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NOTE

THE PUBLIC WORKS EMPLOYMENT ACT OF 1977 AND MINORITY CONTRACTING

A national commitment to promote the development and ongoing viability of minority owned businesses (MBEs)¹ has existed since the late 1960's.² In response to a growing recognition that the simple prohibition of racially discriminatory employment and contracting practices alone would not significantly increase minority participation³ in private enterprise, a number of federal assistance programs were initiated in the early 1970's.⁴ As a result, a substantial federal scheme presently exists to foster MBE development,⁵ as well as a growing number of governmental programs requiring increasingly vigorous "affirmative action"⁶ on the part of

1. The term "minority" is generally defined as including United States citizens who are Negro, Spanish-speaking, Oriental, Indian, Eskimo and Aleut. This definition is used in most federal minority business affirmative action efforts. *See, e.g.*, 41 C.F.R. §§ 1-1.1303, 1-1.1310-2 (1977); Public Works Employment Act of 1977, § 103(f)(2), 42 U.S.C.A. § 6705(f)(2) (West Supp. 1978). In other contexts, a somewhat different definition has been offered. *See* the Small Business Administration's (SBA) minority procurement program regulation, 13 C.F.R. § 124.8-1 (1978) (discussed at note 41 *infra*) and Exec. Order No. 11,625, 3 C.F.R. §§ 616-620 (1975), *reprinted in* 15 U.S.C. § 631 app., at 1138 (1976) (both use "socially or economically disadvantaged" criteria); Department of Transportation Order 4000.7A, Minority Business Enterprise Program (Mar. 6, 1978); Railroad Revitalization and Regulatory Reform Act of 1976 ("4 Rs Act"), § 905, 45 U.S.C.A. § 803 (West Supp. 1978); 49 C.F.R. § 265.5 (1977) (all include women).

A minority business enterprise (MBE) is generally defined as: "a business, at least 50 per centum of which is owned by minority group members or, in case of publicly owned businesses, at least 51 per centum of the stock of which is owned by minority group members." Public Works Employment Act of 1977, § 103(f)(2), 42 U.S.C.A. § 6705(f)(2) (West Supp. 1977); *see also* 41 C.F.R. §§ 1-1.1303, 1-1.1310-2 (1978).

2. In March, 1969, President Nixon, as part of his black capitalism program, issued Exec. Order No. 11,458, 3 C.F.R. § 779 (1966-1970 Compilation) which set out a national policy of promoting minority business ownership and development. It was reissued in 1971 as Exec. Order No. 11, 625, 3 C.F.R. § 616 (1975), *reprinted in* 15 U.S.C. § 631 app., at 1138 (1976). *See* note 26 *infra*.

3. *See, e.g.*, COMMISSION ON CIVIL RIGHTS, CLEARINGHOUSE PUB. NO. 54, STATEMENT ON AFFIRMATIVE ACTION 6 (1977); Comment, *Race Quotas*, 8 HARV. C.R.-C.L.L. REV. 128, 147 (1973).

4. For a discussion of these programs, see notes 44-47 *infra* and accompanying text.

5. *See* notes 40-50 and accompanying text *infra*.

6. The term "affirmative action" is generally understood to mean that positive, active measures must be taken to seek out and assist capable minority group members in order to fulfill nondiscrimination responsibilities. *See, e.g.*, 41 C.F.R. §§ 1-1.1300 to 1-1.1310-2

federal contractors.

Despite these federal efforts, the level of MBE involvement has remained disproportionately low, not only in the business community at large⁷ but in federal contracting programs⁸ in particular. As a result, more ambitious affirmative action schemes have been introduced to increase the level of MBE participation.⁹ One of the most recent and most controversial is the MBE provision¹⁰ contained within the Public Works Employment Act of 1977.¹¹ In order to ensure a significant level of minority business involvement in the public works program, the provision mandates a ten percent "set-aside" in each grant for exclusive minority business participation.¹² By establishing this specific and relatively rigid MBE utilization requirement in a nationwide program,¹³ the provision extends significantly beyond the affirmative action goals and timetables ap-

(1977) (requiring federal prime and subcontractors to take positive steps to seek out and use MBEs in federal contracts); "4 Rs Act", § 905, 45 U.S.C.A. § 803 (West Supp. 1978); 49 C.F.R. §§ 265.1, 265.7(a)(5)(1977) (race can be taken into account as part of an affirmative action remedial scheme).

