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IMPERMISSIBLE REVERSE DISCRIMINATION V. ALLOWABLE AFFIRMATIVE ACTION: THE SUPREME COURT UPHOLDS RACIAL CLASSIFICATIONS

The United States Supreme Court has long struggled with cases pertaining to racial discrimination. In 1857, the Court declared that blacks were not citizens of the United States and Congress was without the power to grant them citizenship.[1] Following the Civil War and continuing until 1954, the Supreme Court maintained a policy of "separate but equal" when deciding racial discrimination cases.[2] Later, in *Brown v. Board of Education*,[3] the Court declared that segregated school systems violated the equal protection rights of minorities.

Even today, racial discrimination cases continue to proliferate. Recently, in *Regents of the University of California v. Bakke*,[4] the Supreme Court held that race may not be the sole criteria employed when awarding benefits to minorities to redress prior discrimination. The following year, however, in *United Steelworkers of America v. Weber*,[5] the Court concluded that industries may take into account a person's race. This was allowed when a remedial program was designed to rectify a violation of a law prohibiting race-based discrimination. It is apparent that the line between impermissible reverse discrimination[6] and allowable affirmative action[7] is a fine one indeed.

In *Fullilove v. Klutznick*[8] the Supreme Court again addressed the issue of whether a remedial program for minorities was constitutional. The Court upheld a statutory provision which allocated federal funds for local public works solely for use by minority businesses. However, *Fullilove* is distinguisha-

1. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).
2. *E.g.*, Plessy v. Ferguson, 163 U.S. 537 (1896).
3. 349 U.S. 294 (1955).
4. 438 U.S. 265 (1978). *See* text accompanying notes 53-71 *infra*.
5. 443 U.S. 193 (1979). *See* text accompanying notes 73-85 *infra*.
6. "Prejudice or bias exercised against a person or class for purpose of correcting a pattern of discrimination against another person or class." BLACK'S LAW DICTIONARY 1186 (5th ed. 1979).
7. "Employment programs required by federal statutes and regulations designed to remedy discriminatory practices in hiring minority group members. . . ." BLACK'S LAW DICTIONARY 55 (5th ed. 1979).
8. 100 S. Ct. 2758 (1980).

ble from previous civil rights cases because "such a judicial decree, following litigation in which a violation of law has been determined, is wholly different from generalized legislation that awards benefits and imposes detriments dependent upon the race of the recipients."[9]

The effect of race-based legislation upon the United States is profound and raises the question of Congress's power to enact legislation to aid minorities.[10] Furthermore, it presents problems of defining minorities and the difficulties attendant upon the revitalization of racial classifications. Moreover, the future of the Supreme Court as the final arbiter of cases relating to constitutional questions of equal protection is at stake. This comment addresses the above enumerated difficulties and discusses *Fullilove* as a logical, or illogical, extension of previous civil rights legislation[11] and cases.[12]

THE *FULLILOVE* DECISION

The *Fullilove* case arose when Congress set aside ten percent of all federal funds earmarked for local public works projects for use by minority business enterprises (MBE). The initial program was designed to alleviate unemployment in the construction industry. Several non-MBE's argued that race should not be the sole factor used to decide who should share in the set-aside. These non-MBE contactors brought suit challenging the constitutionality of the provision.[13] They alleged the set-aside violated the equal protection clause of the fourteenth amendment and the equal protection section of the due process clause of the fifth amendment.[14] To resolve these issues the

9. *Id.* at 2799 n.4 (Stewart, J., dissenting).

10. This is often accomplished under the powers granted to Congress by the Commerce and Spending clauses of the United States Constitution. U.S. CONST. art. 1, § 8, cl. 3; U.S. CONST. art. 1, § 8, cl. 1.

11. *See* 42 U.S.C. §§ 1973-1973bb-4 (1965) (Voting Rights Act of 1965); 42 U.S.C. §§ 2000(a)-2000h-6 (1964) (Civil Rights Act of 1964).

12. *See* United Steelworkers of America v. Weber, 443 U.S. 193 (1979) (upheld an affirmative action craft-training program); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (rejected an affirmative action minority admissions program); United Jewish Orgs., Inc. v. Carey, 430 U.S. 144 (1977) (upheld an affirmative action redistricting program); Franks v. Bowman Transp. Co., 424 U.S. 747 (1976) (upheld an award of seniority rights to minorities); Katzenbach v. Morgan, 384 U.S. 641 (1966) (upheld voting rights legislation).

13. *See* Montana Contractors' Ass'n v. Secretary of Commerce, 460 F. Supp. 1174 (D. Mont. 1978); Associated Gen. Contractors v. Secretary of Commerce, 459 F. Supp. 766 (C.D. Cal. 1978); Department of Gen. Servs. v. Superior Court, 85 Cal. App. 3d 273, 147 Cal. Rptr. 422 (1978); *cf.* Wright Farms Constr. Inc. v. Kreps, 444 F. Supp. 1023 (D. Va. 1977) (MBE provision violates petitioner's equal protection rights).

14. U.S. CONST. amend. V.

Supreme Court granted certiorari to hear *Fullilove v. Klutznick*.[15]

The essence of the *Fullilove* suit was that favored treatment, such as an affirmative action program, was allowed only to redress proven cases of prior discrimination.[16] Previous programs designed to aid minorities stemmed directly from violations of the fourteenth amendment[17] or the civil rights statutes.[18] The non-MBE's contended, however, that Congress never made specific findings of discrimination against MBE's in the construction industry.[19]

Petitioners relied upon the school desegregation cases as authority to show that prior cases were designed to remedy specific cases of discrimination rather than alleged discrimination.[20] First, they argued the scope of the remedies approved by the Court in the past was designed to fit the extent of the violations.[21] Second, they contended that when Congress enacted legislation to aid minorities, the Court required that it be limited to redressing prior discrimination.[22] Race-based measures were sanctioned only after the government had specifically identified past discrimination.[23] Moreover, petitioners distinguished the minority business set-aside from other affirmative action programs. Previously, they maintained, the courts instituted programs to redress prior discrimination.[24] Here, Congress acted on its own and directly mandated a program to aid MBE's.

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15. 100 S. Ct. 2758 (1980).

16. *Id.* at 2763.

17. U.S. CONST. amend. XIV, § 1.

18. 42 U.S.C. §§ 2000d(e) (1976).

19. Fullilove v. Klutznick, 100 S. Ct. 2758, 2775 (1980).

20. *E.g.*, Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406 (1977) (displacement of local school board by federal court in school discrimination case must be based on specific violations); Milliken v. Bradley, 418 U.S. 717 (1974) (absent finding that school boundaries are established to foster racial secregation, it is improper to impose a remedy for racial imbalance); *see* Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976); *see also* Austin Independent School Dist. v. United States, 429 U.S. 990 (1976) (Powell, J., concurring) (annual reorganization of school attendance zones to prevent segregated schools exceeds court's authority to enforce desegregation).

21. *See* United Jewish Orgs., Inc. v. Carey, 430 U.S. 144 (1977); Franks v. Bowman Transp. Co., 424 U.S. 747 (1976).

22. Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775, 797 (1979).

23. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 18-25, *rehearing denied*, 403 U.S. 912 (1971) (racially-based teacher and student assignments upheld in order to balance school districts).

24. *E.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, *rehearing denied*, 403 U.S. 912 (1971) (Supreme Court approved school busing).

The Court rejected the position that the minority business set-aside represented a departure from previous discrimination cases. The Court maintained that when a remedy was designed to cure the effects of alleged prior discrimination, it was permissible to require innocent third parties to share the burden.[25] Therefore, fault no longer had to be proven before an affirmative action program would be upheld.[26]

The Court reached this decision by relying upon the commerce and spending clauses of the Constitution. The commerce clause provides Congress with the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[27] Broadly interpreted, this clause grants Congress the power to promote the economic welfare of United States citizens.[28] Furthermore, the Supreme Court shows great deference to Congress when the legislature enacts programs pursuant to its constitutional powers.[29] Consequently, the judiciary rarely restricts the exercise of the commerce power[30] and upholds the economic decisions of Congress providing there is some argument, no matter how remote, that the institutions Congress regulates fall within the commerce power.[31] Thus, the Court allows Congress, under the broad commerce power, to enact legislation to advance social purposes unrelated to traditional economic concerns, namely, relief from unemployment or inflation.

