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# The Minority Business Enterprise Set Aside: AConstitutional Analysis

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# THE MINORITY BUSINESS ENTERPRISE SET ASIDE: A CONSTITUTIONAL ANALYSIS

Congress enacted the Local Public Works Capital Development and Investment Act of 1976 (LPW)[1] to help alleviate nationwide unemployment in the economically depressed construction industry.[2] Under the LPW, state or local government "grantees" can obtain federal funds for public works projects.[3] When additional funds were appropriated in 1977,[4] section 6705(f)(2) was added to the LPW. This section conditions the award of construction grants upon the grantee giving assurance that at least 10% of the grant will be used to employ minority business enterprises.[5] A minority business enterprise (MBE) is defined by the statute as a business at least 50% of which is owned by minority group members.[6] Thus, for a state or local government grantee using federal funds for a particular project to comply with the MBE provision, a commitment must be obtained from prime contractors bidding on the contract that at least 10% of the grant will be set aside for minority subcontractors or suppliers.[7] In the event that there are insufficient qualified MBEs within a reasonable

[1] 42 U.S.C. §§ 6701-6735 (1976).

[2] The House Report accompanying the LPW Act stated that during 1974 and 1975 the United States experienced its most severe recession since the 1930's. The Report emphasized that the construction industry had been a major victim of this recession. *See* H.R. REP. No. 94-1077, 94th Cong., 2d Sess. 1 [1976], *reprinted in* (1976) U.S. CODE CONG. & AD. NEWS 1746 [hereinafter cited as HOUSE REPORT].

[3] Congress appropriated $2 billion to assist state and local governments to build "badly needed" public facilities. 42 U.S.C. § 6710 (1976); *see* HOUSE REPORT, *supra* note 2 at 1747.

[4] Public Works Employment Act of 1977 (PWE), 42 U.S.C. §§ 6701-6735 (1976). Under the PWE Act, Congress appropriated an additional $4 billion to provide additional stimulus to the sluggish economy. *See* H.R. REP. No. 95-20, 95th Cong., 1st Sess. 9 (1977), *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 150; S. REP. No. 95-38, 95th Cong. 1st Sess. (1977) [hereinafter cited as SENATE REPORT]. The Senate Report emphasized that state and local government outlays for new construction for the 10-year period since 1967 had dropped in volume from $30.8 billion to $22 billion using 1972 dollars. SENATE REPORT, *supra* at 1-2. Since the PWE Act retained the basic purposes and statutory scheme of the LPW Act, Ohio Contractors Ass'n v. Economic Dev. Admin., 452 F. Supp. 1013, 1016-1020 (S.D. Ohio 1977), grants under the PWE Act will be referred to as "LPW grants."

[5] 42 U.S.C. § 6705(f)(2) (1976).

[6] 42 U.S.C. § 6705(f)(2) (1976) defines minority group members as citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts. In the case of a publicly owned business, at least 51% of the stock must be owned by minority group members for it to qualify as a MBE. *Id.*

[7] *Id.* The LPW is administered by the Economic Development Administration (EDA). EDA distributes federal funds to state and local government grantees who in turn contract project construction work to the private sector through competitive bidding. 42 U.S.C. §§ 6701-6705 (1976). Thus, grantees must award contracts to the contractor submitting the lowest bid who assures that 10% of the funds will be used to employ MBEs. *See id.* at § 6705. Congress directed that funds under the act be expended on an expedited basis by requiring that applications either be approved or rejected by EDA within sixty days of receipt and that construction commence within ninety days of project approval. 42 U.S.C. § 6705(d) (1976).

proximity to the particular locality, the grantee can apply for a waiver of the MBE requirement.[8]

In several cases, non-minority contractors have attempted to get injunctions preventing the enforcement of section 6705(f)(2), arguing that the MBE provision creates an impermissible racial classification in violation of the equal protection clause.[9] A number of district courts have de-

[8] Under regulations promulgated by the Secretary of Commerce, the 10% MBE requirement would not apply if the Assistant Secretary determined that the 10% set aside could not be filled by minority businesses "located within a reasonable trade area determined in relation to the nature of the services or supplies intended to be procured." 13 C.F.R. § 317.19(b)(2) (1979). On June 6, 1977 the EDA issued *Guidelines For Round II of the Local Public Works Program* which specify that a grantee must provide the Regional Director of the EDA with a detailed statement of justification in support of a request for a waiver of the MBE requirement before bids are requested. In August 1977 the EDA issued *Guidelines for 10% Minority Businnss Participation in LPW Grants* which require local grantees to assist prime contractors in locating and involving minority businesses in LPW Act grant projects. No reported cases discuss instances in which the MBE waiver provisions have been utilized by grantees.

[9] U.S. CONST. amend. XIV. § 1. *See* text accompanying notes 29-32 *infra;* notes 10 & 11 *infra.* Under the equal protection clause, legislative classifications which burden fundamental rights must be subjected to strict judicial scrutiny. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 991-1136 (1978) [hereinafter cited as TRIBE]. Absent a compelling justification such classifications are impermissible. *See, e.g.,* Shapiro v. Thompson, 394 U.S. 618, 633 (1969) (denial of welfare benefits to persons living in administering jurisdictions less than one year impairs fundamental right to interstate travel); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 670 (1966) (right to equal voting opportunity impaired by state poll tax). Strict scrutiny is also triggered by "suspect" classifications which operate to prejudice racial and ancestral minorities. *E.g.,* Loving v. Virginia, 388 U.S. 1, 11 (1967) (holding unconstitutional state anti-miscegenation statute); Korematsu v. United States, 323 U.S. 214, 217 (1944) (upholding west coast incarceration and dispossession of persons of Japanese ancestry); Hirabayashi v. United States, 320 U.S. 81, 92 (1943) (upholding west coast curfew against persons of Japanese ancestry); Strauder v. West Virginia, 100 U.S. 303, 308-09 (1879) (invalidating state law denying blacks jury eligibility).

In Washington v. Davis, 426 U.S. 229 (1976), the Court held that facially neutral employment tests which have a disparate impact on minority group members will only be found to violate the equal protection clause if an intent to discriminate can be shown. 426 U.S. at 240; *cf.* Griggs v. Duke Power Co., 401 U.S., 424 (1971) (disparate impact definition of discrimination for purposes of employment discrimination under Title VII of the 1964 Civil Rights Act). *See generally* Note, *Proving Discriminatory Intent From a Facially Neutral Decision With a Disproportionate Impact,* 36 WASH. & LEE L. REV. 109 (1979). The Court's holding in *Washington v. Davis* is not apposite to challenges to the MBE "set asides" because the MBE provision is not a facially neutral classification with a disparate impact on racial minorities but rather, intentionally favors minorities. *See* note 16 *infra.*

The Supreme Court's decision in Katzenbach v. Morgan, 384 U.S. 641 (1966), suggests that congressional legislation involving benign "suspect" classifications may be judged by a less strict standard of review. *Developments in the Law - Equal Protection,* 82 HARV. L. REV. 1065, 1109 (1969) [hereinafter cited as *Equal Protection*]. *Morgan* construed congressional power under the enforcement clause of the fourteenth amendment, U.S. CONST. amend. XIV, § 5, to permit the enactment of any "appropriate legislation" to enforce equal protection, including the regulation of state activity not itself violative of equal protection. 384 U.S. at 648, quoting Ex parte Va., 100 U.S. 339, 345 (1880). *See* Cox, *The Supreme Court 1965 Term, Foreword: Constitutional Adjudication and the Promotion of Human Rights,* 80 HARV. L. REV.

nied injunctive relief without ruling on the constitutionality of the MBE provision.[10] Although several courts have upheld the constitutionality of the set asides,[11] two federal district courts have found the 10% set asides unconstitutional.[12] Any determination of the constitutionality of the MBE

91, 102-08 (1966). The Court in *Morgan* applied the standard of reasonableness articulated in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819), to test the congressional legislation. 384 U.S. at 650. Commentators have argued that this more permissive standard of review is appropriate when Congress enacts a remedial classification designed to extend rights to minority groups who have previously been denied such rights. *See, e.g.*, Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723 (1974); *Equal Protection, supra* at 1111; *cf.* R.I. Chapter, Associated Gen. Contractors, Inc. v. Kreps, 450 F. Supp. 338, 349 (D.R.I. 1978) (Congress has power to enact MBE provision under enforcement clause of fourteenth amendment); text accompanying notes 84-86 *infra*.

