer Co., Inc., 337 U.S. 582, 603 (1949) (courts pay great deference to Congress' choice of means to carry out functions).

[70] *See* United Steelworkers of America v. Weber, 443 U.S. 193, 208 (1979) (private employer enacted racial quota to increase black craftsmen among work force); United Jewish Organizations v. Carey, 430 U.S. 144, 162 (1977) (state legislature used quota to establish black minority voting districts); Lau v. Nichols, 414 U.S. 563, 567 (1974) (HEW promulgated regulations granted preferential treatment to minority school children).

[71] *See* Franks v. Bowman Transp. Co., 424 U.S. 747, 775 (1976) (remedy for past discrimination against minority employees that affects interests of non-minority employees is presumptively necessary); Sedler, *supra* note 60, at 1243-44 (racial preference to advance equal participation objective is valid notwithstanding detriment to white individuals). White individuals sharing the burden of redressing past discrimination against minorities is equitable when necessary to remedy that discrimination. 424 U.S. at 777. The rationale behind requiring sharing of the burden is that some non-minority businesses may have gained competitive advantage during the long history of discrimination against minority businesses, in access to contracting opportunities. 448 U.S. at 484-85. *But see* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 307 (1977) (unconstitutional to employ racial preference that injures rights of individuals not guilty of discrimination when no compelling governmental interest exists).

[72] *See* 448 U.S. at 483-84; 448 U.S. at 510 (Powell, J., concurring).

[73] 499 F. Supp. 629 (N.D. Ala. 1980).

Department of Transportation (DOT) regulations requiring states to set aside a fixed percentage of federally funded highway construction contracts for female- and minority-owned businesses violated the equal protection clause of the fifth amendment.[74] Although the court recognized that *Fullilove* bound the judiciary to uphold the constitutionality of an MBE provision enacted after a congressional finding of discrimination, the court decided that *Fullilove* did not extend to an administratively authorized race-conscious measure.[75] To determine whether the administrative agency could establish a preferential classification, the court first inquired whether Congress had granted the DOT authority to enact race-conscious remedial measures.[76] Since the DOT had not received congressional authorization to impose a racial preference to remedy discrimination in the highway construction industry, the court found that the set-aside regulations denied non-minority businesses equal protection.[77] The court did not specify the circumstances that would constitute a valid congressional authorization to an administrative agency.[78] The court found inadequate the DOT's attempt to find congressional authorization for its set-aside provision in federal statutory prohibitions of discrimination in areas other than the highway construction industry.[79]

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[74] *Id.* at 636. The court found that the plaintiff highway contractors might suffer irreparable harm from implementation of the challenged DOT regulations, and granted a preliminary injunction. *Id.* at 632.

[75] *Id.* at 636. *See also Federal Efforts, supra* note 64, at 154 n.133 (*Fullilove* restricted to Congress authority to determine whether racially dependent set-aside is best or only means of enabling MBEs to compete equally with non-minority businesses).

The District Court for the District of Delaware has declined recently to interpret *Fullilove* to forbid administrative enactment of an MBE provision absent congressional authorization. *See* Pettinaro Construction Co., Inc. v. Delaware Authority for Regional Transit (DART), 500 F. Supp. 559, 565 (D. Del. 1980). In *Pettinaro*, the plaintiff was the low bidder on a construction project for DART, but did not receive the contract because the plaintiff failed to comply with a 15% minority set-aside requirement. 500 F. Supp. at 560. The court refused to grant plaintiff's motion for summary judgment on the grounds that a genuine dispute existed concerning whether a legitimate finding of prior discrimination by a competent body (DART) supported the racial preference. *Id.* at 564-65. The *Pettinaro* court was unwilling to hold that *Fullilove* limited to Congress the authority to identify discrimination prior to the promulgation of a remedial program using a fixed racial quota. *Id.* DART maintained that it was acting pursuant to directives of federal administrative agencies. *Id.* at 564. The parties agreed that the two requirements for a constitutional MBE provision under *Fullilove* were a valid judicial, legislative, or administrative finding of perpetuation of unlawful past discrimination and a narrowly drawn remedy. *Id.* at 562.

[76] 499 F. Supp. at 636. Congress had not delegated to the DOT authority to make findings of discrimination. *Id.* at 637.