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25. Fullilove v. Klutznick, 100 S. Ct. 2758, 2778 (1980).

26. "Under the fault idea, the task of antidiscrimination law is to separate from the masses of society those blameworthy individuals who are violating the otherwise shared norm." Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1054 (1978).

27. U.S. CONST. art. 1, § 8, cl. 3.

28. *E.g.*, California Bankers Ass'n v. Schultz, 416 U.S. 21, 45-52 (1974) (Congressional requirement that banks keep records of depositors held constitutional); Lau v. Nichols, 414 U.S. 563 (1974) (San Francisco school system required to institute special language programs to accommodate Chinese-speaking students); Oklahoma v. United States Civil Serv. Comm'n, 330 U.S. 127, 143 (1947) (Congress has the power to fix the terms upon which money to states is allocated).

29. National Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 603 (1949).

30. "[L]ike all others vested in Congress, [the commerce power] is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, *other than are prescribed in the constitution*." Gibbons v. Ogden, 21 U.S. (9 Wheat) 1, 196 (1824) (emphasis added).

31. For example, in Heart of Atlanta Motel Inc. v. United States, 379 U.S. 241 (1964), the Court upheld the congressional right to force desegregation of motels which entertain interstate travelers. The Court asked if a rational basis existed to determine whether discrimination by motels affected interstate commerce. Since that basis existed, the Court merely looked to see if the means employed to eliminate the discrimination were both proper and reasonable. *Id.* at 258-59.

In addition to this broad grant of power under the commerce clause, Congress has broad powers under the spending clause. Congress is authorized "to pay the Debts and provide for the common Defence and general Welfare of the United States."[32] Therefore, Congress may appropriate money to further whatever objectives it chooses[33] with only two restrictions: it must not violate the Bill of Rights,[34] and the expenditure must be for the general welfare.[35]

In the employment sector, Congress frequently invokes the spending power or the commerce clause[36] to further economic and social objectives. Congress implements this power by "conditioning receipt of federal monies upon compliance . . . with federal statutory and administrative directives."[37] While the Supreme Court upholds the use of this technique,[38] the question arises as to how far Congress's power extends to promote the general welfare.

Recently, Congress exercised this power to promote the general welfare to remedy widespread unemployment in the construction industry.[39] Originally, under the Local Public Works Act,[40] two billion dollars were appropriated for state and local governments to use in local public works projects. The grants were administered by the Secretary of Commerce through the Commerce Department's Economic Development Administration.[41] The money was designated for state and local governments with high unemployment areas. They, in turn, distributed the money to successful bidders to erect needed public facilities.[42]

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32. U.S. CONST. art. 1, § 8, cl. 1.

33. *See, e.g.*, Califano v. Webster, 430 U.S. 313 (1977) (Congress may elect to remedy economic disparity due to gender discrimination); Williamson v. Lee Optical Inc., 348 U.S. 483 (1955) (Congress may enact legislation which does not aid all businesses); Perkins v. Lukens Steel Co., 310 U.S. 113, 127 (1940) (Congress may establish conditions in government contracts); Helvering v. Davis, 301 U.S. 619 (1937) (Congressional relief from unemployment benefits the general welfare).

34. "Congress may employ racial or ethnic classifications in exercising its Spending . . . Powers only if those classifications do not violate the equal protection component of the Due Process Clause of the Fifth Amendment." Fullilove v. Klutznick, 100 S. Ct. 2758, 2776 (1980).

35. Congress is forbidden to spend money on just a privileged few. *See* United States v. Gerlach Live Stock Co., 339 U.S. 725, 738 (1950).

36. U.S. CONST. art. 1, § 8, cl. 1.

37. Fullilove v. Klutznick, 100 S. Ct. 2758, 2772 (1980).

38. *E.g.*, California Bankers Ass'n v. Schultz, 416 U.S. 21 (1974); *see* note 28 *supra*.

39. Public Works Employment Act, 42 U.S.C. §§ 6701-36 (1977).

40. Local Public Works Capitol Development and Investment Act, 42 U.S.C. §§ 6701-35 (1976) (Act designed to alleviate high unemployment in the construction industry by providing federal funds for local public works).

41. *Id.*

42. 42 U.S.C. § 6702 (1976).

Within less than one year it became evident that the initial appropriation was inadequate. There were 25,000 applications for funds totaling twenty-five billion dollars, but only 2,000 applicants received grants.[43] Consequently, Congress supplemented the Local Public Works Act program in 1977 with the Public Works Employment Act[44] which provided an additional four billion dollars. The new Act included a provision which prohibited issuing a grant for any local public works project unless the applicant assured that "at least ten per centum of the amount of each grant [would] be expended for minority business enterprises."[45] The designated minorities were Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts.[46] Thus, certain minorities were given preferential treatment as a result of this statutory provision. Past experience had shown that these minorities simply did not benefit from the previous public works program as originally formulated.[47] Under this ten percent set-aside, minority applicants could compete for 100 percent of federal public works funds whereas nonminority applicants could compete for only ninety percent of the funds.

A HISTORICAL INQUIRY

Inasmuch as the provision is designed to remedy the effect of prior discrimination, it is helpful to examine it in light of previous antidiscrimination programs. Some of these programs were enacted pursuant to legislation such as the Civil Rights Act of 1964[48] and the Voting Rights Act of 1965.[49] Others, such as

43. 123 CONG. REC. 2136 (1977) (remarks of Sen. Randolph).

44. 42 U.S.C. §§ 6701-36 (1977) (follow-up program to the Local Public Works Capitol Development and Investment Act designed to provide an additional four billion dollars for local public works).

45. 42 U.S.C. § 6705(f)(2) (1977) provides:

> Except to the extent that the Secretary determines otherwise, no grant shall be made under this chapter for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises. For purposes of this paragraph, the term "minority business enterprise" means a business at least 50 per centum of which is owned by minority group members or, in the case of a publicly owned business, at least 51 per centum of the stock of which is owned by minority group members. For the purpose of the preceding sentence, minority group members are citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts.

46. *Id.*

47. 123 CONG. REC. 5098 (1977) (remarks of Rep. Mitchell, the sponsor of the MBE provision).

48. 42 U.S.C. § 2000d (1976).

49. 42 U.S.C. § 1973 (1976).

admission programs to universities[50] or training programs,[51] were privately formulated.

The Bakke Approach to Preferential Classification

The leading case dealing with the constitutionality of preferential treatment of minorities is *Regents of the University of California v. Bakke*.[52] In *Bakke*, a white male applied twice for admission to the Medical School of the University of California at Davis. He was denied entrance each time.[53] He claimed his rejections were the result of the school's policy to set aside sixteen seats for disadvantaged students including blacks, Chicanos, Asians, and American Indians. The University maintained that the special admissions program was necessary in order to increase the number of minority students in the medical school.[54] Bakke, however, was better qualified than any of the minority students accepted.[55]

In a suit seeking admission to the University, Bakke claimed the special admissions policy violated the equal protection clause of the fourteenth amendment[56] and Title VI of the Civil Rights Act of 1964.[57] The Supreme Court, in a widely divided decision, held in Bakke's favor and rejected the special admissions policy of the Davis Medical School. The Court maintained that while race could be considered as one factor in determining admission policies, it must not be the sole factor.[58] In deciding *Bakke*, the Court employed two different tests to decide the constitutionality of the Davis set-aside program.