7. See note 30 *infra*.

8. See note 31 *infra*.

9. See, e.g., Department of Transportation Order 4000.7A, Minority Business Enterprise Program (Mar. 6, 1978) which encourages the use of MBE "set-asides" to reach required MBE percentage goals and supports increased MBE participation even if it results in higher costs to the Department. Under this provision, contracts, or sections of contracts, can be "set-aside" for exclusive minority business competition.

10. 42 U.S.C. § 6705(f)(2) (West Supp. 1978). This subsection 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 enterprise.

11. 42 U.S.C.A. §§ 6701 to 6710 (West Supp. 1978). The Act provides for six billion dollars in grant funds to be obligated by December 31, 1978. An extension was introduced in the House but failed to pass. See H.R. 11,610, 95th Cong., 2d Sess., 124 CONG. REC. H2184 (daily ed. Mar. 16, 1978).

12. In order to qualify for funds, a grantee must assure the Economic Development Administration that at least ten percent of the grant dollars will go to MBE contractors, subcontractors or suppliers. This "set-aside" allows grantees to choose the methods by which they will reach the ten percent requirement and the specific allocation among the contracts to be let. See ECONOMIC DEVELOPMENT ADMINISTRATION (EDA), U.S. DEP'T OF COMMERCE, GUIDELINES FOR 10% MINORITY BUSINESS PARTICIPATION IN LPW GRANTS 7-9 (August, 1977) [hereinafter cited as EDA GUIDELINES] for the various methods by which grantees can satisfy this requirement. This procedure must be differentiated from the use of MBE set-asides in the direct procurement context, in which competition for some contracts will be specifically limited to MBEs (see note 9 *supra*) and for which a body of federal law exists. See Federal Procurement Regulations, 41 C.F.R. §§ 1-1000 to 1-1.2302-5 (1977).

13. Although this percentage figure is an inflexible one, a waiver provision does exist. Under EDA guidelines, the waiver can be triggered if the grantee can demonstrate that "there are not sufficient, relevant, qualified minority business enterprises whose market areas include the project location." EDA GUIDELINES, *supra* note 12, at 14. However, in an attempt to ensure that serious efforts are made to seek out MBEs, EDA has made the waiver very difficult to obtain. *Id.* at 13-15.

proach sanctioned by the courts.¹⁴ As a purely racial classification, the MBE measure is also distinguishable from other affirmative action measures and set-asides which utilize non-racial criteria.¹⁵

As predicted, numerous lawsuits have been filed by general contracting corporations challenging the provision's constitutionality.¹⁶ They allege it is an invidious race quota violative of the fifth amendment and of Title VI of the Civil Rights Act of 1964.¹⁷ Since it requires a specific percentage of minority participation in a national federal program, the provision may have significant implications which reach far beyond the duration of the

14. See notes 53-60 and accompanying text *infra*. These programs, also based on race, have been limited to particular metropolitan areas and to specific trades. Although sanctioned in the areas of employment and education, the analogy to minority business enterprise can easily be made.

15. These include the SBA's Section 8(a) procurement program (see note 41 *infra*) which utilizes "socially or economically disadvantaged" criteria, see 13 C.F.R. § 124.8-1 (1978) and note 1 *supra*, and other set-asides, e.g. the Federal Procurement Regulation small business set-asides, 41 C.F.R. § 1-1.706-1(c) (1978) and labor surplus set-asides, 15 U.S.C.A. § 644(d) (West Supp. 1978).