[77] *Id.* at 636-37.

[78] *See id.* at 637-38.

[79] 449 F. Supp. at 637-38. The *Central Alabama Paving* court found no congressional authorization for the DOT regulations since none of the enabling statutes dealt with discrimination in the construction industry. *Id.*; *see* 23 U.S.C. § 140 (1976) (requiring states receiving federal highway funds to assure absence of racial discrimination in employment for highway projects); 40 U.S.C. § 471 *et seq.* (1970 & Supp. V 1975) (providing for procurement of property and services for federal agencies); 42 U.S.C. § 2000d (1976) (prohibition of

Supreme Court cases involving preferential treatment of minorities provide some support for the view adopted by the *Central Alabama Paving* court that only Congress may enact or authorize the promulgation of a racial preference to combat discrimination.[80] Justice Powell, concurring in *Fullilove*, stated that the Court refused to uphold the racial preference program challenged in *Bakke* because the state governmental body imposing the race-conscious remedy had no authority to act in response to identified discrimination.[81] In *Bakke*, the Court found unconstitutional a public medical school admissions program that set aside a fixed quota of the available positions in the entering class for racial minorities.[82] The *Bakke* Court reasoned that no compelling governmental interest in remedying discrimination existed unless the body promulgating the remedial measure had the power to identify and prohibit discrimination.[83] The Court stated that a medical school admissions board was not competent to determine that discrimination existed or to fashion preventative remedies, in the absence of congressional authorization.[84] In addition, the *Bakke* Court's statement that its decision did not question the validity of congressionally authorized administrative actions providing preferential treatment to minorities implies that an administrative agency may remedy discrimination only upon express congressional authorization.[85]

Lau v. Nichols[86] is consistent with the holding in *Central Alabama Paving* that only Congress may authorize administrative use of racial

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discriminatory practices in any program receiving federal funds); 45 U.S.C. § 803 (1976) (prohibiting racial discrimination in railroad projects receiving federal aid); 49 U.S.C. § 1602a(2)(A) (Supp. II 1978) (denying federal assistance to urban mass transportation projects having discriminatory contract procurement practices); 49 U.S.C. § 1711 *et seq.* (1976 & Supp. II 1978) (providing federal aid for development of public airports).

[80] *See* text accompanying notes 81-94 *infra.*

[81] 448 U.S. at 498; 438 U.S. at 309.

[82] 438 U.S. at 309-10. *Bakke* answered the question left open in DeFunis v. Odegaard, 416 U.S. 312 (1974) (per curiam). In *DeFunis*, the Court did not reach the merits of the issue whether a racial preference program in the admissions program of a state university law school violated constitutional equal protection guarantees. 416 U.S. at 319-20.

[83] 438 U.S. at 309. If a governmental body has no authority to determine past discrimination, it cannot find constitutional or statutory violations to support a compelling governmental interest in benefiting one group of individuals over another. *Id.* at 308-09. The *Bakke* Court characterized a medical school board's function as educational in nature and stated that the board could not formulate legislative policy or adjudicate claims of illegality. *Id.* at 309. Justice Powell nevertheless argued in *Fullilove* that a state university has a compelling interest in acquiring a diverse student body. 448 U.S. at 498. A fixed admission quota was not, however, an appropriate method to achieve a diverse student body. *Id.* The quota system eliminated some non-minority applicants from consideration for a specified number of positions, while allowing minority students to compete for all available seats. *Id.* In adopting race as the sole determining factor for admissions, the board's remedy was not fashioned narrowly to fulfill the goal of a diverse student body. *Id.*

[84] 438 U.S. at 309.

[85] *See id.* at 302 n.41.