The majority employed the strict scrutiny test. This two-pronged examination is often used when a "suspect classification" is invoked similar to the group enumerated in the Davis set-aside.[59] A classification is suspect if it is likely to be based

50. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).
51. *See* United Steelworkers of America v. Weber, 443 U.S. 193 (1979).
52. 438 U.S. 265 (1978).
53. *Id.* at 276-77.
54. *Id.* at 272.
55. *Id.* at 277.
56. U.S. CONST. amend. XIV, § 1.
57. 42 U.S.C. § 2000d (1976).
58. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 318 (1978).
59. The Court uses this standard even when "reviewing legislative judgments that interfere with fundamental constitutional rights. . . ." San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 16 (1973); *see also* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 357 (1978) (Brennan, J., dissenting) ("[a] government practice or statute which restricts 'fundamental rights' . . . is to be subjected to 'strict scrutiny' and can be justified only if it furthers a compelling government purpose and, even then, only if no less restrictive alternative is available."). However, Justice Brennan did

upon impermissible purposes such as denial of equal educational opportunities.[60] The test requires that when a law or program treats persons in similar circumstances differently, the state must show that (1) the classification serves a compelling governmental purpose,[61] and (2) the classification is the least restrictive means available to accomplish the stated goal.[62] Therefore, even if Congress can show that its legislation was designed to accomplish a public necessity, it must be struck down if other, less onerous means can be utilized. The strict scrutiny test thus provides judicial protection from arbitrary racial classifications.[63]

In his dissenting opinion, Justice Brennan recommended a different test. He maintained that an intermediate test should be utilized when racial classifications were designed, not to arbitrarily burden a race, but to remedy prior discrimination.[64] Although unadopted, Justice Brennan's test subjects programs that employ racial classifications to an intermediate standard of review.[65] First, a court determines whether the stated goal of a program is sufficiently important to justify the use of a racial classification. Thereafter, the court determines whether the classification relates to the articulated goal.[66]

The *Bakke* majority rejected the intermediate test and applied the strict scrutiny test. The Court found that the Davis minority set-aside program neither fulfilled a compelling state interest nor met the least restrictive means available requirement. *Bakke*, however, did not settle the question of how far the Court would allow the Constitution to be stretched to permit racial preferences. "On the one hand, justice requires that groups that have previously suffered gross discrimination be given truly equal opportunity in American life; on the other, justice pre-

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not employ the strict scrutiny test in *Bakke* because he found neither a suspect class nor a violation of a fundamental right.

60. *See* note 23 *supra*.

61. For example, the maintenance of national security. Korematsu v. United States, 323 U.S. 214, 218 (1944).

62. *See* San Antonio Independent School Dist. v. Rodriquez, 411 U.S. 1 (1973).

63. This does not mean all restrictions which interfere with civil rights are unconstitutional. It merely infers that the restrictions are "suspect" and must be subjected to strict scrutiny by the courts. While a public emergency may justify a denial of civil rights, "racial antagonism never can." Korematsu v. United States, 323 U.S. 214, 216 (1944).

64. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 362 (1978) (Brennan, J., concurring in part and dissenting in part).

65. *Id.* at 359.

66. Nowak, *Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral, and Permissive Classifications*, 62 GEO. L.J. 1071 (1974).

cludes the assignment of benefits and burdens on the arbitrary basis of racial and ethnic characteristics."[67] *Bakke* decided only that voluntary affirmative action programs which employed quotas based solely on race were unconstitutional.[68] Thus, the Court will uphold an affirmative action program, providing the measures used to redress prior racial discrimination are limited to guaranteeing minorities the same access to programs as nonminorities.[69] However, once minority groups are given benefits at the expense of nonminorities who hold superior claims to enjoy the benefits,[70] the program will be declared unconstitutional.[71]

The Weber Approach to Preferential Treatment

Since *Bakke* related solely to school admissions programs, the decision does not directly address the issue of racial classifications utilized in the employment sector. This situation was addressed in *United Steelworkers of America v. Weber*.[72] The *Weber* case arose when the United Steelworkers of America Union and Kaiser Aluminum entered into an agreement to eliminate racial imbalance in Kaiser's craftwork force.[73] An on-the-job program was established to train unskilled production workers to become craftsmen.[74] Fifty percent of these positions were set aside for black employees while the remainder were filled on the basis of seniority.[75] The special program was designed to end when the percentage of black skilled craftsmen in the Kaiser plant approximated the percentage of blacks in the labor force where the plant was located.[76]

Brian Weber, a white production worker, brought suit when he was refused a position in the training program. He had seniority over the chosen black trainees[77] and seniority was the usual basis for advancement in the Kaiser plant. Weber's complaint charged that by selecting black employees with less experience than white employees, Kaiser discriminated against

67. Greenawalt, *The Unresolved Problems of Reverse Discrimination*, 67 CALIF. L. REV. 87, 87 (1979) [hereinafter cited as Greenawalt].
68. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 318 (1978).
69. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).
70. Higher grades or greater experience are examples.
71. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).
72. 443 U.S. 193 (1979).
73. *Id.* at 197-98.
74. *Id.* at 199.
75. *Id.*
76. *Id.*
77. *Id.*

Weber and other similarly situated white employees. He argued this violated sections 703(a)[78] and 703(d)[79] of Title VII.[80]

The Supreme Court rejected Weber's argument. It held that nothing in Title VII forbade private employers and unions from voluntarily agreeing to promote racial preferences when a particular race was underrepresented.[81] The Court held this way despite its failure to find Kaiser guilty of prior discrimination against blacks.[82] The Supreme Court sustained the affirmative action program in *Weber* on the grounds that:

> [t]he plan [did] not unnecessarily trammel the interests of the white employees. The plan [did] not require the discharge of white workers and their replacement with new black hirees. Nor [did] the plan create an absolute bar to the advancement of white employees; half of those trained in the program [would] be white.[83]

Therefore, although minorities were benefitted by the program, nonminorities were not excluded from it.[84] Furthermore,

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78. 42 U.S.C. § 2000(e)(2)(a) (1976) provides:

> It shall be an unlawful employment practice for an employer—
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> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

79. 42 U.S.C. § 2000(e)(2)(d) (1976) provides:

> It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

80. 42 U.S.C. § 2000(e) (1976).

81. United Steelworkers of America v. Weber, 443 U.S. 193, 208 (1979) ("The natural inference is that Congress chose not to forbid all voluntary race-conscious affirmative actions.").

82. "In *Weber* we see . . . that not every step taken is a step forward. With *Weber* the Court approved, for the first time ever, preferential classifications on the basis of race in the absence of any proven constitutional or statutory violations." T. EASTLAND & W.J. BENNETT, COUNTING BY RACE: EQUALITY FROM THE FOUNDING FATHERS TO BAKKE AND WEBER 209 (1979) [hereinafter cited as COUNTING BY RACE].

83. United Steelworkers of America v. Weber, 443 U.S. 193, 208 (1979) [citations omitted].

84. Franks v. Bowman Transp. Co., 424 U.S. 747 (1976) (further defines the usefulness of Title VII). Here, black employees were granted retroactive seniority rights. However, this case is noteworthy because, for the first time, innocent third parties (non-discriminating white employees) were required to shoulder part of the burden of the program. The Court stated that "denial of seniority relief to *identifiable* victims of racial discrimination on the sole ground that such relief diminishes the expectations of other, arguably innocent, employees would if applied generally frustrate the central 'make whole' objective of Title VII." *Id.* at 774 (emphasis added). It is nota-

the program met the two prongs of the strict scrutiny test.[85] First, it served the compelling governmental interest of overcoming underrepresentation of blacks in Kaiser's crafts department. Second, it was the least restrictive program available to accomplish the stated goal.

TRADITIONAL TESTS APPLIED TO THE MINORITY BUSINESS ENTERPRISE PROGRAM

Based on the *Bakke* and *Weber* decisions, there is no compelling governmental interest to sustain an affirmative action program in the private sector absent some showing of prior discrimination.[86] However, when a member of a minority is the victim of employment[87] or industry-wide discrimination,[88] a compelling governmental interest exists which justifies classifying the minority member in order to remedy the prior discrimination.[89] Thus, programs designed to eliminate discrimination which classify individuals by race are not only necessary but judicially approved.[90] The Supreme Court held that "just as . . . race . . . must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy."[91]

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ble, however, that no non-discriminating employee was deprived of the seniority status he had attained despite the fact that such status might have been due to the illegal discrimination against blacks initially.

85. *See* note 59 and accompanying text *supra*.

86. *See* notes 52-84 and accompanying text *supra*.

87. *See* Franks v. Bowman Transp. Co., 424 U.S. 747 (1976).