[10] *See, e.g.*, Ohio Contractors Ass'n v. Economic Dev. Admin., 452 F. Supp. 1013 (S.D. Ohio 1977), *aff'd*, 580 F.2d 213 (6th Cir. 1978); R. I. Chapter, Associated Gen. Contractors v. Kreps, 450 F. Supp. 367 (D.R.I. 1978); Va. Chapter, Associated Gen. Contractors v. Kreps, 444 F. Supp. 1167 (W.D. Va. 1978); Associated Gen. Contractors, Inc. v. Secretary of Commerce, No. 77-4218 (D. Kan. 1977); Carolinas Branch, Associated Gen. Contractors v. Kreps, 442 F. Supp, 392 (D.S.C. 1977); Mont. Contractors Ass'n v. Secretary of Commerce, 439 F. Supp. 1331 (D. Mont. 1977); Fla. East Coast Chapter v. Secretary of Commerce, No. 77-8351 (S.D. Fla. 1977). Courts which have denied preliminary injunctions against the MBE provision without ruling on its constitutionality generally have found that the plaintiffs had failed to demonstrate likelihood of success on the merits and that the public interest in having LPW funds expended expeditiously would be injured by issuance of an injunction. *See, e.g.*, Va. Chapter, Associated Gen. Contractors v. Kreps, 444 F. Supp. 1167, 1180-86 (W.D. Va., 1978); Mont. Contractors Ass'n v. Secretary of Commerce, 439 F. Supp. 1331 (D. Mont. 1977).

[11] In Fullilove v. Kreps, 443 F. Supp. 253 (S.D.N.Y. 1977) *aff'd*, 584 F.2d 600 (2d Cir. 1978), *cert. granted*, 47 U.S. L.W. 3757 (1979), the Second Circuit applied the strict scrutiny standard to the MBE set aside requirement and concluded that the provision was a constitutionally valid exercise of congressional power to remedy the effects of previous discrimination in the construction industry. In Ohio Contractors' Ass'n v. Economic Dev. Admin., 452 F. Supp. 1013 (S.D. Ohio 1977), the district court denied plaintiff's motion for a preliminary injunction, reasoning that the MBE provision was a necessary measure to combat discrimination against minority contractors. 452 F. Supp. at 1023-24. The court concluded that even if the MBE provision was constitutionally defective, the loss of LPW grant monies to local government grantees which would result from enjoining the MBE provision outweighed the potential loss to plaintiff contractors. *Id.* at 1023. The Sixth Circuit in *Ohio Contractors* concluded that the district court did not abuse its discretion in declining to issue a preliminary injunction. 580 F.2d at 214.

In Constructors Ass'n v. Kreps, 573 F.2d 811 (3d Cir. 1978), the Third Circuit affirmed the district court's denial of plaintiff's request for a preliminary injunction enjoining operation of the MBE 10% set aside provision. 573 F.2d at 820. The district court applied the strict scrutiny standard of review and concluded that the MBE provision was constitutional since Congress had enacted it pursuant to a compelling governmental interest in remedying the past and present effects of discrimination against MBEs. Fullilove v. Kreps, 441 F. Supp. at 952. The Third Circuit held that the district court had not abused its discretion in reaching this decision. 573 F.2d at 820.

[12] In Associated Gen. Contractors v. Secretary of Commerce, 441 F. Supp. 955 (C.D. Cal. 1977), *vacated* 98 S. Ct. 3132 (1978), the district court issued a declaratory judgement that the MBE provision was unconstitutional and granted a prospective injunction prohibiting its enforcement. 441 F. Supp. at 971. In addition to finding the MBE provision unconstitutional, the court concluded that 42 U.S.C. § 6705(f) (2) discriminated against non-minority contrac-

provision must be made both in terms of traditional constitutional principles and the Supreme Court's recent decision in *Regents of the University of California v. Bakke.*[13]

In *Bakke,* the Court held unconstitutional a special admissions program at the University of California at Davis which set aside sixteen places in each entering class for qualified members of minority groups.[14] Although the Court held Davis' special admissions program unconstitutional as a

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tors and therefore was inconsistent with Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d, 2000d-1 (1976), which forbids discrimination under any program receiving Federal financial assistance. The district court apparently reasoned that Title VI contains a definition of discrimination that is "colorblind", thus prohibiting racial preferences such as that contained in the MBE provision. This construction of Title VI is incorrect since Congress would not likely enact a statute which clearly violates prior legislation. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 349 (1978) (Brennan, J., concurring in part, dissenting in part).

The Supreme Court remanded *Associated Gen. Contractors* for mootness because the Secretary of Commerce had already granted all of the LPW funds and, therefore, a viable case or controversy was no longer present. 459 F. Supp. at 769. On remand the district court held that the challenge to the MBE provision was not moot because it was "capable of repetition, yet evading review." 459 F. Supp. at 776. Southern Pac. Term. Co. v. I.C.C., 219 U.S. 498, 515 (1911); *see* Neb. Press Ass'n v. Stuart, 427 U.S. 539, 546-47 (1976). *See also* C. WRIGHT, HANDBOOK OF THE LAW OF THE FEDERAL COURTS, § 12, at 39-40 (3d ed. 1976); Note, *Mootness on Appeal in the Supreme Court,* 83 HARV. L. REV. 1672, 1685-87 (1970). Challenges to the MBE provision were "capable of repetition" because Congress had considered reenactment of the LPW Act along with the MBE requirement, *see* note 9 *infra,* and "yet evading review" because of the expeditious manner in which LPW funds are allocated. 459 F. Supp. at 776; *see* note 7 *supra.* The court on remand also reaffirmed its initial conclusion that the MBE provision created an unconstitutional racial quota. 459 F. Supp. at 781.