[86] 414 U.S. 563 (1974).

quotas to redress discrimination. In *Lau*, the Supreme Court upheld the constitutionality of HEW regulations requiring school districts which received federal funds to take affirmative action to ensure that ethnic and racial minority children were not denied effective participation in the educational system because of an inability to speak and understand English.[87] The Court found the racial preference constitutionally permissible because HEW had acted pursuant to express congressional authorization to eliminate discrimination against racial minorities in federally assisted school systems.[88]

The *Central Alabama Paving* court's assertion that Congress must authorize the implementation of racial quotas is consistent with the Supreme Court's treatment of a private employer's enactment of a racial quota. In *United Steelworkers of America v. Weber*,[89] the Court held that the ban in Title VII of the Civil Rights Act of 1964 against racial discrimination in employment practices did not forbid a private employer and a union from voluntarily agreeing upon an affirmative action plan giving preferential treatment to minorities.[90] The challenged plan reserved for black employees 50% of the openings in a training program until the percentage of black craftsmen in the plant approximated the percentage of blacks in the local labor force.[91] The Court found that the private, voluntary, race-conscious plan, aimed at elimination of an existing racial imbalance in employment opportunities, was entirely consistent with the goals of Title VII.[92] The *Weber* Court noted that Title VII did not require employers to grant preferential treatment to minorities although a *de facto* racial imbalance existed in the employer's work force.[93] The Court inferred from the Act's language that Congress did

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[87] *Id.* at 569. The relevant HEW guidelines state that a school district must take affirmative steps to compensate for English language deficiency of ethnic and racial minority children to ensure their effective participation in the educational system. 35 Fed. Reg. 11595 (1970). The *Lau* Court noted that mere provision for the same facilities, textbooks, teachers and curriculum to students who did not understand English did not put them on an equal footing with English speaking students. 416 U.S. at 566.

[88] 416 U.S. at 566-67; *see* 42 U.S.C. § 2000d-1 (1976) (authorizing HEW to issue rules requiring school districts to rectify language deficiencies of minority children); note 7 *supra*.

[89] 443 U.S. 193 (1979).

[90] *Id.* at 208; *see* note 6 *supra* (relevant Title VII provisions).

[91] 443 U.S. at 197. Although Franks v. Bowman Transportation Co., Inc., 424 U.S. 747 (1976), involved a grant of preferential treatment to minority employees by a private employer, the remedy did not constitute an affirmative action plan where a competent judicial, legislative, or administrative body had made no finding of discrimination. 424 U.S. at 751 (District Court found that Bowman had engaged in pattern of racial discrimination); *see* Brest, *supra* note 11, at 39 (*Franks* does not involve racial preference remedy because employer had discriminated against particular plaintiffs).

[92] 443 U.S. at 208; *see* 110 CONG. REC. 6548 (1964) (remarks of Sen. Humphrey) (goal of Title VII to increase employment opportunities of blacks requires upgrading of black occupational skills through education and training).

[93] 443 U.S. at 205 n.5; *see* 42 U.S.C. § 2000e-2(j) (1976). Title VI of the Civil Rights Act of 1964, the statute considered in *Bakke*, contains no provision comparable to that in Title

not intend to prohibit private affirmative action to combat the present effects of past discrimination in employment opportunities.[94] Thus, Congress' implied authorization of remedial measures in Title VII appears to sustain the constitutionality of private, voluntary affirmative action plans after *Fullilove* and *Central Alabama Paving*.

The *Central Alabama Paving* court also relied on the DOT's failure to show that the favored minority groups suffered from the present effects of past discrimination, in holding that the set-aside regulations were unconstitutional.[95] The court required the administrative agency to engage in a fact-finding procedure to determine the existence of discrimination in the highway construction industry.[96] The *Fullilove* Court, on the other hand, found that Congress' conclusion that the racial disparity in minority participation in public contracts resulted from past discrimination was sufficient identification of discrimination to sustain congressional legislation against constitutional challenge.[97] Where Congress has delegated the authority to remedy discrimination to an administrative agency, therefore, courts will require the agency to make findings of fact on a case-by-case basis in order to ensure that the broad congressional finding of past discrimination authorizes remedial action in each case.[98]

In *Perini Corp. v. Massachusetts Bay Transportation Authority*[99] (MBTA), the United States District Court for the District of Massachusetts addressed the issue of the adequacy of a finding of discrimination in reviewing the constitutionality of an MBE set-aside provision

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VII implicitly or explicitly stating that a public educational institution may enact a quota to redress a racial imbalance in the school's student population. *Compare* 42 U.S.C. § 2000d (1976) *with* 42 U.S.C. § 2000e-2(j) (1976). The *Weber* Court declared that Congress did not intend to incorporate the fifth and fourteenth amendment guarantees into Title VII since Congress enacted the provision pursuant to the commerce power. 443 U.S. at 206 n.6. Title VII does not require private employers to remedy a racial imbalance without a prior judicial finding of discrimination. *Id.* at 205 n.5.