88. Contractors Ass'n of E. Pa. v. Schultz, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971).

89. For cases in the area of school desegregation, *see*, *e.g.*, notes 20 and 23 *supra*; in the employment sector, *see, e.g.*, United States v. Wood, Wire, and Metal Lathers Local 46, 471 F.2d 408 (2d Cir. 1973) (union ordered to grant membership to minority applicants); Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972) (city ordered to give priority to black and Spanish-speaking police applicants); Cartier v. Gallagher, 452 F.2d 315 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972) (employer ordered to hire one minority employee for every two non-minority workers until a certain number was reached); United States v. Ironworkers Local 86, 443 F.2d 544 (9th Cir. 1971), *cert. denied*, 404 U.S. 984 (1971) (union ordered to hire a certain number of minority apprentices); United States v. Sheet Metal Workers Local 36, 416 F.2d 123 (8th Cir. 1969) (union ordered to begin a minority recruiting program); Stamps v. Detroit Edison Co., 365 F. Supp. 87 (E.D. Mich. 1973) (employer ordered to hire minority employees until they reached 30 percent of the workforce).

90. Franks v. Bowman Transp. Co., 424 U.S. 747, 763 (1976); Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974); *see also* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Griggs v. Duke Power Co., 401 U.S. 424 (1971). *See generally* Note, Franks v. Bowman Transportation Co: *Expanding The Remedy For Employment Discrimination*, 1976 DET. C.L. REV. 609.

91. North Carolina State Bd. of Educ. v. Swann, 402 U.S. 43, 46 (1971).

Application of the Strict Scrutiny Test

The Court, however, continues to examine affirmative action remedies to determine whether the strict scrutiny test is met. This was true in *Bakke* and *Weber*. Since the minority business set-aside classifies persons according to their race, it must also withstand judicial review. The first prong of the strict scrutiny test, that the program be based on racial classifications related to a compelling governmental interest, is met. Congress perceived a pressing need to achieve equality of economic opportunity in the construction industry. However, the second prong of the test, requiring the set-aside to be the least restrictive means available, is not met. Existing acts can be used to increase the participation of MBE's in government contracts.[92] Adding more legislation merely increases the burden on contractors by requiring them to adhere to another set of regulations. Furthermore, a less restrictive program would permit the ten percent set-aside to be available to all businesses which have suffered low levels of unemployment or income,[93] not just a select few.[94] Moreover, by implementing a racially neutral program, the government is not involved in racial classifications.

Application of the Intermediate Test

If the minority business set-aside does not fulfill the strict scrutiny test, the question becomes whether it meets Justice Brennan's less restrictive intermediate test. Under this test, if the means employed to assist a minority stigmatizes or singles out powerless persons to bear the burden of the program, it will be struck down.[95] Applying this test to the minority business set-aside, one can argue that it is inappropriate for the Court to assume that because a contractor is a member of a nonminority he is well-represented.[96] Therefore, the set-aside appears to fail the intermediate test.

In deciding *Fullilove*, however, the Supreme Court used neither the strict scrutiny test nor the intermediate test. As the

92. *See* Fullilove v. Klutznick, 100 S. Ct. 2758, 2807 n.10 (1980) (Stevens, J., dissenting); *cf.* Small Business Act, 15 U.S.C. §§ 631-47 (1976) (program designed to aid small businesses).

93. Fullilove v. Klutznick, 100 S. Ct. 2758, 2810 (1980) (Stevens, J., dissenting); Comment, *The Minority Business Enterprise Set Aside: A Constitutional Analysis*, 36 WASH. & LEE L. REV. 1223, 1233 n.61 (1979).

94. *See* Regents of the Univ. of Cal. v. Bakke, 468 U.S. 265 (1978) (Brennan, J., concurring in part, dissenting in part); *see also* text accompanying notes 53-71 *supra*.

95. Regents of the Univ. of Cal. v. Bakke, 468 U.S. 265, 361-62 (1978).

96. *See generally* Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775, 801-02 (1979).

Court stated, "this opinion does not adopt, either expressly or implicitly, the formulas of analysis articulated in such cases as *University of California Regents v. Bakke*. . . ."[97] Alternatively, the Court held that Congress has the "necessary latitude to try new techniques such as the limited use of racial and ethnic criteria to accomplish remedial objectives."[98]

The Supreme Court, in upholding the set-aside, first called for the use of *close* examination[99] when reviewing programs that employ racial criteria. It then stated, "we are bound to approach our task with appropriate deference to the Congress. . . ."[100] This deference is shown by accepting the articulated legislative objective of the set-aside[101] without subjecting the measure to strict scrutiny. The rationale is two-fold. First, the Court saw the set-aside as merely a temporary measure.[102] Second, it maintained that the non-minority petitioners indirectly benefitted from prior discrimination. This occurs when the non-MBE's obtain jobs that would have been acquired by minority subcontractors but for the existence of discrimination.[103] Therefore, the Court felt it was not unjust to deprive the non-MBE's of some of their benefits.[104] However, even if the minority business set-aside is as innocuous as the Court describes, the failure to use any previously recognized standard of review portends a complete abandonment of standards where Congress is involved.

Civil Rights Legislation and Preferential Treatment

An argument can be made, however, that there is no "abandonment of standards" because an analysis of *Fullilove* in relation to *Bakke* and *Weber* is not completely accurate. *Fullilove* deals with an act of Congress while *Bakke* and *Weber* are dis-

97. Fullilove v. Klutznick, 100 S. Ct. 2758, 2781(1980).

98. *Id.*

99. *Id.* at 2771.

100. *Id.*

101. *Id.* at 2780-81.

102. "This is a pernicious illusion. In human affairs nothing is so likely to become permanent as the temporary. Once we strive to undo the consequences of past privileges by instating new privileges in the present, we establish the precedent for the continuation of privilege in the future." Hook, *Preface* to B. Gross, Discrimination in Reverse Is Turnabout Fair Play at ix (1978).

103. Fullilove v. Klutznick, 100 S. Ct. 2758, 2778 (1980).

104. This premise would follow only if another premise were inserted to the effect that all present injustices upon which we focus should be remedied no matter what the consequences. . . . [I]f the consequences of remedying this injustice were to create yet a greater injustice, one would be loathe to think there was a moral ground for so doing. B. Gross, Discrimination In Reverse Is Turnabout Fair Play 43 (1978).

crimination cases pertaining to privately developed affirmative action programs. Furthermore, *Bakke* involves an interpretation of section 601 of Title VI of the Civil Rights Act of 1964[105] while *Weber* involves an interpretation of sections 703(a), (d), and (j) of Title VII of the Civil Rights Act of 1964.[106] Therefore, it is more appropriate to test the *Fullilove* decision against previous Congressional legislation such as the Civil Rights Act[107] and the Voting Rights Act.[108]

The Civil Rights Act of 1964

The Civil Rights Act states that "*no person* in the United States *shall*, on the grounds of race, color, or national origin, be excluded from participation in, *be denied benefits of*, or be subjected to discrimination under *any program* or activity *receiving Federal financial* assistance."[109] Originally, the Act was designed to preclude recipients of federal funds from discriminating against blacks.[110] Later, the concept developed that civil rights legislation could countenance preferential treatment of minorities to redress prior discrimination.[111] Congress was particularly concerned with the plight of blacks because they were not receiving equal treatment in federally funded programs.[112] There were indications, however, that the framers of the Act expected the legislation to apply to all people.[113] In the words of

105. 42 U.S.C. § 2000d (1976).
106. 42 U.S.C. § 2000e-2 (1976).
107. 42 U.S.C. § 2000d (1976).
108. 42 U.S.C. § 1973 (1976).
109. 42 U.S.C. § 2000d (1976). However, § 2000e-2j provides that:

> *Nothing contained in this subchapter shall be interpreted to require any employer*, employment agency, labor organization, or joint labor-management committee subject to this subchapter *to grant preferential treatment to any individual or to any group because of the race*, color, religion, sex, or national origin *of such individual or group* on account of an imbalance which may exist with respect to the total number or percentage of persons or any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency of labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State section or other area (emphasis added).