In Wright Farms Constr., Inc. v. Kreps, 444 F. Supp. 1023 (D. Vt. 1977), the district court found that Vermont had a small minority population and concluded that the MBE provision was unconstitutional as it applied to contractors in that state. This conclusion is unwarranted since local and state government grantees may apply for a waiver of the 10% requirement in the event that there are insufficient MBE's in a particular project area. *See* note 8 *supra.* Moreover, the statements of the sponsor of the MBE provison clearly indicate that the set aside provision would not apply in the case that there were no minority businesses in a particular area. *See* 123 CONG. REC. H. 1437 (daily ed. Feb. 24, 1977) (remarks of Rep. Mitchell). The district court in *Wright Farms* emphasized that Congress had made no finding that discrimination against minority contractors existed in Vermont. 444 F. Supp. at 1039. Under the analogous situation of voting rights legislation, however, Congress need not make specific findings of discrimination in each state. *See* R.I. Chapter, Associated Gen. Contractors v. Kreps, 450 F. Supp. 338, 354 n.13 (D.R.I. 1978). Congress' ban on literacy tests was based on a general observation of the discriminatory effect of such tests instead of actual findings in each state. *See* Voting Rights Act of 1965, 42 U.S.C. § 1973 (1976). The Supreme Court upheld this ban despite the fact that, in many states, the literacy test was not used to discriminate and despite the Court's refusal to find that literacy tests constituted a per se constitutional violation. *See* Oregon v. Mitchell, 400 U.S. 112, 132-34, 146-67, 216-17, 232-36, 282-84 (1970); South Carolina v. Katzenbach, 383 U.S. 301 (1966) (ban on literacy tests in states with only 50% of eligible voters registered or actually voting); Weinberger v. Salfi, 422 U.S. 749, 777 (1975) (upholding Congress' use of broad classifications in place of individualized determinations in spending program); Brest, *Foreword: In Defense of the Antidiscrimination Principle,* 90 HARV. L. REV. 1, 32-33.

[13] 438 U.S. 265 (1978).

[14] *Id.* at 271.

racial quota, it also held that Davis could consider race as a factor in its future admissions decisions.[15] Since the 10% set asides create an explicitly race-based condition on the receipt of LPW funds,[16] the constitutionality of the MBE provision is facially suspect in light of the *Bakke* decision.[17]

The first issue presented by the MBE requirement is whether the plaintiffs have standing to challenge the statute.[18] Courts have been willing to grant standing to both individual construction companies and associations representing general contractors, reasoning that both face injury in fact.[19] Prime contractors who are low bidders on construction projects are injured when grantees do not award them contracts because they have failed to set aside 10% of the grant for minority subcontractors.[20] Thus, application of the MBE requirement removes noncomplying contractors from consideration for an identified percentage of federal construction funds.[21] Furthermore, prime contractors are potentially harmed when, in order to comply with the LPW Act, they employ more expensive subcontractors than they

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[15] *Id.* at 315-18. Bakke argued that his exclusion from medical school violated Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1976), and his constitutional rights under the equal protection clause of the fourteenth amendment. *Id.* at 277-78. Justice Brennan, joined by Justices White, Marshall and Blackmun, wrote an opinion which held that the Davis program was constitutional and that it did not violate Title VI. 438 U.S. at 324. Justice Stevens, joined by Chief Justice Burger and Justices Stewart and Rehnquist, avoided the constitutional issue under the equal protection clause, but concluded that the Davis program did violate Title VI. *Id.* at 408-21.

Justice Powell wrote a separate opinion on the constitutional and statutory issues. *Id.* at 281-87, 291-320. Although he disagreed with Justices Stevens, Stewart, Rehnquist and Chief Justice Burger on the meaning of Title VI, he did conclude that the Davis program violated the equal protection clause and Title VI. *Id.* at 284-87.

[16] 42 U.S.C. § 6705 (f)(2) (1976). The Secretary of Commerce has acknowledged that the MBE provision creates an explicitly race-based condition on the receipt of the PWE Act funds. Fullilove v. Kreps, 584 F.2d 600, 602 (2d Cir. 1978).

[17] The *Fullilove* decision 584 F.2d 600 (2d Cir. 1978), upholding the constitutionality of the MBE provision is of particular interest since it is the first circuit court ruling on the 10% set asides after *Bakke.* In *Associated Gen. Contractors* v. Secretary of Commerce, 459 F. Supp. 766 (C.D. Cal. 1978), however, the district court, on remand from the Supreme Court, held that *Bakke* did not affect its initial conclusion that the MBE provision created an impermissable racial quota. 459 F. Supp. at 780; *see* text accompanying notes 47 *infra.*

[18] In order to be granted standing, the party must have alleged such a "personal stake in the outcome of the controversy," Baker v. Carr, 369 U.S. 186, 204 (1962), as to ensure that "the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution." Flast v. Cohen, 392 U.S. 83, 101 (1968); *see* Sierra Club v. Morton, 405 U.S. 727, 732 (1972); U.S. CONST. art. 3, § 2.

[19] *See, e.g.,* Va. Chapter, Assoc. Gen. Contr. v. Kreps, 444 F. Supp. 1167 (W.D. Va. 1978); Associated Gen. Contractors of Cal. v. Secretary of Commerce, 441 F. Supp. 955 (C. D. Cal. 1977); Constructors Ass'n of W. Pa. v. Kreps, 441 F. Supp. 936 (W.D. Pa. 1977) *aff'd,* 573 F.2d 811 (1978).

[20] *Cf.* Va. Chapter, Associated Gen. Contractors v. Kreps, 444 F. Supp. 1167, 1176 (W.D. Va. 1978) (non-minority electrical contractor denied contract due to general contractor's failure to comply with MBE provision). *See* note 7 *supra.*

[21] *See* note 19 *supra.*

would otherwise employ, resulting in the submission of higher bids.[22] Associations representing contractors are potentially injured by the LPW since the MBE provision discriminates against their members on the basis of race, thereby preventing the organizational objective of nondiscriminatory bidding on public contracts.[23] Thus, the courts are warranted in granting standing to these contractor associations.

The second issue posed by the MBE provision is whether the waiver provision available to grantees is an effective administrative remedy which all plaintiffs should be required to exhaust before seeking judicial review of the act's constitutionality.[24] Courts have given two reasons why the exhaustion doctrine does not apply to challenges of the MBE provision. First, only local and state government grantees can apply for a waiver of the MBE requirement.[25] The alleged remedy provided by the waiver provision, therefore, is not available to prime contractors or contractor associations.[26] Since this remedy is not available to contractors, they have no administrative relief. Second, plaintiffs challenging the constitutionality of a statute have been held exempt from the exhaustion doctrine because administrative agencies do not have jurisdiction to rule on the constitutionality of congressional enactments.[27] Constitutional challenges to the

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[22] *See* Associated Gen. Contractors v. Secretary of Commerce, 441 F. Supp. 955, 962 (C.D. Cal. 1977). Although all general contractors must comply with the MBE provision, a general contractor who normally does not employ minority subcontractors is put at a competitive disadvantage when bidding against a general contractor who has had previous subcontracting work done by MBE's. Any contractor who is required to hire more expensive subcontractors will be harmed since his profit margin will be reduced. Moreover, a general contractor will suffer economic injury if he must hire MBEs to do work which he would normally do himself. *See* Constructors Association v. Kreps, 441 F. Supp. 936, 945 (W.D. Pa. 1977).

[23] *See* note 10 *supra.* An organization has standing to bring suit on behalf of its members when its members would have standing to sue in their own right or when the interests it seeks to protect relate to the organization's purpose. Hunt v. Washington State Apple Advertising Comm'n., 432 U.S. 333, 340; Warth v. Seldin, 422 U.S. 490, 511 (1975). Since individual contractors have standing to challenge the MBE provision, contractor associations also have standing to sue on behalf of their members.

[24] *See* notes 8 & 10 *supra.* The doctrine of exhaustion of administrative remedies is well established in the area of administrative law. *See generally* K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 20.01-20.10 (1958). The doctrine provides that a party is not entitled to judicial relief for an alleged injury until he has "exhausted" the prescribed administrative remedy. Myers v. Bethlehem Shipbldg. Corp., 303 U.S. 41, 50-51 (1938). The purposes of the exhaustion doctrine are avoidance of interruption of an agency's duty to apply a statute, development of the factual background upon which decisions should be based, and deference to the agency's discretion and expertise. McKart v. United States, 395 U.S. 185, 193-94 (1969).