[94] 443 U.S. at 208; *see* Wright, *supra* note 11, at 299 (after *Weber* and *Bakke* private employers may enact affirmative action plans absent any judicial, administrative, or congressional finding of discrimination).

[95] 499 F. Supp. at 638. The *Central Alabama Paving* court adopted both elements of the "compelling governmental interest" test enunciated in *Bakke. Id.* at 636; *see* text accompanying note 49 *supra.* The DOT failed to show that the regulations were fashioned narrowly to eradicate the effects of past discrimination. 499 F. Supp. at 639. The court found no evidence that the DOT had considered the appropriateness or effectiveness of the set-aside requirement over alternative means of remedying discrimination, before enacting the set-aside provision. *Id.*

[96] 499 F. Supp. at 639. The court did not decide whether a reasonable basis existed for the DOT to conclude that past discrimination existed against minority businesses in the highway construction industry. *Compare* 499 F. Supp. at 638-39 *with* 448 U.S. at 477-78 *and* text accompanying notes 34, 35 & 38 *supra.*

[97] 448 U.S. at 477-78.

[98] *See id.* at 478.

[99] No. 77-2340-MC (D. Mass. September 20, 1980) *summarized at* [1980] 855 FED. CONTRACT REP. A-5.

established by a state transportation agency.[100] The MBTA conditioned receipt of contract awards for construction of a transportation terminal upon the general contractors' assurance that minority-owned businesses would perform at least 30% of the subcontracting work.[101] The plaintiff was the low bidder on a construction contract, but did not receive the contract award because the company did not agree to employ MBEs to perform 30% of the subcontracting work.[102] The court granted summary judgment for the plaintiff on the grounds that the MBTA had made no finding of past discrimination against minority contractors.[103] The court rejected MBTA's reliance upon congressional and other legislative and administrative findings of discrimination throughout the construction industry to justify an affirmative action program using a racial quota.[104] In the absence of an MBTA factual finding of past discrimination, the court declined to find that the set-aside provision served a compelling state interest in remedying identified past discrimination.[105]

The Court's reasoning in *Bakke* also supports the position that an administrative agency must make a factual finding before employing a racial quota. In *Bakke*, the Court found that even if the school board had the competence to identify discrimination it did not determine that the university had engaged in a discriminatory practice.[106] The *Bakke* Court asserted that the Supreme Court never had approved preferential classifications without proved constitutional or statutory discrimination viola-

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[100] *See id.* at A-5.

[101] No. 77-2340-MC at A-5.

[102] *Id.* In *Perini*, the MBTA conceded that Perini was not responsible for the company's failure to comply with the MBE requirements. *Id.* Perini claimed that the MBE provision constituted an impermissible racial quota and a violation of constitutional equal protection and due process guarantees. *Id.* In addition, Perini asserted that the MBTA's imposition of a racial quota was unconstitutional under *Bakke*. *Id.* Perini argued that the MBTA lacked the authority to identify discrimination requiring a remedy. *Id.* Finally, Perini argued that the MBTA had failed to show the existence of prior racial discrimination. *Id.* Thus, the MBTA set-aside provision did not pass the compelling state interest test of *Bakke*. *Id.*; *see* text accompanying notes 48-50 *supra*.

[103] No. 77-2340-MC at A-5. The *Perini* court noted that the MBTA had prepared a report on past discrimination within the construction contract industry more than a year after the agency enacted the MBE provision. *Id.* The MBTA's subsequent attempt to justify the program, however, did not constitute a finding of past discrimination. *Id.*

[104] *Id.* The *Perini* court stated that every affirmative action plan using a racial quota required individual scrutiny, and that the agency establishing an affirmative action program must make its own findings of past discrimination. *Id.* According to the court, the MBTA should have considered whether minority contractors were in fact victims of constitutional violations or discrimination in the award of MBTA contracts, and whether a 30% set-aside was a reasonable means of redressing identified discrimination. *Id.*

[105] *Id.* The *Perini* court did not address explicitly the issue whether the program would be valid if MBTA had made the necessary factual finding of discrimination. *Id.* The court noted, however, that MBTA's minority participation goal approximated the minority population percentage in its service area and therefore appeared to be a reasonable response to a discrimination problem. *Id.* at A-6.