110. 110 CONG. REC. 6544 (1964).
111. United Steelworkers of America v. Weber, 443 U.S. 193 (1979); *see* text accompanying notes 73-85 *supra*.
112. 110 CONG. REC. 6544 (1964).
113. "Discriminatory preference for *any* group, minority or majority, is precisely and only what Congress has proscribed." Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (emphasis added). The Supreme Court reiter-

Senator Humphrey, the Civil Rights Act is designed "to insure that Federal funds are spent in accordance with the Constitution and the moral sense of the Nation,"[114] not merely for blacks.

The Civil Rights Act bans discrimination against all people.[115] "[D]istinctions between citizens solely because of their ancestry [are by their very nature] odious to a free people whose institutions are founded upon the doctrine of equality."[116] While the original Civil Rights Act prohibited racial discrimination in federally funded programs,[117] Congress felt the need to extend this prohibition to the employment sector. Consequently, Title VII of the Civil Rights Act was enacted.[118] Title VII provides that a business receiving federal funds must institute affirmative action programs[119] if it has discriminated against minorities.[120] Failure to do so results in the loss of federal monies. These programs are designed to insure that past racial favoritism is eliminated.[121]

The concept of equality is embodied in section 703(j) of Title VII. This section states that an employer is not required "to grant preferential treatment to any individual or to any group because of the race . . . of such individual or groups"[122] in order to correct a racial imbalance in the employer's shop. Specifically, Title VII outlaws discrimination against all individuals; it does not allow Congress to discriminate against some individu-

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ated this viewpoint in 1976 when it held: "We . . . hold today that Title VII prohibits racial discrimination against the white petitioners in this case upon the *same* standards as would be applicable were they Negroes. . . ." McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 280 (1976) (emphasis added). *But see* United Steelworkers of America v. Weber, 443 U.S. 193 (1979), and text accompanying notes 73-85 *supra*.

114. 110 CONG. REC. 6544 (1964).

115. 42 U.S.C. § 2000e (1976). *See* Franks v. Bowman Transp. Co., 424 U.S. 747, 778 (1976) (Court ordered retroactive seniority rights for minorities). *See generally* United States v. Sheet Metal Workers, Local 36, 416 F.2d 123 (8th Cir. 1969) (union ordered to publicize the termination of its past discriminatory practices).

116. Loving v. Virginia, 388 U.S. 1, 11 (1967), quoting Hirabayashi v. United States, 320 U.S. 81, 100 (1943).

117. *See* text accompanying notes 109-10 *supra*.

118. 42 U.S.C. § 2000e (1976).

119. *See* note 7 *supra*.

120. The contractor will not discriminate against *any* employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, *without regard to their race*, color, religion, sex, or national origin.

Exec. Order No. 11,246, 3 C.F.R. 339, 340-41 (1964-65), *as amended* Exec. Order No. 11,375, 3 C.F.R. 684, 685-86 (1966-67), *reprinted in* 42 U.S.C. § 2000e (1976) (emphasis added).

121. *See* United Steelworkers of America v. Weber, 443 U.S. 193 (1979), and text accompanying notes 73-85 *supra*.

122. *See* note 109 *supra*.

als in order to give preferential treatment to others. In contrast, the minority business set-aside program excludes non-MBE's from sharing in ten percent of all federal funds.[123]

While employers are not required to grant preferential treatment, recipients of federal funds are compelled to remedy their prior discriminatory practices. The penalty for not doing so is the loss of federal funds.[124] Even when previous discrimination is lacking, an applicant for federal money can give special consideration to race, color or national origin if minority participation in an industry is low.[125] The use of race, however, is only one factor which is used to determine the recipients of federal funds. It does not entitle minority groups to use race as the exclusive factor in granting federal monies. However, when the Supreme Court upheld the minority business set-aside provision in *Fullilove*, it sanctioned a remedial program that employed race as the sole factor in deciding what groups share in ten percent of federal funds.

The Voting Rights Act of 1965

A comparison of *Fullilove* to the Voting Rights Act of 1965[126] is another example of Congress's departure from prior legislation. This Act is designed to guarantee access to the electoral process for all people.[127] Before passage of the measure, Congress explored in great depth the problem of racial discrimination in voting.[128] "By outlawing specific practices, such as poll taxes and special tests, the statute removed old barriers to equal access; by requiring preclearance of changes in voting practices

123. *See* note 45 *supra*.

124. 42 U.S.C. § 2000d-1 (1976).

125. *See* United Steelworkers of America v. Weber, 443 U.S. 193 (1979) (institution of a special training program with admission preference for minorities); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (medical school set aside 16 seats specifically for minority applicants).

126. 42 U.S.C. § 1973b(e)(2) (1976) declares that:

> No person who demonstrates that he has successfully completed the sixth primary grade in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English, shall be denied the right to vote . . . because of his inability to read, write, understand, or interpret any matter in the English language . . . .

127. *Id.*

128. South Carolina v. Katzenbach, 383 U.S. 301, 308-09 (1966).

> The House and Senate Committees on the Judiciary each held hearings for nine days and received testimony from a total of 67 witnesses. More than three full days were consumed discussing the bill on the floor of the House, while the debate in the Senate covered 26 days in all.

in covered States, it precluded the erection of new barriers."[129] Furthermore, there was no Congressional finding that this legislation would have a deleterious effect upon the nonminority members.[130]

The Fullilove Analysis—Inconsistent With the High Court's Interpretation of Other Civil Rights Legislation

Two factors immediately distinguish the minority set-aside provision from earlier civil rights legislation. First, both the Civil Rights Act of 1964[131] and the Voting Rights Act of 1965[132] were preceded by exhaustive Congressional debate before passage. Second, Congress made specific findings of prior discrimination before it developed remedial programs to redress the situation.[133]

Unlike the detailed legislative debates which led to the enactment of the Local Public Works Act[134] and the Public Works Employment Act,[135] the legislative history of the ten percent minority set-aside provision was noticeably lacking. Congress never considered the plight of the MBE's until the House was prepared to vote on the Public Works Employment Act.[136] At that point Congressman Mitchell argued that minorities would not have a fair opportunity to share in the benefits of the public works program.[137] No congressional study was conducted, however, concerning the specific problems of MBE's.[138] Furthermore, the MBE amendment, proposed by Congressman Mitchell, was never considered by the House or Senate Judiciary Committees.[139] This situation renders the scant legislative history of the set-aside a tool of limited utility in interpreting the legislative purpose of the statute.[140]

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129. Fullilove v. Klutznick, 100 S. Ct. 2758, 2810 (1980) (Stevens, J., dissenting).

130. "Section 4(e) does not restrict or deny the franchise but in effect extends the franchise to persons who otherwise would be denied it by state law." Katzenbach v. Morgan, 384 U.S. 641, 657 (1966). *See also* United Jewish Orgs., Inc. v. Carey, 430 U.S. 144 (1977) (affirmative action redistricting program upheld).

131. 42 U.S.C. § 2000d (1976).

132. 42 U.S.C. § 1973b(e) (1976).

133. Fullilove v. Klutznick, 100 S. Ct. 2758, 2810 (1980) (Stevens, J., dissenting).

134. *See* note 40 *supra*.

135. *See* note 39 *supra*.

136. 123 CONG. REC. 5097-98 (1977).

137. *Id.* at 5098, 5327.

138. Fullilove v. Klutznick, 100 S. Ct. 2758, 2775 (1980).

139. *Id.* at 2764.

140. Congress assumed, and the Court accepted, the view that because minority businesses received only a small percentage of government con-

After minimal congressional debate on the MBE amendment, an addendum granted the Secretary of Commerce the power to grant waivers in certain circumstances.[141] Although the set-aside remained intact, the Secretary had the power to waive the ten percent requirement where its application was not feasible. This would occur, for example, when MBE's were nonexistent in an area targeted for federal funds. Following this change, the Public Works Employment Act, the original of which contained no set-aside provision, passed the House.[142] The Senate amended its draft and adopted the House MBE amendment without debate.[143] The bill was eventually enacted by Congress.[144]

Despite the lack of specific findings of discrimination, the minority business set-aside singles out certain groups to receive preferential treatment.[145] The result of the race-based condition on the construction industry is two-fold. First, general contractors cannot award a subcontract to the lowest bidder unless it is an MBE. The set-aside requires that contracts be awarded to MBE's if their higher bids reflect inflated prices caused by discrimination.[146] Second, since contractors are required to subcontract to MBE's, some non-MBE's are automatically precluded from an award of a contract because of their race.