[25] *See* note 8 *supra.*

[26] Va. Chapter, Associated Gen. Contractors v. Kreps, 444 F. Supp. 1167, 1178 (W.D. 1978); Associated Gen. Contractors v. Secretary of Commerce, 441 F. Supp. 955, 962 (C.D. Cal. 1977). The exhaustion doctrine does not apply to a party to whom existing administrative remedies are either unavailable or will not grant him full relief. McNeese v. Board of Educ., 373 U.S. 668, 674-76 (1963).

[27] Oestereich v. Selective Serv. Bd., 393 U.S. 233, 242 (1968), (constitutional challenge to Selective Service Act of 1967, 50 U.S.C. App. § 456 (1970)). Attacks on enabling statutes have been held exempt from the exhaustion requirement because an administrative body

MBE provision fall within this exception to the exhaustion doctrine.[28] Consequently, courts have properly permitted plaintiff contractors and contractors associations to seek judicial relief from the application of the MBE requirement.

Plaintiffs challenging the 10% set-aside requirement have contended that the MBE provision creates a discriminatory racial and ethnic quota in violation of the fifth amendment.[29] Although the fifth amendment does not contain an equal protection clause, its due process clause incorporates the equal protection element prohibiting racial discrimination to the same extent as the equal protection clause of the fourteenth amendment.[30] Under the equal protection clause, racial classifications are "suspect" and are subject "to the most rigid scrutiny."[31] This strict scrutiny standard requires that the governmental objective advanced by the classification serve a "compelling state interest" and that the means of accomplishing the objective must be the least discriminatory means available.[32]

Despite the suspect nature of racial classifications, however, the courts have recognized that remedies for prior discrimination must consider race in order to fully eradicate the effects of previous discrimination.[33] Thus, the

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cannot be expected to rule on the constitutionality of the very act which established it. *E.g.* Weinberger v. Salfi, 422 U.S. 749, 765 (1975); Johnson v. Robison, 415 U.S. 361, 368 (1974); Public Utilities Comm'n. of Cal. v. United States, 355 U.S. 534, 539-40 (1958); K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES, § 20.04 (1976).

[28] *See* note 26 *supra.*

[29] *See* note 10 *supra;* U.S. CONST. amend XIV, § 1.

[30] *E.g.,* Washington v. Davis, 426 U.S. 229, 239 (1976); Johnson v. Robison, 415 U.S. 361, 364 (1974) (upholding denial of veteran's benefits to conscientious objector who performed civilian service); Richardson v. Belcher, 404 U.S. 78, 81 (1971) (reduction of social security benefits to reflect workmen's compensation payments not violative of fifth amendment due process); Bolling v. Sharpe, 347 U.S. 497, 499 (1954); *see* note 9 *supra;* TRIBE, *supra* note 9 at 800, 810, 922, 1063 (1978); Karst, *supra* note 9; Comment, *Should* Bakke *Affect Title VII: A Constitutional Analysis,* 6 SAN FERN. U. L. REV. 75 (1977).

[31] Loving v. Virginia, 388 U.S. 1, 11 (1967); *see* note 9 *supra.*

[32] *See* note 9 *supra;* Dunn v. Blumstein, 405 U.S. 330, 337 (1972) (state's denial of right to vote due to durational residency requirement subject to strict scrutiny); Loving v. Virginia, 388 U.S. 1, 11 (1967); Associated Gen. Contractors v. Secretary of Commerce, 441 F.2d at 964-65; Sherain, *The Questionable Legality of Affirmative Action,* 51 J. URB. L. 25 (1973). Absent a compelling governmental interest, preferential treatment of minorities becomes illegal reverse discrimination against the majority. *See, e.g.,* Kirkland v. New York State Dep't of Correctional Servs., 520 F.2d 420, 430 (2d Cir. 1975), *cert. denied,* 429 U.S. 823 (1976) (judicially imposed promotion quota constituted reverse discrimination because no alleged past discrimination); Harper v. Kloster, 486 F.2d 1134, 1138 (4th Cir. 1973) (invalidating racial hiring quotas because effective relief possible without resort to quotas). *See generally* Wright Farms Constr., Inc. v. Kreps, 444 F. Supp. 1023, 1032-37 (D.Vt. 1977); *see also* Ely, *The Constitutionality of Reverse Discrimination,* 41 U. CHI. L. REV. 723, 727 (1974) (arguing that racial classification is not "suspect" when majority discriminates against itself).

[33] The Supreme Court has approved the use of racial classifications to achieve school desegregation. *See, e.g,* North Carolina v. Swann, 402 U.S. 43, 45-46 (1971); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15-21 (1971); United States v. Montgomery County Bd. of Educ., 395 U.S. 225 (1969).

The recognition of race in the selection of union members and construction workers has

fact that a racial classification is intended to remedy the adverse effects of past or present discrimination may indicate a compelling governmental interest sufficient to justify the use of such a classification.[34] The *Bakke* decision does not significantly alter the Supreme Court's position in favor of recognizing that remedies for prior discrimination may consider race.[35]

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withstood constitutional challenge in two contexts. Constructors Assoc. of W. Pa. v. Kreps, 441 F. Supp. 936, 948 (D.W.Pa. 1977). First, courts have ordered remedial action for past discrimination pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g) (1976). Courts have ordered unions to grant immediate membership to a number of minority applicants, United States v. Wood, Wire, and Metal Lathers Int'l Union, Local No. 46, 471 F.2d 408 (2d Cir.), *cert. denied,* 421 U.S. 939 (1973), to begin an affirmative minority recruitment program, United States v. Sheet Metal Workers Int'l Ass'n, Local No. 36, 416 F.2d 123 (8th Cir. 1969), and to take on a certain number of minority apprentices for each class of workers, United States v. Ironworkers Local 86, 443 F.2d 544 (9th Cir.), *cert. denied,* 404 U.S. 984 (1971). Courts have also ordered employers to hire minority employees up to 30% of the total work force, Stamps v. Detroit Edison, 365 F. Supp. 87 (E.D. Mich. 1973), to hire one minority worker every time two white workers were hired, up to a certain number, Carter v. Gallegher, 452 F.2d 315 (8th Cir. 1971), *cert. denied,* 406 U.S. 950 (1972), and to give priority in future hiring to black and Spanish-speaking applicants for police positions who had failed to qualify under a constitutionally impermissible set of hiring standards. Castro v. Beecher, 459 F.2d 725 (3d Cir. 1972).