16. Final decisions have been reached by several district courts holding the provision constitutional. See, e.g., *Associated Gen. Contractors v. Secretary of Commerce*, No. 77-4218 (D. Kan., Dec. 19, 1977); *Rhode Island Associated Gen. Contractors v. Kreps*, 450 F. Supp. 338 (D.R.I. 1978). See notes 79-89 and accompanying text, *infra*. One district court has found the provision unconstitutional on its face and granted prospective relief only; however, that decision, on appeal to the Supreme Court, was vacated and remanded to consider the question of mootness. See *Associated Gen. Contractors v. Secretary of Commerce*, 441 F. Supp. 955 (C.D. Cal. 1977), *vacated and remanded*, 98 S. Ct. 3132 (1978); *aff'd on remand* No. 77-3738 (C.D. Cal. Oct. 20, 1978). See also notes 95-97 and accompanying text *infra*. One district court found the provision unconstitutional as applied to only the narrow set of facts before it. *Wright Farms Constr., Inc. v. Kreps*, 444 F. Supp. 1023 (D. Vt. 1977). See also *Montana Contractors' Ass'n v. Secretary of Commerce*, 47 U.S.L.W. 2385 (D. Mont. Dec. 19, 1978) (finding MBE set-aside violative of standards set forth by the U.S. Supreme Court in *Regents of the Univ. of Cal. v. Bakke*, 98 S.Ct. 2733 (1978)). See also notes 91-94 and accompanying text *infra*.

Several district courts have denied preliminary injunctions holding that the plaintiffs failed to show the likelihood of success on the merits of their claims. See, e.g., *Virginia Chapter, Associated Gen. Contractors, Inc. v. Kreps*, 444 F. Supp. 1167 (W.D. Va. 1978). Several courts of appeals have affirmed such denials of preliminary injunctions. See, e.g., *Fullilove v. Kreps*, 584 F.2d 600 (2d Cir. 1978), *aff'g* 443 F. Supp. 253 (S.D.N.Y. 1977), *Constructors Ass'n v. Kreps*, 573 F.2d 811 (3d Cir. 1978), *aff'g* 441 F. Supp. 936 (W.D. Pa. 1977); *Ohio Contractors Ass'n v. Economic Dev. Administration*, No. 78-3053 (6th Cir. July 7, 1978), *aff'g* No. C-1-77-619 (S.D. Ohio, Nov. 22, 1977).

In all, over 25 lawsuits have been filed by general contracting groups nationwide. Address by Assistant Attorney General Drew Days, Civil Rights Symposium sponsored by Lawyers' Committee for Civil Rights Under Law (June 21, 1978).

17. 42 U.S.C. § 2000(d)-1(1976). The fifth amendment requires that all United States residents be afforded equal protection under the laws. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). Title VI prohibits discrimination on the grounds of race, color or national origin in the distribution of services and benefits under any program receiving federal financial assistance. 42 U.S.C. § 2000d-1 (1976).

program itself.¹⁸ This Note will evaluate the provision's constitutionality and its effectiveness as an affirmative action tool, emphasizing the role of federal contracting in promoting minority business ownership and development.

I. MINORITY PARTICIPATION IN THE FEDERAL CONTRACTING PROCESS

A. National Policy Goals

The contracting opportunities provided by the federal government through direct procurement and grants programs are substantial.¹⁹ The government's power to contract has traditionally included the authority to determine its own business terms and conditions.²⁰ This policy has been based on the "right-privilege" distinction,²¹ which has not been without its critics.²² Although it appears that such power has specific limitations,²³ it

18. At the present time, all grants have been obligated under the program and Congress must approve any extension; therefore, the legislature can evaluate, at that time, whether the MBE provision remains necessary and reasonable. *See also* note 11 *supra*.