The effect of the minority set-aside provision forces contractors to choose subcontractors and suppliers for reasons totally unrelated to the construction industry. In the past, these choices were ordinarily based upon experience, reputation, and

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tracts, they must be subject to discrimination by the construction industry at large. Fullilove v. Klutznick, 100 S. Ct. 2758, 2767 (1980). However, the REPORT OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS, "*Minorities and Women as Government Contractors*" 24 (May, 1975) did not cite discrimination as the reason for the relatively small number of MBE's acquiring government contracts.

What it did find was ten specific problems causing economic hardship to minority businesses: (1) insufficient working capital; (2) no knowledge of future bidding opportunities; (3) inadequate marketing staff; (4) overbidding; (5) inadequate past experience; (6) poor understanding of bidding procedures; (7) little understanding of government contracting regulations; (8) poor preparation of bids and proposals; (9) inadequate staff; and (10) unfamiliarity with preselection prior to the formal advertising process. *See* Petitioner's Brief for Certiorari at 19-20, Fullilove v. Kreps, 584 F.2d 600 (2d Cir. 1978).

141. 123 CONG. REC. 5328 (1977) (remarks of Rep. Roe).

142. 123 CONG. REC. 5352 (1977).

143. 123 CONG. REC. 7173 (1977).

144. 123 CONG. REC. 12943 (1977); 123 CONG. REC. 13257 (1977).

145. *See* note 45 *supra*.

146. 42 U.S.C. § 6705(e)(1) (1977) ("Construction of each such project shall be performed by contract awarded by competitive bidding, unless the Secretary shall affirmatively find that, under the circumstances relating to such project, some other method is in the public interest.").

ability. Today, contractors are required to select businesses solely on the basis of their race.

The Court in *Fullilove* accepted as fact, without corroborating evidence, that industry-wide discrimination existed in the construction field. Therefore, even if petitioners were not themselves guilty of discriminatory practices, the Court held they had received a benefit since MBE's were excluded from contracting opportunities.[147] Although innocent of any illegal conduct, petitioners were required to shoulder the burden of remedying prior discrimination; they were excluded from ten percent of federal public work funds.[148] This approach deviated from the Court's previous civil rights decisions. In the past, detailed legislative findings of specific discrimination[149] were required before the Court would approve "a classification that [aided] persons as members of relatively victimized groups at the expense of other innocent individuals. . . ."[150] Moreover, as Chief Justice Burger once queried, "how [were] judges supposed to ascertain the *purpose* of a statute except through the words Congress used and the legislative history of the statute's evolution?"[151] While the purpose of the minority business set-aside was to redress prior discrimination suffered by MBE's, Congress failed to make specific findings of discrimination against the MBE's benefitted.[152]

The Court's Role as Final Arbiter

As indicated by the previous discussion, the Court in *Fullilove* neither required a detailed legislative history of prior discrimination nor applied any standard previously employed to test the constitutionality of the set-aside. Therefore, a question arises as to why the Court chose not to strictly evaluate Congress's legislation. One suggestion is based upon the "func-

147. Fullilove v. Klutznick, 100 S. Ct. 2758, 2778 (1980).

148. *Id.*

149. *See* text accompanying notes 20-23 *supra*.

150. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 307 (1978).

151. United Steelworkers of America v. Weber, 443 U.S. 193, 217 (1979) (Burger, C.J., dissenting).

152. *See* Montana Contractors' Ass'n v. Secretary of Commerce, 460 F. Supp. 1174 (D. Mont. 1978) (no findings that mixed blood Indians had been discriminated against); Associated Gen. Contractors v. Secretary of Commerce, 459 F. Supp. 766 (C.D. Cal. 1978) (court did not find the provision an acceptable way to increase minority business participation in the construction industry); *cf.* Wright Farms Constr., Inc. v. Kreps, 444 F. Supp. 1023 (D. Vt. 1977) (court rejected the minority business provision because it could find no history of discrimination in the state).

tional differentiation"[153] between Congress and the Supreme Court. The functional differentiation is based upon the assumption that the work of the judiciary differs dramatically from that of the legislature. If the courts addressed themselves to the same issues as the legislature there would be an invasion of the legislative function.[154] The *Fullilove* Court followed this theory, particularly when it emphasized "necessary latitude"[155] in its relations with Congress.

The Court, however, could have adopted the theory of "checks and balances"[156] which "really requires that the court reconsider the same questions that the legislature has already considered."[157] Whenever Congress embarks on a new course of action the Court is entitled to scrutinize the legislation to protect the American citizen from a violation of his civil rights. In the case of the minority business set-aside a preference is created for only a few specified minority groups.

> In both its substantive and procedural aspects this Act is markedly different from the normal product of the legislative decisionmaking process. The very fact that Congress for the first time in the Nation's history has created a broad legislative classification for entitlement to benefits based solely on racial characteristics identifies a dramatic difference between this Act and the thousands of statutes that preceded it.[158]

Since the set-aside departs from previous affirmative action programs, the Court should have examined more carefully the constitutionality of the legislation.[159] Too great a deference to Congress weakens the position of the Supreme Court as final arbiter of constitutional questions.

The Problems of Defining a Minority and Affixing Racial Labels

Defining a Minority

The Court, by upholding the set-aside, forces governmental involvement in racial labeling. The set-aside provision specifies that Negroes, Spanish-speaking, Orientals, Indians, Eskimos,

153. Tussman & tenBroek, *The Equal Protection of The Laws*, 37 Calif. L. Rev. 341, 365-66 (1949) [hereinafter cited as Tussman & tenBroek].

154. *Id.*

155. *See* note 97 and text accompanying note 98 *supra*.

156. Tussman & tenBroek, *supra* note 153, at 366.

157. *Id.*

158. Fullilove v. Klutznick, 100 S. Ct. 2758, 2811-12 (1980) (Stevens, J., dissenting).

159. "[T]he Court . . . must stand guard against an over-concern for mere 'convenience'; and, . . . must place a barrier in the path of over-eager acquiescence." Tussman and tenBroek, *supra* note 153, at 351

and Aleuts qualify as minority groups for the purpose of the Public Works Employment Act.[160] This list, however, does not describe how to verify the minority status of a particular applicant. In particular, how much minority blood must one have to qualify under the set-aside provision? This question must be answered, as a benefit attaches to a person in a MBE. An incentive, therefore, exists to misrepresent one's racial heritage in order to share in this benefit.[161]

Racial classifications do not have well-defined limits. At one time in United States history, a person was designated legally black if he was one-eighth Negro.[162] Today, in some Indian tribes, a person qualifies as an Indian with only one-eighth Indian blood.[163] A different standard exists under the guidelines of the Economic Development Administration. According to that organization, a minority member is a person with any amount of minority blood, regardless of the percentage.[164] As a result of the minority business set-aside, the government and the courts are dragged into the business of racial labeling in order to prevent unjust claims for federal funds.

Assuming it is desirable for the government and the courts to become involved in racial labeling, correct racial classifications are not always self-evident. For example, some blacks and Spanish-speaking people have Caucasion features and are indistinguishable from Caucasians.[165] Thus, "the question arises whether it [classification] is to be applied on the basis of the physical appearance of the individual or on the basis of a geneological research as to his [applicant's] ancestry."[166] If neither is conclusive, the government can always adopt the anthropological approach and make "distinctions of race on differences in the size and the proportions of skulls and on other physical differ-

160. 42 U.S.C. § 6705(f)(2) (1977).

161. In San Francisco, for example, fifty-three self-proclaimed American Indian police officers were reclassified as white by the Equal Opportunity Commission. J. WILKINSON, FROM BROWN TO BAKKE THE SUPREME COURT AND SCHOOL INTEGREGATION: 1954-1978, at 292 (1979).