The second context in which race has been recognized as a permissible criterion for employment is where courts have upheld affirmative action to remedy the disproportionately low employment of minorities in the construction industry pursuant to Executive Order No. 11, 246, 40 Fed. Reg. 12319 (1965). Courts have upheld the specific percentage goals found in several plans developed to implement this Order. *See, e.g.,* Southern Ill. Builders Ass'n v. Ogilvie, 327 F. Supp. 1154 (S.D. Ill. 1971), *aff'd,* 471 F.2d 680 (7th Cir. 1972) (Illinois Ogilvie Plan); Joyce v. McCrane, 320 F. Supp. 1284 (D.N.J. 1970) (Newark Plan); Contractors Ass'n v. Secretary of Labor, 311 F. Supp. 1002 (E.D. Pa. 1970), *aff'd,* 442 F.2d 159 (3d Cir.), *cert. denied* 404 U.S. 854 (1971) (Philadelphia Plan); Weiner v. Cuyahage Community College School District, 19 Ohio St. 2d 35, 249 N.E. 2d 907, 908 (1969), *cert. denied,* 396 U.S. 1004 (Cleveland Plan). *See also* Associated Gen. Contractors, Inc. v. Altshuler, 361 F. Supp. 1293 (D. Mass.), *aff'd,* 490 F.2d 9 (1st Cir. 1973), *cert. denied,* 416 U.S. 957 (1974) (upholding state 20% minority employment quota); Comment, *The Philadelphia Plan: A Study on The Dynamics of Executive Power,* 39 U. CHI. L. REV. 732, 747-57 (1972). Courts upholding these federal affirmative action programs from challenges under the equal protection clause or under the anti-preference provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(j) (1976) have reasoned that public authorities have discretionary power to remedy past discrimination that is even broader than that of the judicial branch. *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. at 16. This line of reasoning suggests that Congress has discretionary authority to enact provisions such as the MBE preference to remedy past discrimination. *Accord,* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 302 n.41 (1978) (opinion of Powell, J.).

[34] Several courts which have considered challenges to the 10% MBE requirement have held that a compelling state interest exists if the racial classification is intended to remedy prior discrimination. *See, e.g.,* Fullilove v. Kreps, 443 F. Supp. 253, 257 (S.D.N.Y. 1977), *aff'd,* 584 F.2d 600, 603 (2d Cir. 1978) (decided after *Bakke*); Constructors Ass'n of W. Pa. v. Kreps, 441 F. Supp. 936, 950 (W.D. Pa. 1977), *aff'd,* 573 F.2d 811, 816 (3d Cir. 1978).

[35] In *Bakke,* Justice Brennan stated that "Government may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice, at least when appropriate findings have been made by judicial, legislative, or administrative bodies with competence to act in this area." 438 U.S. at 325 (opinion of Brennan, J.); *see id.* at 307 (opinion of Powell, J.).

Since the MBE requirement distinguishes among various business enterprises based upon the racial background of their owners,[36] the provision can be upheld only if it is intended to remedy prior discrimination.

The issue of whether the MBE provision was designed to eliminate the vestiges of racial discrimination is composed of two intertwined, yet analytically distinct, elements.[37] The first element concerns the Congressional enactment of the 10% MBE requirement as a remedy for past discrimination.[38] Whether discrimination has in fact occurred is the second element.[39] Disagreement among courts over the constitutionality of the MBE provision has resulted in part from different treatment of these questions.[40]

The congressional purpose underlying the enactment of the MBE provision cannot be discerned by examining the reports of the Senate and House committees that considered the 1977 version of the LPW Act.[41] This formal legislative history contains no mention of the minority business set aside because the 10% requirement was proposed as an amendment at a relatively late date in the bill's history and therefore, was never considered by any congressional committee.[42] Inquiry into the congressional intent in enacting the MBE provision has focused on statements made by Representative Mitchell, the sponsor of the amendment, during the debate.[43] Mitchell stated that minority contractors were receiving only 1% of government contracts in any given fiscal year and expressed concern that minority enterprises could not be incorporated into the economic system without setting aside funds.[44] In *Associated General Contractors v. Secretary of Commerce*,[45] the district court discounted Representative Mitchell's remarks as "debate rhetoric"[46] and concluded that the only objective of the MBE provision was to direct financial assistance to minority businesses

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[36] See 42 U.S.C. § 6705(f)(2) (1976); note 16 *supra*.

[37] Fullilove v. Kreps, 584 F.2d 600, 603 (2d Cir. 1978).

[38] *Id.*

[39] *Id.*

[40] *Compare* Fullilove v. Kreps, 584 F.2d 600 (2d Cir. 1978) *and* Constructors Ass'n v. Kreps, 573 F.2d 811 (3d Cir. 1978) (MBE provision enacted to remedy past discrimination against minority contractors) *with* Associated Gen. Contractors v. Secretary of Commerce, 441 F. Supp. 955 (C.D. Cal. 1977) (holding lack of evidence of past discrimination precludes finding that MBE provision is remedial).

[41] *See* H.R. REP. No. 95-20, 95th Cong., 1st Sess. (1977), *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 150; SENATE REPORT, *supra* note 4.

[42] *See* note 41 *supra;* Fullilove v. Kreps, 443 F. Supp. 253, 257 (S.D.N.Y. 1977). One district court has viewed the paucity of legislative history on the MBE provision as "troublesome." Constructors Ass'n v. Kreps, 441 F. Supp. 936, 952 (W.D. Pa. 1977).

[43] *See* 123 CONG. REC. H. 32 1437 (daily ed. Feb. 24, 1977); *see also* Fullilove v. Kreps, 584 F.2d 600, 605 (2d Cir. 1978); Constructors Ass'n of W. Pa. v. Kreps, 573 F.2d 811, 817 n. 22 (3d Cir. 1978); Associated Gen. Contractors of Cal. v. Secretary of Commerce, 441 F. Supp. 955, 960, 965, 969 (C.D. Cal. 1977).

[44] *See* 123 CONG. REC. H. 32 1436 (daily ed. Feb. 24, 1977).

[45] 441 F. Supp. 955 (C.D. Cal. 1977).

[46] 441 F. Supp. at 969.

solely on the basis of race to the exclusion of non-minority businesses.[47] The court refused to find that a congressional desire to remedy prior discrimination was implicit in Mitchell's remarks because Mitchell had not presented specific evidence of discrimination against minority contractors.[48]

The position of the district court in *Associated General Contractors* is questionable since the Supreme Court has held that Congress has discretionary authority to take appropriate measures to remedy the effects of past and present discrimination where there is some evidence that discrimination does in fact exist.[49] In *Bakke,* Justice Powell reaffirmed the view that the judiciary should defer to congressional legislation which remedies past discrimination based on the enforcement clauses of the thirteenth and fourteenth amendments.[50] Thus, in upholding the constitutionality of the MBE provision, courts have correctly considered both the floor debate surrounding its adoption and the "societal and legislative context" within which the provision was meant to operate.[51] These courts have been willing to infer that the Congressional purpose was to remedy prior discrimination from the remarks of Representative Mitchell and from Representative Conyers' observation that "minority contractors and businessmen who are trying to enter in on the bidding process . . . get the 'works' almost every time."[52] Although these statements do not explicitly attribute the difficul-

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[47] *Id.* at 965.

[48] *Id.*

[49] Katzenbach v. Morgan, 384 U.S. 641, 656 (1966). In Hampton v. Mow Sun Wong, 426 U.S. 88 (1976), the Court stated that if a rule were "expressly mandated by the Congress or the President, we might presume that any interest which might rationally be served by the rule did in fact rise to its adoption." *Id.* at 103. In *Fullilove,* the Second Circuit quoted from *Morgan,* stating that "it is 'enough that [the court] perceive a basis upon which Congress might predicate a judgement that' the MBE amendment would remedy past discrimination against minority construction businesses." 584 F.2d at 604-05. *See* note 9 *supra.*

[50] 438 U.S. at 302 n.41 (opinion of Powell, J.). Congress has power under the thirteenth amendment to eliminate all "badges and incidents of slavery." The Civil Rights Cases, 109 U.S. 3, 20 (1833); see U.S. CONST. amend. XIII. In Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) the Court stated that "Congress has the power . . . rationally to determine what are the badges and incidents of slavery." 392 U.S. at 440. In R.I. Chapter, Associated Gen. Contractors v. Kreps, 450 F. Supp. 338 (1978) the district court concluded that discrimination in the making of contracts is a badge and incident of slavery. 450 F. Supp. at 364; *cf.* Jones v. Alfred H. Mayer 392 U.S. at 441-43 (prohibiting racial discrimination by private parties in sale or rental of property); Tillman v. Wheaton-Haven Recreation Ass'n, Inc., 410 U.S. 431, 439-40 (1973)(discriminatory membership policy of community swimming pool). Congress, therefore, has power under the thirteenth amendment to enact the MBE provision to eliminate this discrimination. 450 F. Supp. at 360-66. *See generally* Note, *Federal Power to Regulate Private Discrimination: The Revival of the Enforcement Clauses of the Reconstruction Era Amendments.* 74 COLUM. L. REV. 449 (1974); Note, Jones v. Mayer: *The Thirteenth Amendment and the Federal Anti-Discriminaton Laws,* 69 COLUM. L. REV. 1019 (1969); Note, *The "New" Thirteenth Amendment: A Preliminary Analysis,* 82 HARV. L. REV. 1294 (1969).