19. "Federal contracting plays a significant role in the economy, purchasing an amount equal to 4.8% of the gross national product in FY 1972." U.S. COMMISSION ON CIVIL RIGHTS, MINORITIES AND WOMEN AS GOVERNMENT CONTRACTORS 2 (1975). For example, federal procurement of goods and services from private contractors totalled \$57.5 billion in fiscal year 1972. *Id.* Information available for fiscal year 1977 shows total agency procurement at \$81.5 billion, including over \$57 billion for the Department of Defense alone, U.S. DEP'T OF DEFENSE, MILITARY AND CIVIL FUNCTIONS PROCUREMENT BY CLAIMANT PROGRAM (1977), and over \$24 billion for civilian agencies, GENERAL SERVICES ADMINISTRATION, PROCUREMENT BY CIVILIAN EXECUTIVE AGENCIES FOR THE PERIOD OCTOBER 1, 1976—SEPTEMBER 30, 1977. In addition, federal grants totalled \$39.1 billion in fiscal year 1973, *see* Morgan, *Achieving National Goals Through Federal Contracts: Giving Form to an Unconstrained Administrative Process*, 1974 WIS. L. REV. 301, 303 n.12, and will have increased to an estimated \$71.6 billion to state and local governments in fiscal year 1978. *See* Don Sowle Associates, Inc., *The Potential for Minority Business Participation in Federal Assistance Programs I* (May 15, 1978) (report prepared for Systems Technology Int'l Market Corp., Washington, D.C.).

The funds dispensed under the Public Works Employment Act, 42 U.S.C.A. §§ 6701 to 6710 (West Supp. 1978) are in the form of grants. The grantee state/city contracts out the construction of the public works projects to private contractors, using the federal funds.

20. *See* Perkins v. Lukens Steel Co., 310 U.S. 113, 127 (1940). *See generally* Morgan, *supra* note 19, at 319-20.

21. *See id.* It has been argued that a contractor has no right to work for the government, but only a privilege, and therefore attaching conditions to this privilege is an appropriate governmental initiative. Arguably, this power to attach conditions is even greater when the funds are in the form of grants, i.e. government "largesse." *Cf.* Wyman v. James, 400 U.S. 309, 319 (1971) (system of home visits by welfare caseworker held not unreasonable search, especially since funds are "charitable" and "public"). *See generally* Morgan, *supra* note 19, at 323-24.

22. *See, e.g.*, Morgan, *supra* note 19, at 320 nn.88 & 89. For discussion of the viewpoint that the right-privilege distinction is eroding, *see id.* at 320-22.

23. For example, the government should not be allowed to impose unconstitutional or irrational conditions on a contractor. The former limitation is particularly relevant here,

has enabled the federal government, through its multitudinous contracting programs, to include various "nonprocurement objectives" or "national goals" clauses in its contracts.²⁴ To promote equal employment opportunity, this policy prerogative has been supplemented by a specific "affirmative action" authorization through Executive Order 11,246²⁵ which requires all federal contracting agencies to include a nondiscrimination and affirmative action employment clause in every government contract. The national policy of promoting MBE development embodied in Executive Order 11,625²⁶ further seeks to "eliminate the barriers which now prevent many who are members of minority groups from controlling their fair share of American business."²⁷

It has also been noted that the government has a special responsibility to ensure that public funds are not spent in a manner which furthers racial discrimination.²⁸ Arguably, then, it is a proper governmental prerogative to delineate the appropriate levels of affirmative action necessary to attain the national goal of a nondiscriminatory society, and to implement those

given the constitutional challenges to the Public Works Employment Act's MBE provision. *Id.* at 322-25. It has also been suggested that the ideal system of determining national policy goals to be included in federal contracts is one which "combines the safeguards and sense of legitimacy of the legislative process with the flexibility and responsiveness of the Executive Branch." *Id.* at 307.

24. *Id.* at 301-02. These national goals clauses take many forms and include, for example, small business and labor surplus set-asides, *see* note 15 *supra*; balance of payments set-asides, 31 U.S.C. § 938 (1976); construction contract requirements to pay prevailing wages on federal contracts under the Davis-Bacon Act, 40 U.S.C. §§ 276a to 276a-5 (1976), *implemented in* 29 C.F.R. §§ 1.1 to 1.17 (1977); contract employment preferences for Vietnam veterans, 38 U.S.C. § 2012 (1976); public works contracts requirements to "Buy American" even if it results in higher costs, 41 U.S.C. § 10b (1976). The latter three provisions all appear in the Public Works Employment Act, 42 U.S.C.A. §§ 6701 to 6710 (West Supp. 1978).

25. 3 C.F.R. § 339 (1965), as amended by Exec. Order No. 11,375, 3 C.F.R. § 320 (1967), *reprinted in* 42 U.S.C. § 2000e app., at 10294 (1976).