162. "The power to assign to a particular [railroad] coach obviously implies the power to determine . . . who, under the laws of the particular State, is to be deemed a white, and who a colored person." Plessy v. Ferguson, 163 U.S. 537, 549 (1896); *see also* Posner, *The Defunis Case And The Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1, 12-14 [hereinafter cited as Posner].

163. Montana Contractors' Ass'n v. Secretary of Commerce, 460 F. Supp. 1174, 1178 (D. Mont. 1978) (Walter Fouty, one-eighth Confederated Salish and Kootenai; William L. Kelly, one-fourth Crow; Ronald Paul, 15/32 Blackfeet; Raymond Wetzel, one-fourth Cree-Chippewa).

164. U.S. DEPT. OF COMM., ECONOMIC DEVELOPMENT ADMINISTRATION, MINORITY ENTERPRISE TECHNICAL BULLETIN (1977).

165. Posner, *supra* note 162, at 12.

166. Perez v. Sharp, 32 Cal. 2d 711, 730, 198 P.2d 17, 28 (1948).

ences found to follow these, such as the shape of the cross section of the hair and the composition of the blood."[167]

If the above scenario appears absurd, consider defining any of the enumerated minorities in the set-aside provision. For example, neither physical appearance nor geneology help in the classification of the American Indian because the definition of an Indian is imprecise.[168] Not only must the individual have ancestors who lived in America before it was discovered by Europeans, he must also be "recognized as an Indian by either a tribe, tribal organization, or a suitable authority in the community."[169]

Furthermore, despite Congress's all-encompassing "Indian" classification, there is no single group known as the American Indian. The Bibliography of American Ethnology[170] lists a minimum of sixty-seven Indian tribes ranging from the Acoma to the Zuni. Each Indian tribe has its own culture, language, customs, personalities, and beliefs.[171] While it is true that many American Indians have been subjected to mistreatment,[172] the minority business set-aside lumps together all Indians for special treatment despite their individual characteristics and needs.

The Set-Aside Provision—Underinclusive and Overinclusive

A dual problem is created by massing people together who are really separate and distinct; the group becomes either underinclusive or overinclusive. For example, the set-aside is designed to aid only those MBE's that are victims of prior discrimination.[173] The set-aside, therefore, is underinclusive as it limits its benefits to only some minorities rather than all businesses which have experienced discrimination.[174] The United States is comprised of citizens from at least thirty-eight separate minority groups from Arab-Americans to Yugoslav-Americans.[175] It is certainly conceivable that some of these groups

167. THE LINCOLN LIBRARY OF ESSENTIAL INFORMATION 514 (1951).

168. United States v. Dodge, 538 F.2d 770, 786 (8th Cir. 1976).

169. Montana Contractors' Ass'n v. Secretary of Commerce, 460 F. Supp. 1174, 1176 (D. Mont. 1978) ("A suitable authority in the community may be: educational institutions, religious organizations, or state agencies.").

170. M. CASHMAN & B. KLEIN, THE BIBLIOGRAPHY OF AMERICAN ETHNOLOGY (1976).

171. W.E. WASHBURN, THE INDIAN IN AMERICA at XV (1975).

172. *See* Morton v. Mancari, 417 U.S. 535, 553 (1974).

173. Fullilove v. Klutznick, 100 S. Ct. 2758, 2771 (1980).

174. It is conceivable that a non-MBE from Appalachia might experience greater economic difficulties than an MBE in an urban area. Posner, *supra* note 162, at 14.

175. *See* note 170 *supra*.

have suffered discrimination sufficient to warrant redress by the government.

Moreover, it is also arguable that the designated beneficiaries of the set-aside program represent an overinclusive group. The set-aside provision treats in a similar manner those whom Congress intended to aid but also those who share their distinguishing characteristics. This latter group, however, may not share a personal history of prior discrimination.[176] While it is perhaps true that "Spanish-speaking" and "Oriental" contractors who have lived in the United States for many years have experienced discrimination, many applicants will be children of recent immigrants or immigrants themselves.[177] Their disadvantageous position in the construction industry might be attributed to their own economic and social conditions in their homeland, and the consequence of beginning a new life in a foreign country.[178] Additionally, if the preference for "Spanish-speaking" includes MBE's other than Mexican-Americans and Puerto Ricans, it will "encompass many persons who may not have suffered the effects of significant discrimination in the United States."[179] In particular, the recent Cuban refugees are Spanish-speaking, but have not been in the United States long enough to have suffered discrimination in the construction industry.

A further example of the overinclusiveness of the set-aside provision is the "Oriental" class. Similar to the situation of the American Indian, the continent of Asia is comprised of many diverse groups with separate identities and cultures. It is doubtful that they have all suffered significant continuous discrimination.[180] In fact, some sub-groups of Orientals are well-represented in the construction industry and are not impeded in their opportunity to share in federal contracts.[181]

The Fraudulent Minority

Still other pitfalls exist with the set-aside. Certain persons may fraudulently misrepresent themselves as members of a chosen minority merely to share in the set-aside. The Report of

176. Greenawalt, *supra* note 67, at 120.

177. The "Spanish-speaking" class could conceivably include the recent Cuban refugees and the "Oriental" class might include the Vietnamese refugees. Although they fall into the preferred minority category, they have not suffered prior discrimination in this country to warrant their sharing in the federal public works fund.

178. Greenawalt, *supra* note 67, at 118.

179. *Id.*

180. *Id.* at 120.

181. *Id.*

The Comptroller General of the United States[182] raises certain questions with respect to the identification of bona fide MBE's. First, it states that some enterprises are established solely to take advantage of the "free" funds and have no intention of remaining in the construction field beyond the termination of the program.[183] Second, certain supposed minority owners are merely figureheads for nonminority owners.[184] Third, minority subcontractors subcontract out most of their work to nonminority businesses.[185] Therefore, the problems facing an administrative agency created to oversee the set-aside program can be summarized as follows: (1) the agency must determine what constitutes membership in a particular racial group; (2) it must develop adequate means to establish that an applicant is a member of a minority group;[186] and (3) it must determine whether a particular applicant for federal local public works funds has suffered prior discrimination.

The List of Minorities in the Set-Aside—A Product of Congressional Caprice?

The above definitional difficulties of minorities represent the practical problem inherent in the set-aside.[187] However, another problem not addressed by Congress in creating the select minority group is that America is a country of minorities. There is no accurate basis for deciding which groups should be singled out for special help and which should not.[188] "It would hardly take extraordinary ingenuity for a lawyer to find . . . [deserving] minorities at every turn in the road."[189]

Furthermore, a serious consequence of racial classification

182. REPORT OF THE COMPTROLLER GENERAL OF THE UNITED STATES, Jan. 16, 1979.

183. *Id.* at iii.

184. *Id.* at 25-27.

185. *Id.* at 27.

186. *See generally* B. BITTKER, THE CASE FOR BLACK REPARATIONS (1973) (discussion of the problems associated with racial classifications).

187. *See* text accompanying notes 162-71 *supra*.

188. Mr. Justice Douglas noted the problems associated with such inquiries:

> The reservation of a proportion of the law school class for members of selected minority groups is fraught with . . . dangers, for one must immediately determine which groups are to receive such favored treatment and which are to be excluded, the proportions of the class that are to be allocated to each, and even the criteria by which to determine whether an individual is a member of a favored group. There is no assurance that a common agreement can be reached, and first the schools, and then the courts, will be buffeted with the competing claims.

DeFunis v. Odegaard, 416 U.S. 312, 338 (1974) (Douglas, J., dissenting).