[51] Fullilove v. Kreps, 443 F. Supp. at 258; *see* R. I. Chapter, Associated Gen. Contractors v. Kreps, 450 F. Supp. at 355. *See also* Katzenbach v. Morgan, 384 U.S. 641 (1966); Pan Am. World Airways, Inc. v. CAB, 310 F.2d 770, 782 (2d Cir. 1967) (statements made in debates are authoritative indicia of congressional intent).

[52] 123 CONG. REC. H. 32 1440 (daily ed. Feb. 24, 1977), *reprinted in* Associated Gen.

ties encountered by minority businesses to racial discrimination, a congressional purpose to remedy discrimination can properly be inferred from the MBE provision itself.[53] In such a case, "recourse to internal legislative history and other ancillary materials is unnecessary."[54] In view of recent congressional antidiscrimination legislation,[55] the MBE provision was most likely designed to remedy racial discrimination rather than to discriminate against non-minority business enterprises.[56]

Although the 1977 version of the LPW Act does not include a purpose clause necessitating an explicit finding of past racial discrimination,[57] the floor debate of the MBE provision documents discrimination in the construction industry.[58] The statistical disparity between minority group representation in the general population and their low level of involvement in economic activity is also indicative of prior racial discrimination.[59] Moreover, findings by the federal government under other antidiscrimination efforts support the conclusion that discrimination exists in the construction industry.[60] Since Congress had previously set up many programs to provide assistance to minority enterprises,[61] the MBE provision was probably incorporated into the LPW Act after only brief debate because of a

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Contractors v. Secretary of Commerce, 441 F. Supp. 955, 997-1006 (C.D. Cal. 1977) (Appendix C); *see* Fullilove v. Kreps, 443 F. Supp. at 258.

[53] Fullilove v. Kreps, 584 F.2d at 604. The Second Circuit reasoned that the MBE provision made no sense unless it was construed as a remedial measure to benefit minority subcontractors. *Id.*

[54] *Id.* quoting *Equal Protection, supra* note 9, at 1077.

[55] *E.g.*, Voting Rights Amendments of 1975, 42 U.S.C. § 1971 *et seq.* (1976); Civil Rights Act of 1968, 18 U.S.C. §§ 231, 233, 241, 242, 245, 1153, 2101, 2102 (1976); Civil Rights Act of 1964, 28 U.S.C. § 1447 (1976).

[56] Fullilove v. Kreps, 584 F.2d at 605; *see* Hampton v. Mow Sun Wong, note 48 *supra.*

[57] See 42 U.S.C. §§ 6701-6735 (1976); note 4 *supra.*

[58] *See* 123 CONG. REC. H. 32 1437 (daily ed. Feb. 24, 1977) (remarks of Rep. Mitchell); Fullilove v. Kreps, 584 F.2d at 605; Constructors Ass'n of W. Pa. v. Kreps, 573 F.2d 811, 817 n.21 (3d Cir. 1978).

[59] Although the United States has a minority population of approximately 17%, only about 4% of all businesses are controlled by members of minority groups, and they account for less than 1% of national gross business receipts. OFFICE OF MINORITY BUSINESS ENTERPRISE, UNITED STATES DEP'T OF COMMERCE, MINORITY BUSINESS OPPORTUNITY HANDBOOK, I-1 (1976) [hereinafter cited as MINORITY BUSINESS HANDBOOK]; *see* REPORT OF THE HOUSE COMMITTEE ON SMALL BUSINESS, H.R. REP. NO. 1791, 94th Cong., 2d Sess. 124 (1977) [hereinafter cited as REPORT ON SMALL BUSINESS]; Fullilove v. Kreps, 443 F. Supp. at 258.

[60] *See, e.g.*, REPORT ON SMALL BUSINESS, *supra* note 59, at 182-83; UNITED STATES COMM'N. ON CIVIL RIGHTS, MINORITIES AND WOMEN AS GOVERNMENT CONTRACTORS (1977) [hereinafter cited as GOVERNMENT CONTRACTORS]; MINORITY BUSINESS HANDBOOK, *supra* note 59 at I-1-2.

[61] There are thirty-five federal assistance programs designed particularly for minority enterprises. *See* Fullilove v. Kreps, 443 F. Supp. at 259 n. 14; OFFICE OF MINORITY ENTERPRISE, UNITED STATES DEP'T OF COMMERCE, FEDERAL ASSISTANCE PROGRAMS FOR MINORITY BUSINESS ENTERPRISES (1977); *see, e.g.*, Exec. Order No. 11,625, 36 Fed. Reg. 199 (1971) (requiring federal agencies to increase efforts promoting minority business enterprise); 41 C.F.R. § 1-1.1302 (1975) (requiring federal agencies to establish minority contractor procurement program). *See generally* Constructors Ass'n. v. Kreps, 441 F. Supp. 936, 951 n.8 (W.D. Pa. 1977).

general awareness of discrimination against minority businesses seeking to participate in government contracting.[62]

Since Congress could reasonably have found that discrimination existed in the construction industry, it had discretionary authority to take appropriate remedial measures.[63] Although remedying past racial discrimination constitutes a compelling governmental interest, the strict scrutiny standard which courts have applied to the MBE provision also requires that Congress adopt the least discriminatory method of accomplishing its objective.[64] Plaintiffs challenging the MBE provision have asserted that increased minority participation in the construction industry could be achieved by providing minority businesses with additional capital through loans or advances.[65] Representative Mitchell, however, stated that capital assistance to minority owned businesses under the Office of Minority Business Enterprise and Small Business Administration programs[66] has been unsuccessful in raising minority business participation in federal contracts above 1%.[67] This low level of participation may be due in part to the fact that the majority of minority businesses are small, specialty contractors with whom government agencies rarely contract directly.[68] Since construction contractors prefer to deal with firms that have an established record, minority businesses have difficulty breaking into the industry.[69] Moreover, government studies have reported that voluntary plans to obtain minority subcontractors on government projects have been totally ineffective.[70] Thus, only by requiring prime contractors to provide subcontracting opportunities to minority businesses in large scale construction contracts can these minority businesses gain the necessary experience and the resultant confidence of prime contractors.[71]

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[62] Fullilove v. Kreps, 443 F. Supp. at 259.

[63] *See* text accompanying notes 33-35 *supra;* note 98 *infra.*

[64] *See* text accompanying note 32 *supra;* note 9 *supra;* Associated Gen. Contractors v. Kreps, 441 F. Supp. at 965.