26. 3 C.F.R. § 616 (1975), *reprinted in* 15 U.S.C. § 631 app., at 1138 (1976). This Order strengthened its predecessor, Executive Order No. 11,458, which had established the Office of Minority Business Enterprise (OMBE) within the Department of Commerce. OMBE was given expanded responsibility to develop programs and coordinate interagency activities in order to encourage the formation and development of MBEs.

27. Special Message to the Congress Urging Expansion of the Minority Business Enterprise Program, 1971 PUB. PAPERS 1041, 1045.

28. "Neither the President nor the Congress nor the conscience of this nation can permit money which comes from *all* the people to be used in a way that discriminates against *some* of the people." Annual Message to Congress on the State of the Union, 1971 PUB. PAPERS 50, 54. "Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination." *Lau v. Nichols*, 414 U.S. 563, 569 (1974) (quoting Sen. Humphrey during debate on the Civil Rights Act of 1964, 110 CONG. REC. 6543 (1963)). *See also* Nash, *Affirmative Action under Executive Order 11,246*, 46 N.Y.U.L. REV. 225, 229 n.27 (1971).

procedures most likely to bring about that goal through federal contracting provisions.²⁹ The practical impact on the business community of such national goals provisions can be significant, due to the extent to which federal dollars filter down through prime contractors and subcontractors of goods and services.

B. Problems Faced by Minority Business Enterprises

Minority business owners have been, and continue to be, severely under-represented in the business community,³⁰ especially in federal contracting programs.³¹ This low level of participation has been attributed to a number of factors, including an inability to secure working capital,³² difficulties in obtaining bonding,³³ lack of experience in management and bidding skills,³⁴ the historical subjectivity of the subcontracting process,³⁵ the

29. This prerogative has gained support from the combined efforts and commitment of the executive and legislative branches. Judicial sanction of these measures provides conclusive affirmation of their constitutionality.

30. In 1972, minority-owned businesses represented 3.9% of the total number of establishments in the construction industry and gross receipts for the minority-owned firms were about one percent of total receipts. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 553 (1977). The record is no better in either the wholesale trade (1.3% of total firms and .5% of receipts) or in the manufacturing industry (2.1% of total firms and .1% of receipts). *Id.* See also 122 CONG. REC. S7147 (daily ed. May 13, 1976) (remarks of Sen. Javits); 122 CONG. REC. S17907 (daily ed. Oct. 1, 1976) (remarks of Sen. Muskie, quoting Sen. Glenn who noted that only .65% of total national gross business receipts are realized by MBEs); 124 CONG. REC. E985 (daily ed. March 2, 1978) (remarks of Rep. Hamilton).

31. In fiscal year 1972, less than one percent of total federal contracting dollars went to minority and female-owned firms. U.S. COMMISSION ON CIVIL RIGHTS, *supra* note 19, at 2. Five years later, with 1976 data, the situation remained unchanged. See 123 CONG. REC. H1440 (daily ed. Feb. 24, 1977) (remarks of Rep. Biaggi in floor debate on MBE provision in the Public Works Employment Act of 1977).

32. See U.S. COMMISSION ON CIVIL RIGHTS, *supra* note 19, at 24-25. Financial institutions are reluctant to extend credit and capital to MBEs lacking sufficient equity. *Id.* This problem for MBEs and other small businesses was recognized by Congress when it passed the Small Business Investment Act Amendments of 1972, Pub. L. No. 92-595, § 2(b), 86 Stat. 1314 (amending Small Business Investment Act of 1958, 15 U.S.C. § 681(d) (1976)). See note 42 *infra*. See also 118 CONG. REC. 35378 (1972) (remarks of Sen. Tower).

33. See Comment, *Minority Construction Contractors*, 12 HARV. C.R.-C.L.L. REV. 693, 694-95 (1977). This problem has been noted frequently in Congress. See 115 CONG. REC. 19383 (1969) (remarks of Sen. Bayh, quoting National Business League report indicating that 70% of Negro contractors report losing contracts due to inability to secure bonding); 116 CONG. REC. 18888 (1970) (remarks of Sen. Bayh, quoting from letter of Office of Minority Business Enterprise program officer which stated that surety companies have historically refused to bond MBEs in the construction industry on a par with nonminority businesses).