[106] 438 U.S. at 309; 448 U.S. at 498 (Powell, J., concurring).

tions.[107] Since the medical school's implementation of a racial quota did not respond to identified past discrimination, the remedial measure served no compelling governmental interest.[108]

Commentators have asserted that the rationale supporting the legality of affirmative action plans is that non-governmental and governmental bodies can rely on a presumption of pervasive societal discrimination to authorize racial quotas.[109] The Supreme Court in *Bakke*, however, specifically rejected the notion that societal discrimination justified a governmental implementation of a racial classification which imposed disadvantages on non-minority individuals.[110] Although the *Weber* Court found that the purposes of Title VII and of affirmative action plans were consistent, the Court expressly declined to define the boundary between permissible and impermissible affirmative action plans.[111] Supreme Court cases indicate that administrative agency affirmative action is permissible only when a governmental body competent to identify and combat discrimintion has authorized the agency to take remedial measures to redress a violation of a constitutional or statutory right.[112] Although the *Fullilove* Court did not explicitly decide whether Congress was the only governmental body competent to authorize redress of dis-

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[107] 438 U.S. at 307. The *Bakke* Court asserted that programs having distinctions based on race or ethnic background must undergo a judicial determination that the remedy placing a burden on an individual because of his race is narrowly tailored to serve a compelling government interest. *Id.* at 299.

[108] *Id.* at 308-09. The *Bakke* Court maintained that a state has a legitimate and substantial interest in eliminating the continuing effects of past discrimination, but that the state cannot remedy discrimination on the grounds of eliminating societal discrimination. *Id.* at 310.

[109] *See* Sindler, *Racial Preference Policy, the Political Process, and the Courts*, 26 WAYNE L. REV. 1205, 1225 (1980) [hereinafter cited as Sindler]. The issue in determining the constitutionality of an affirmative action plan is whether pervasive societal discrimination is a permissible basis for allowing institutions not themselves guilty of past racial discrimination to implement a racial preference that will help to offset disadvantages suffered by racial minority groups. *Id.* at 1225. Commentators have argued that a presumption of legality should exist when a non-minority group voluntarily chooses to provide minorities with preferential treatment to its detriment. *See* Wright, *supra* note 11, at 234-35; Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 727 (1974).

[110] 438 U.S. at 310. The *Bakke* Court was reluctant to allow governmental institutions to rely upon societal discrimination as the basis for a racial preference program disadvantageous to individuals not themselves responsible for the harm allegedly suffered by the minority applicants to the special admissions program. *Id.* The Court refused to convert the racial preference remedy previously reserved for constitutional violations into a remedy that any educational institution could implement without making findings of past discrimination. *Id.*

[111] *See* 443 U.S. at 208. The *Weber* Court found that the purpose of both Title VII and the affirmative action plan was to eradicate traditional patterns of racial segregation. *Id.* In addition, the plan did not unnecessarily interfere with white employees' interests, and was a temporary measure not intended to maintain a continuous racial balance in the employer's work force. *Id.*

[112] *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. at 309; Lau v. Nichols, 414 U.S. at 567.

crimination by means of a racial quota, *Central Alabama Paving* held that *Fullilove* stood for that proposition.[113] The Supreme Court's analysis in *Lau* and *Bakke* supports the contention that administrative agencies cannot remedy racial discrimination in the absence of congressional authorization.[114]

While Congress' power to identify discrimination and promulgate racially preferential remedies is significantly greater than that of the judiciary,[115] court-ordered remedies containing racial preferences are constitutionally permissible.[116] Furthermore, courts may sanction affirmative action remedial plans formulated by other governmental bodies.[117] The Supreme Court also has supported a state legislature's employment of a racial classification to improve minority representation in the state legislature.[118] A state legislature's power to remedy discrimination should include the power to delegate its authority to state agencies.[119] Thus, the scope of the *Central Alabama Paving* holding should be limited to requiring federal agencies to act pursuant to congressional mandate. Courts, state legislatures, and private employers appear competent to redress discrimination without specific or explicit congressional authorization.[120]

The Supreme Court has held the judiciary and administrative agencies to a more stringent evidentiary standard than Congress in satisfy-

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[113] *See* text accompanying notes 72 & 75 *supra.*

[114] *See* note 112 *supra.*

[115] 448 U.S. at 483; Rhode Island Chapter, Associated Gen. Contractors v. Kreps, 450 F. Supp. 338, 353-54 (D.R.I. 1978).