[65] *See* Fullilove v. Kreps, 443 F. Supp. at 260. Congress could have assisted MBEs through increased cash advances to minority contractors pursuant to 41 C.F.R. §§ 1-30.400-1-31.419 (1977). Under § 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1976), Congress could increase the number of government procurement contracts let to businesses owned by socially or economically disadvantaged persons. *See* 13 C.F.R. § 124.8-1(b) (1977).

[66] *See* note 6 *supra.*

[67] 123 CONG. REC. H. 32 1437 (daily ed. Feb. 24, 1977). *See* GOVERNMENT CONTRACTORS, *supra* note 60 at 35-62. The majority of courts have agreed that other, less drastic means to increase MBE participation in federal contracts actually have been tried and have failed. *See, e.g.,* R.I. Chapter, Associated Gen. Contractors v. Kreps, 450 F. Supp. 338, 359 (D.R.I. 1978); Ohio Contractors Ass'n v. Economic Dev. Admin., 452 F. Supp. 1013, 1022 (S.C. Ohio 1977); Constructors Ass'n v. Kreps, 441 F. Supp. 936, 952-53 (W.D. Pa. 1977).

[68] *See* R. I. Chapter, Associated Gen. Contractors v. Kreps, 450 F. Supp. 338, 359-60 (D.R.I. 1978).

[69] Fullilove v. Kreps, 443 F. Supp. 253, 261 (S.D.N.Y. 1977).

[70] *See* R. I. Chapter, Associated Gen. Contractors v. Kreps, 450 F. Supp. 338, 359 (D.R.I. 1978).

[71] Fullilove v. Kreps, 443 F. Supp. 253, 261 (S.D.N.Y. 1977).

In *Associated General Contractors,* the court reasoned that underemployed minorities in the construction industry could be aided by racially neutral legislation, suggesting that the 10% set aside could be directed at those economically disadvantaged businesses which had recently experienced a high level of unemployment.[72] This position fails to recognize that the LPW Act was enacted to "reactivate the distressed construction industry" at a time when all construction firms were at an economic disadvantage.[73] Consequently, redefining the 10% set aside to include all such construction companies would be tantamount to eliminating the set aside provision entirely.

In determining whether the 10% set asides are an appropriate means to rectify prior discrimination, the burden imposed upon non-minority contractors must be balanced against the compelling governmental interest in eliminating employment discrimination.[74] Courts considering challenges to the MBE set asides have concluded that the 10% figure is a reasonable one that does not impose an inequitable burden upon non-minority contractors.[75] This conclusion is proper in light of the relatively small amount of business from which the MBE provision excludes non-minority contractors. The $4 billion added to the LPW in 1977[76] amounted to approximately 2.5% of the total of nearly $170 billion spent on construction in 1977.[77] Since the MBE provision provided for a 10% set aside of LPW funds, it applied to only .25% of the total dollar amount expended in 1977 on construction work in the United States.[78] Since minority businesses amounted to only 4.3% of the total number of firms in the construc-

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[72] Associated Gen. Contractors v. Secretary of Commerce, 441 F. Supp. 955, 965-66 (C.D. Cal. 1977).

[73] *See* H.R. REP. No. 95-20, 95th Cong., 1st Sess. (1977), *reprinted in* (1977) U.S. CODE CONG. & AD. NEWS 150; text accompanying notes 1-4 *supra.*

[74] Fullilove v. Kreps, 584 F.2d 600, 606-07 (2d Cir. 1978). In Franks v. Bowman Transp. Co., 424 U.S. 747 (1976), Justice Powell implied that affirmative action to remedy past discrimination must not exceed the bounds of fundamental fairness by disregarding equitable considerations. *See* 424 U.S. at 784-86. (Powell, J., concurring and dissenting). The effects of remedial measures to benefit racial minorities cannot be concentrated upon a relatively small, ascertainable group of non-minority persons. EEOC v. Local 638, Sheet Metal Workers, 532 F.2d 821, 828 (2d Cir. 1976).

[75] *E.g.,* Fullilove v. Kreps, 584 F.2d 600, 607-08 (2d Cir. 1978); Ohio Contractors Ass'n v. Economic Dev. Admin., 452 F. Supp. 1013, 1022-23 (S.D. Ohio 1977). In Constructors Ass'n v. Kreps, 441 F. Supp. 936 (W.D. Pa. 1977) the court reasoned that the 10% set aside figure was not unreasonable since grantees could apply for a waiver of the MBE requirements where insufficient MBEs were available in the particular area. 441 F. Supp. at 936, 950-54; *see* note 8 *supra.*

[76] 42 U.S.C. § 6710 (1976); *see* note 3 *supra.*

[77] U.S. DEP'T OF COMMERCE, INDUSTRY AND TRADE ADMINISTRATION, CONSTRUCTION REVIEW, (May-June 1978), at 11. The $170 billion figure relates to the total amount spent on all construction in 1977 rather than to the amount expended by the federal government in that year.

[78] Fullilove v. Kreps, 584 F.2d 600, 607 (2d Cir. 1978).

tion industry,[79] the burden of being excluded from the .25% of these construction funds was not concentrated on a small group of non-minority contractors but rather was spread among contractors comprising 96% of the industry.[80] Moreover, since the MBE requirement was subject to a cut-off date of December 31, 1978,[81] the short time span of the set aside program minimized the burden on non-minority contractors.[82] Non-minority businesses have been benefitted in the past by the exclusion of minority businesses from the industry.[83] This prior benefit may justify the minimal exclusion of non-minority businesses from competing for 10% of the LPW Act grants.[84]

Although courts which have upheld the constitutionality of the MBE provision have applied the strict scrutiny standard of review, the *Bakke* decision may require a less stringent standard of review where remedial racial classifications are involved. Justice Brennan stated that an "ostensibly benign" racial classification could be justified by showing "an important and articulated purpose for its use."[85] In addition, a remedial statute could not operate to stigmatize or single out any discrete and insular non-minority group.[86] Justice Brennan also reasoned that the need to provide a remedy for victims of discrimination and society's interest in eliminating racial discrimination provide important purposes which justify affirmative action programs.[87] Although Justice Brennan, White, Marshall and Blackmun would require racial classifications to be remedial, they would not require specific findings of past or present discrimination.[88] The

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[79] U.S. BUREAU OF THE CENSUS, 1972 CENSUS OF CONSTRUCTION INDUSTRIES: INDUSTRIAL SERIES, UNITED STATES SUMMARY—STATISTICS FOR CONSTRUCTION ESTABLISHMENTS WITH AND WITHOUT PAYROLLS, Table Al (Aug. 1975); U.S. BUREAU OF THE CENSUS, 1972 SURVEY OF MINORITY-OWNED BUSINESS ENTERPRISES: MINORITY-OWNED BUSINESSES, Table 1 (May 1975).

[80] Fullilove v. Kreps, 584 F.2d 600, 608 (2d Cir. 1978); *see* note 79 *supra.*

[81] *See* Fullilove v. Kreps, 584 F.2d 600, 608 (2d Cir. 1978); REPORT ON SMALL BUSINESS, *supra* note 59 at 182-83. *See generally* BECKER, THE ECONOMICS OF DISCRIMINATION (1971); Glenn, *White Gains From Negro Subordination,* SOCIAL PROBLEMS 159 (1966).