34. See U.S. COMMISSION ON CIVIL RIGHTS, *supra* note 19, at 24-28. The Commission's study noted MBEs' lack of awareness of future bidding opportunities, inadequate marketing staff, lack of familiarity with government contracting regulations and inadequate or untimely submission of bids and proposals. See also 116 CONG. REC. 18888-89 (1970) (remarks of Sen. Bayh, quoting program officer for OMBE).

35. There are no federal requirements for full and free competition in subcontracting.

state of the economy,³⁶ and racial bias.³⁷ The significant problems faced by MBEs have not gone unrecognized in Congress³⁸ or by the President.³⁹

C. Federal Efforts to Assist Minority Business Enterprises

The federal government has provided minority business with a number of assistance programs.⁴⁰ Congressional initiatives have resulted in the Small Business Administration's section 8(a) procurement program,⁴¹ sec-

See 41 C.F.R. § 1-7.202-30 (1977) (requires competition to the "maximum practical extent consistent with the objectives and requirements of the contract"); U.S. COMMISSION ON CIVIL RIGHTS, *supra* note 19, at 28 (preselection frequently factors out MBEs).

36. *See* M. Hall & O. Scott, *Minority Enterprise and Public Policy* 29 (Congressional Research Service Monograph No. 77-177e June 9, 1977) [hereinafter cited as *Minority Enterprise and Public Policy*]. Undercapitalized firms are hurt most during periods of recession as a result of the increased inaccessibility to financing and credit. Similarly, higher supply costs, interest rates, and wages during inflationary periods weaken MBEs' competitive positions.

37. The effects of past discrimination continue to place MBEs at a distinct disadvantage since they have not been able to build up the extensive business contacts which sustain nonminority firms. In November 1976, the House Committee on Small Business described the problems still facing MBEs:

The very basic problem . . . is that, over the years, there has developed a business system which has traditionally excluded measurable minority participation. In the past more than the present, this system of conducting business transactions overtly precluded minority input. Currently, we more often encounter a business system which is racially neutral on its face, but because of past overt social and economic discrimination is presently operating, in effect, to perpetuate these past inequities.

HOUSE COMM. ON SMALL BUSINESS, SUMMARY OF ACTIVITIES OF THE COMM. ON SMALL BUSINESS, H.R. DOC. NO. 1791, 94th Cong., 2d Sess. 182 (1977). *See also* U.S. COMMISSION ON CIVIL RIGHTS, *supra* note 19, at 20-22. The Commission reports of one federal procurement official who recently stated that "[a] lot of minority firms are like leeches. They don't want to go out on their own and do a little hard work." *Id.* at 21. That racial discrimination continues to plague MBEs has also been noted in Congress. *See Hearings on H.R. 567, 4960 and 2379 Before the Subcomm. on Minority Enterprise and General Oversight of the House Comm. on Small Business, 95th Cong., 1st Sess. 3, 42 (1977)* (statements of Reps. Addabbo and Mitchell) (discrimination is the simple reason why minority enterprise has not kept up with national minority population growth).

38. Congressmen often have spoken on the floor regarding the problems faced by MBEs. *See* statements cited in notes 30-34 & 37 *supra*. It should also be noted that the report of the United States Commission on Civil Rights on MBEs, *supra* note 19, was submitted to Congress and the President pursuant to 42 U.S.C. § 1975c(b) (1976).

39. *See* notes 27-28 and accompanying text *supra*.

40. For a list of over 100 federal agency programs which provide financial, marketing and management assistance to minority and other small businesses, see OFFICE OF MINORITY BUSINESS ENTERPRISE, U.S. DEP'T OF COMMERCE, FEDERAL ASSISTANCE PROGRAMS FOR MINORITY BUSINESS ENTERPRISES (1977).