[116] *See* Swann v. Bd. of Educ., 402 U.S. 1, 31 (1971) (federal district court may fashion racial preference remedy that employs racial quota to combat discrimination in public schools); Wright, *supra* note 11, at 228.

[117] *See* Swann v. Bd. of Educ., 402 U.S. 1, 15-16 (1971); Green v. County School Bd., 391 U.S. 430, 437-38 (1968).

[118] *See* United Jewish Organizations v. Carey, 430 U.S. 144, 168 (1977). In *Carey*, the New York legislature enacted a voting redistricting plan to enable black voters to achieve a majority population in two voting districts. *Id.* at 152. At the same time, a Jewish community that was reassigned to an adjoining district claimed that the effectiveness of its vote was diluted by the reassignment. *Id.* at 152-53. The *Carey* Court rejected plaintiffs' argument that the state was denying them the right to vote on account of race, and held that a reapportionment using a racial quota was not violative of the fourteenth and fifteenth amendment due process and equal protection guarantees. *Id.* at 162.

[119] In stating that a non-political governmental body should not be able to impose a racial quota in the absence of legislative mandates, the *Bakke* Court implied that state legislative authorization might justify the implementation of a racial quota by such a body. *See* 438 U.S. at 309. *See also* Sindler, *supra* note 109, at 1223 (school faculty may not decide alone to establish special admissions quotas, because resort to affirmative action is political and not educational question). Thus, attempts to provide preferential treatment to minorities should involve the direct participation of a politically accountable body such as Congress or a state legislature. *Id.* at 1225-26. Furthermore, a legislative decision to use a racial preference to remedy present effects of past discrimination should indicate to courts that the remedy is constitutional. *Id.*

[120] *See* text accompanying notes 93-94 *supra*; notes 116 & 118 *supra.*

ing the identification of discrimination requirement.[121] Thus, the *Central Alabama Paving* and *Perini* courts correctly held that an agency must show that the minority group receiving preferential treatment has suffered from past discrimination, before implementing a racial quota.[122] Judicial acceptance of a "manifest racial imbalance" as adequate evidence of past discrimination, however, facilitates the identification of present effects of prior discrimination which is a prerequisite to a constitutional racial preference.[123] Furthermore, the authority or authorization to combat discrimination implies the power to enact a suitable remedy to effectuate that purpose.[124] Thus, courts, administrative agencies, state legislatures, and private employers should be able to implement a racial quota if the authority to eliminate discrimination exists. The remedy must be restricted, however, to fulfilling the objective of eradicating past discrimination, without unnecessarily interfering with non-minority enjoyment of constitutional and statutory rights.[125]

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[121] *See* 448 U.S. at 478; text accompanying note 37 *supra.*

[122] *See* 499 F. Supp. at 638; No. 77-2340-MC at A-5.

[123] *See* 448 U.S. at 478 (marked disparity in percentage of public contract awards to minority businesses held adequate evidence of past discrimination); 443 U.S. at 208 (employer may act in reponse to manifest racial imbalance in work force); note 62 *supra.*

[124] *See, e.g.,* Franks v. Bowman Transp. Co., 424 U.S. at 794-95 (Powell, J., concurring in part and dissenting in part) (choice of remedies to redress discrimination is in sound discretion of trial court); Swann v. Bd. of Educ., 402 U.S. at 15 (after finding violation of anti-discrimination law, district court has broad power to remedy past discrimination).

[125] A body designing a remedy for past discrimination which employs a racial quota should consider the efficacy of alternative remedies, the planned duration of the racial quota, the relationship between the percentage of minority group members and the percentage of minorities in the relevant population or work force, and the availability of a waiver provision in case the quota requirements are unattainable. *See* 448 U.S. at 510-11 (Powell, J., concurring).