[84] *See* Fullilove v. Kreps, 584 F.2d 600, 608 (2d Cir. 1978). In *Bakke,* Justice Powell rejected the view that discrimination against the white "majority" is permissible if it is intended to remedy the effects of general societal discrimination against minority groups. 438 U.S. at 294-99. Justice Powell, however, approved the use of racial preferences to remedy identified discrimination in a particular industry even though this relief imposed some burdens on non-minority employees. *Id.* at 301-02; *citing* Franks v. Bowman Transp. Co., 424 U.S. 747 (1976). Justices Brennan's opinion in *Bakke* cited the MBE provision as confirming that race could be considered as part of a remedy for societal discrimination. 438 U.S. at 348-49. Thus, the concurring Justices apparently believe that the 10% set asides do not impose an unreasonable burden on non-minority businesses.

[85] 438 U.S. at 361.

[86] *Id. See* United Jewish Org. of Williamsburgh v. Carey, 430 U.S. 144 (1977); Washington v. Davis, 426 U.S. 229 (1976).

[87] 438 U.S. at 362.

[88] 438 U.S. at 362-69. Justices Brennan, White, Marshall and Blackmun would permit race-conscious programs "where there is reason to believe that the evil addressed is a product of past racial discrimination." *Id.* at 366. Justice Brennan emphasized that race-conscious

remedial nature of a racial classification could be demonstrated after-the-fact at the time the statute is challenged.[89] Under the Brennan group's less stringent form of review for "benign" racial classifications, the MBE provision would most likely be upheld.

Justice Powell disagreed with the standard of review adopted by Justices Brennan[90] concluding that strict scrutiny must be applied to all racial classifications.[91] He acknowledged, however, that the government had a "substantial" interest in remedying prior discrimination found by judicial, legislative or administrative bodies.[92] This discrimination may be general in the industry affected rather than specific to the entity utilizing an affirmative action program.[93] The flexibility of this findings requirement, coupled with the replacement of the normal "compelling state interest" phrase with the "substantial" government interest terminology indicates that Justice Powell may be moving away from a standard of review which has been termed "strict in theory" and "fatal in fact."[94]

Although Justices Stevens, Stewart and Rehnquist and Chief Justice Burger did not reach the constitutional issue in *Bakke,* all four have previously endorsed remedial racial preferences in other contexts.[95] Justice Stevens' opinion does not indicate whether the four justices would agree with Justice Powell and require prior judicial, legislative or administrative findings of discrimination or whether they would simply require an after-

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remedies have been approved in the absence of explicit findings of past discrimination; *Id.* at 364-66; *see, e.g.,* International Bhd. of Teamsters v. United States, 432 U.S. 324, 357-62 (1977) (sufficient that recipient of preferential advancement is within class of persons likely to have been victims of discrimination); Franks v. Bowman Transp. Co., 424 U.S. 747 (1976) (judicially imposed preference where no finding that employer acted with discriminatory intent); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971) (voluntary adoption of school desegregation plan with fixed racial ratio).

[89] 438 U.S. at 364. Justice Brennan reasoned that judicial intervention was a last resort to stop illegal conduct rather than a prerequisite to voluntary remedial action. *Id.*

[90] *See id.* at 294 n.34.

[91] *Id.* at 290-91.

[92] 438 U.S. at 307-08.

[93] *See id.* at 301-02 (*citing* Associted Gen. Contractors v. Altshuler, 490 F.2d 9 (1st Cir. 1973), *cert. denied,* 416 U.S. 957 (1974)); Contractors Ass'n v. Secretary of Labor, 442 F.2d 159, 175 (3d Cir.), *cert. denied,* 404 U.S. 854 (1971).

[94] *See* Gunther, *The Supreme Court, 1971 Term-Forward: In Search of Evolving Doctrine on a Changing Court: A Model For a Newer Equal Protection,* 86 HARV. L. REV. 1, 8 (1972).

[95] *See, e.g.,* Franks v. Bowman Transp. Co., 424 U.S. 747 (1976); Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975) (requiring differential validation of employment tests having disparate impact on different races). Justices Stevens, Stewart, Rehnquist and Chief Justice Burger have endorsed the principle that a governmental action does not violate the equal protection clause in the absence of purposeful discrimination. Washington v. Davis, 426 U.S. 229 (1976). In *Washington,* Justices Stevens, Stewart, Rehnquist and Chief Justice Burger joined Justice White's approval of the affirmative recruiting of black applicants by the District of Columbia police department. *See* 426 U.S. at 246 (opinion of White, J.), 426 U.S. at 254 (Stevens, J., concurring). This affirmative recruiting constitutes use of a racial preference at the initial level. *See* Scherer, *Bakke Revisted,* 7 HUMAN RIGHTS 22, 24 (1978) [hereinafter cited as Scherer].

the-fact demonstration of the remedial nature of a racial classification advocated by Justice Brennan. One commentator has suggested that at least one of the Stevens four would have adopted the Brennan view.[96] Therefore, the Brennan group's opinion that a less stringent standard of review is mandated when "benign" racial classifications are involved could be considered to be the present position of the Supreme Court.[97]

Since Justice Powell indicated that Congress should be accorded a large degree of judicial restraint in its enactment of remedial legislation,[98] the standard of review applied to the MBE provision should not affect the outcome of future challenges to the 10% set asides. If, however, the lower courts strictly interpret Justice Powell's findings requirement in *Bakke,* they may be more willing to defer to Congress' judgement where the purpose of the legislation appears explicitly in the record. Thus, if Congress decides to re-enact the MBE provision,[99] it should include findings which demonstrate a continued compelling need to set aside funds for minority businesses.[100] This need can be determined at that time by examination of updated statistics on minority participation in the construction industry.[101]

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[96] Scherer, *supra* note 95 at 28.

[97] *See id.*

[98] 438 U.S. at 302 n.41. In *Bakke,* Justice Powell stated that the Court had previously recognized Congress' "special competence . . . to make findings with respect to the effects of identified past discrimination and its discretionary authority to take appropriate remedial measures." *Id.*

[99] Three bills were introduced in Congress which would have authorized further federal grants for local public works projects. Associated Gen. Contractors v. Secretary of Commerce, 459 F. Supp. 766, 774-75 (C.D. Cal. 1978) (opinion on remand). *See* H.R. 11610, 95th Cong., 2d Sess., 124 CONG. REC. H. 2184 (daily ed. March 16, 1978); H.R. 12993, 95th Cong., 2d Sess., 124 CONG. REC. H. 5062 (daily ed. June 6, 1978); S.R. 3186, 95th Cong., 2d Sess., 124 CONG. REC. S. 8845 (daily ed. June 8, 1978). Rather than allocating a fixed 10% of these federal funds for MBE's in each locality, the proposed bills provided that the MBE share would reflect the percentage of minority group members in the community. MBE's would receive a "fixed share" of between two to fifteen percent of the funds, while the nationwide "target" figure for MBE funding was set at 10%. See Associated Gen. Contractors of Cal., 459 F. Supp. at 775.

[100] Fullilove v. Kreps, 443 F. Supp. 253, 262 (S.D.N.Y. 1977); Constructors Ass'n of W. Pa. v. Kreps, 441 F. Supp. 936, 953-54 (W.D. Pa. 1977). In *Bakke,* Justice Powell stated that "remedial action usually remains subject to continuing oversight to assure that it will work the least harm possible to other persons competing for the benefit." 438 U.S. at 308. Thus, if Congress re-enacts the MBE provision, it should include a finding that the set aside program is not imposing an unduly burden upon non-minority contractors.

[101] *See* Fullilove v. Kreps, 584 F.2d 600, 607 (2d Cir. 1978).