189. Sugarman v. Dougall, 413 U.S. 634, 657 (1973) (Rehnquist, J., dissenting).

is the resentment and hostility engendered in nonminorities[190] when minorities are singled out to receive special benefits. Despite the classification of the set-aside as a temporary measure, "inclusion in employment goals and quotas is clearly a positive benefit for individuals in the benefitted groups, and an actual loss for the others. As a result these benefits will be defended most fiercely."[191] As a consequence of racial labeling, American citizens are increasingly divided into categories with different rights.[192]

The Rebirth of Racial Classifications

Racial classifications pose a new dilemma for the country. The concept of equal protection for all is blurred when one group is singled out to receive a benefit denied to another group. Under the fourteenth amendment, no person is to be denied equal protection of the law by any state.[193] Although there is no equal protection clause applicable to the federal government, the due process clause of the fifth amendment prevents the federal government from treating people unequally.[194] This requirement that all people be treated equally, however, does not mean that all legislation which discriminates against a group is unconstitutional since nearly all legislation treats one segment of society differently than another.[195] Nor does equal protection preclude preferential programs merely because they are based

190. "It focuses on race in such a way that it draws attention to racial differences, and, though not intending to do so, exacerbates them in some minds." COUNTING BY RACE, *supra* note 82, at 156.

191. N. GLAZER, AFFIRMATIVE DISCRIMINATION: ETHNIC INEQUALITY AND PUBLIC POLICY 201 (1975); *see* note 102 *supra*.

192. It is common to refer to "the rights of minorities" or "minority rights", but both phrases are misleading in suggesting that the rights referred to are uniquely those of minorities by conferring rights upon them alone. Its premise, rather, is that certain interests of individuals are to be immunized from governmental authority without regard to whether the individuals are members of the majority or of a minority. Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162, 1164-65 n.6 (1977).

193. U.S. CONST. amend. XIV, § 1.

194. *See, e.g.*, Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (distinction by sex for different social security benefits is unconstitutional); Bolling v. Sharpe, 347 U.S. 497 (1954) (segregation of Negro children in the public schools denies them due process).

195. *See* Tussman & tenBroek, *supra* note 153, at 344 ("The Constitution does not require that things different in fact be treated in law as though they were the same."); *see also* Trimble v. Gorden, 430 U.S. 762, 779 (1977) (Rehnquist, J., dissenting) ("The Equal Protection Clause is itself a classic paradox . . . . It creates a requirement of equal treatment to be applied to the process of legislation—legislation whose very purpose is to draw lines in such a way that different people are treated differently.").

on racial classifications.[196] However, what the equal protection clause does prevent is the use of racial classification from continuing unchecked. "[T]he equal protection clause reminds the legislator that he must guard himself against favoritism or inequality of purpose."[197] Therefore, if a program, such as the Public Works Employment Act,[198] guarantees to MBE's the same opportunity to share in all federal funds as non-MBE's, the program offends no one. However, the designated minorities in the set-aside provision reap benefits at the expense of non-MBE's by having 400 million dollars set-aside strictly for their own use. The question becomes, which represents the American goal: equality for all or inequality for some to redress prior discrimination?

Legitimization of Racial Classifications

For a time, the answer to the question was equality for all. Between the years 1955 and 1976, the Supreme Court held that justice in civil rights cases required an end to benefits and burdens based solely on racial classifications.[199] Today, however, under the *Fullilove* decision, the Supreme Court holds that justice requires the imposition of burdens upon non-MBE's to help MBE's receive a larger share of federal funds.[200] Unfortunately, "once the use of race becomes legitimate again, we shall repeat all of the problems that divided us before: solidarity collapses, consensus with respect to the impropriety of measuring by race dissolves, race becomes important once more, and all are diminished by the experience."[201] This foreshadows numerous potential difficulties.

One result of legitimizing racial classifications is the danger of other ethnic groups engaging in an endless struggle for political preference.[202] Another drawback of race-based preferential programs is their tendency to reinforce the stereotype that certain groups are unable to attain success without special protection.[203] Moreover, benefits based upon racial classifications are

196. *See, e.g.*, Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977) (zoning ordinance classified people by race).

197. Tussman & tenBroek, *supra* note 153, at 365.

198. *See* note 39 *supra*.

199. Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775, 783-84 (1979).

200. Fullilove v. Klutznick, 100 S. Ct. 2758, 2778 (1980).

201. Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775, 778 n.10 (1979).

202. J. WILKINSON, FROM BROWN TO BAKKE THE SUPREME COURT AND SCHOOL INTEGREGATION: 1954-1978, at 293 (1979).

203. DeFunis v. Odegaard, 416 U.S. 312, 343 (1974) (Douglas, J., dissenting) (a separate program for minorities "creates suggestions of stigma and

simply morally wrong. "Indeed, that is the great lesson for government itself to teach: in all we do in life, whatever we do in life, to treat any person less well than another or to favor anyone more than another for being black or white or brown or red, is wrong. Let that be our fundamental law. . . ."[204]

Finally, on a more practical level, the purpose of the race-based minority business set-aside is to enable MBE's to compete in the construction industry.[205] However, the net effect of having a set-aside exclusively for the use of minority contractors is to remove them from industry-wide competition. The result is just another "support survival program"[206] which Congress sought to avoid[207] due to the drain on federal funds.

CONCLUSION

The Supreme Court's decision to uphold the minority business set-aside creates many difficulties. First, it represents a relegitimization of benefits awarded solely on the basis of race.[208] Second, it raises the problem of how to define a minority.[209] Third, it creates a moral dilemma. The country is told that it is acceptable to discriminate against nonminorities provided it is to help minorities. Yet, if discrimination is wrong, it is wrong at all times and for all people. The Supreme Court, however, has allowed Congress to discriminate against non-MBE's by excluding them from ten percent of federal local public works funds. This is due to an assumed pressing need to eliminate racial imbalance in the construction industry.[210] Certainly, the desire to eliminate racial imbalance is an honorable goal.[211] However, "there is perhaps no device more destructive to the

caste. . . ."); *see also* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 298 (1978) (Powell, J.) ("[P]referential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth.").

204. Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775, 809-10 (1979).

205. 123 CONG. REC. 5327 (1977) (remarks of Rep. Mitchell).

206. *Id.*

207. *Id.*

208. *See* note 45 *supra*.

209. *See* text accompanying notes 162-71 *supra*.

210. A court should accept the articulated purpose of the legislation but closely scrutinize the relationship between the classification and the purpose. Fullilove v. Klutznick, 100 S. Ct. 2758, 2781 (1980); *see* Gunther, *Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

211. However, "there is always the danger that the seeds of precedent sown by good men for the best of motives will yield a rich harvest of unprincipled acts of others also aiming at 'good ends.'" United Steelworkers of America v. Weber, 443 U.S. 193, 219 (1979) (Burger, C.J., dissenting).

notion of equality than the *numerus clausus*—the quota. The racial quota is . . . a creator of castes, a two-edged sword that must demean one in order to prefer another."[212]

Furthermore, such legislation directly violates the concept of equal protection.[213] "The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal."[214] Since the Supreme Court finds that the Constitution prohibits the exclusion of minorities from sharing in federal funds, it ought to provide the same protection for nonminorities.

A better focus for the country is a program to aid all disadvantaged contractors, not just those in a small select group. A desirable end[215] does not justify a return to the awarding of benefits based solely upon racial classifications.[216] "It is one thing for groups to nurture their own ethnic and racial identity, quite another for government to allocate upon it."[217]

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212. United Steelworkers of America v. Weber, 443 U.S. 193, 254 (1979) (Rehnquist, J., dissenting); *see* text accompanying notes 73-85 *supra*.

213. "The Equal Protection Clause commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized." DeFunis v. Odegaard, 416 U.S. 312, 342 (1974) (Douglas, J., dissenting).

214. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 289-90 (1978).

215. In Fullilove v. Klutznick, 100 S. Ct. 2758 (1980), it is an increase in minority business participation in the construction industry.

216. In the longer run, the Court is taking frightful risks. (1) Can the Court insist on such intrusive use of racial classification without teaching the country that policies based on racial classification are legitimate? (2) Will those who are asked to step aside for the benefit of blacks not harbor ill will against them? Will this not be a particular problem for the young, who, having grown up on this side of the civil rights revolution, disassociate themselves from the racism of the old America, and may be surprised to learn that they are asked to pay for it?

Kitch, *The Return of Color-Consciousness to the Constitution: Weber, Dayton and Columbus*, 1979 SUP. CT. REV. 1, 12-13.

217. J. WILKINSON, FROM BROWN TO BAKKE THE SUPREME COURT AND SCHOOL INTEGRATION: 1954-1978, at 293 (1979).