41. The SBA administers a procurement program under section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1976), which gives the agency the power to contract to provide goods and services to federal agencies and, in turn, to subcontract the actual work to small

tion 301(d) minority investment program,⁴² and the Surety Bond Guarantee Program.⁴³ Executive initiative has come largely from Executive Order 11,625,⁴⁴ which established minority enterprise as a national goal. Under its mandate, a number of MBE programs have been instituted by federal agencies, and mandatory affirmative action provisions have been included in federal contracts.⁴⁵ For example, all federal agencies are required to have minority procurement programs which assure that efforts are undertaken to provide MBEs with subcontracting opportunities.⁴⁶ President Carter has also voiced his support of special efforts to increase MBE participation in federal contracting, most recently with an "initiative" to triple the amount of federal procurement from MBEs by fiscal year 1979,⁴⁷ and by his support of the MBE set-aside provision in the Pub-

businesses. See 13 C.F.R. § 124.8-1 (1978). Since 1968, this authority has been used by the SBA to assist MBEs in particular. See *Minority Enterprise and Public Policy*, *supra* note 36, at 52-53. For a detailed discussion of the program and its shortcomings, see Comment, *supra* note 33, at 695-710. The program has withstood attack as a legitimate exercise of administrative power. See, e.g., *Valley Forge Flag Co. v. Kleppe*, 506 F.2d 243 (D.C. Cir. 1974); *Ray Baillie Trash Hauling, Inc. v. Kleppe*, 477 F.2d 696 (5th Cir. 1973), *cert. denied*, 415 U.S. 914 (1974). It must be noted, however, that the program does not use strict racial categorizations. It has also never been attacked on constitutional grounds. Recently, the Congress passed a bill sponsored by Congressman Addabbo providing statutory support to SBA's implementation of the program as an MBE assistance program. See Pub. L. No. 95-507 (October 24, 1978).

42. The SBA administers the "301(d)" investment program pursuant to the Small Business Investment Act of 1958, § 301(d), 15 U.S.C. § 681(d) (1976). Since 1969, 301(d) has been operated as a minority enterprise small business investment company (MESBIC) program offering increased financial assistance to those companies which invest primarily in small minority enterprises. See *Minority Enterprise and Public Policy*, *supra* note 36, at 51-52.

43. Under the Housing and Urban Development Act of 1970, 15 U.S.C. § 694(b), (a) (1976), the SBA was authorized to establish this program to cover surety companies for up to 90% of their losses on bonds. The program covers contracts of up to one million dollars.

44. 3 C.F.R. § 616 (1975), *reprinted in* 15 U.S.C. § 631 app., at 1138 (1976). For the objectives of the order see note 26 *supra*. There has been no case law dealing with Exec. Order No. 11,625.

45. See, e.g., 41 C.F.R. §§ 1-1.1300 to 1.1310-2 (1977) (requiring federal prime and subcontractors to seek out and employ MBEs in federal contracts); DOT Minority Business Enterprise Order 4000.7A, discussed in note 9 *supra*.

46. 41 C.F.R. § 1-1.1310 (1977). This regulation requires that MBEs be given the "maximum practicable opportunity to participate in the performance of Government contracts" as subcontractors. Specific clauses to that effect must be included in contracts greater than \$10,000 and less than \$500,000. 41 C.F.R. § 1-1.1310-2 (1977). For contracts over \$500,000, prime contractors may be required to establish an MBE subcontracting program. *Id.* The efficacy of these regulations has been challenged. See, e.g., U.S. COMMISSION ON CIVIL RIGHTS, *supra* note 19, at 77-84.

47. See National Urban Policy, 14 WEEKLY COMP. OF PRES. DOC. 581, 588 (March 27, 1978). This "initiative" is part of the comprehensive national urban policy package which President Carter submitted to Congress. Another "initiative" proposed in the same package requests all federal agencies to include goals for MBE participation in their contracts and

lic Works Employment Act of 1977.⁴⁸

The concept of requiring MBE percentages as a means of increasing MBE participation is not a new one.⁴⁹ At least one federal agency has begun to require MBE set-asides as a means of reaching MBE percentage goals.⁵⁰ However, the MBE set-aside as part of a national public works project is unprecedented in its scope.

The MBE set-aside provision in the Public Works Employment Act is a nationwide racial percentage requirement, which, although mandated by Congress, is supported by only scanty formal legislative history. Introduced from the floor during debate on the full Act,⁵¹ there were no background studies undertaken or committee reports made. As a result, challenges have been brought on the ground that since no specific findings of previous discrimination were made, the provision is unconstitutionally preferential, rather than remedial in nature.⁵²

No case law exists defining the constitutional limits of Executive Order 11,625 or determining the legality of other specific affirmative action measures which have been taken to increase MBE utilization in the federal contracting process. Therefore, in order to evaluate the constitutionality of the MBE provision in the Public Works Employment Act, it is instructive to examine how the courts have treated the use of similar minority percentage requirements in other areas.

II. MINORITY PERCENTAGE GOALS AND REQUIREMENTS

Affirmative action measures, including the establishment of specific goals and timetables, are required of federal contracting agencies and con-

grants programs. He commended five agencies for proposed improvements in their MBE programs, including DOT's MBE program described in note 9 *supra*. *Id.* at 588.

48. In his state of the union address, President Carter stated: "We will continue to enforce the \$400 million minority business set-aside provision in the local public works act, and may exceed that target." 14 WEEKLY COMP. OF PRES. DOC. 90, 112 (Jan. 19, 1978).

49. *See* *Associated Gen. Contractors v. San Francisco Unified School Dist.*, 431 F. Supp. 854 (N.D. Cal. 1977) (school board does not have the authority to establish MBE percentage requirement, but the state can do so and can authorize the school board to do so). Massachusetts and Illinois have programs applicable to certain projects which establish percentage requirements of MBE contractor and subcontractor participation in construction projects. *See* Note, *Federal Contract Compliance: Use of Special Contract Provisions to Encourage Minority Employment*, 8 LOY. CHI. L.J. 913, 926-27 (1977).

50. *See* note 9 *supra*.

51. *See* note 73 and accompanying text *infra*.

52. Such a challenge was successfully made in *Wright Farms Constr., Inc. v. Kreps*, 444 F. Supp. 1023 (D. Vt. 1977). *See* notes 91-94, and accompanying text *infra*. *Cf.* *Flanagan v. President and Directors of Georgetown College*, 417 F. Supp. 377, 384 (D.D.C. 1977). *See* note 61 and accompanying text *infra*; but *see* *Associated Gen. Contractors v. Kreps*, 446 F. Supp. 553, 567 (D.R.I. 1978), discussed at notes 87-88 *infra*.

tractors for reaching reasonable minority representation in their work forces.⁵³ Under the authority of Executive Order 11,246 and pursuant to public hearings and other data investigations, the Department of Labor has established specific affirmative action plans for federal contractors in a number of metropolitan areas.⁵⁴ The first such program imposed by the Department of Labor was the so-called "Philadelphia Plan", which required that bids on any federal or federally-assisted construction contracts in the Philadelphia metropolitan area include affirmative action plans setting out specific goals for minority utilization in six skilled crafts.⁵⁵ The Philadelphia Plan was subsequently upheld as valid action within the executive power, and proscribed by neither Titles VI or VII of the Civil Rights Act nor the fifth amendment to the Constitution.⁵⁶ The constitutionality of this plan, and others similar to it, was recently reaffirmed in *Regents of the University of California v. Bakke*.⁵⁷

53. See, e.g., 41 C.F.R. § 60-1.40 (1977) (covering contractors dealing directly with government or involved in federally assisted construction); 41 C.F.R. §§ 60-2 to 60-2.32 (1977) (special rules for nonconstruction contractors). In establishing these goals and timetables, consideration is given to a number of factors, including the minority population in the facility's labor area and its unemployment rate, the percentage of such minority work force compared with the total work force in the labor area and the general availability of minorities having requisite skills in the labor force area. See 41 C.F.R. § 60-2.11 (1977).

54. E.g., 41 C.F.R. §§ 60-5 to 60-11 (1977). Based on clear findings that under utilization of minority workers exists in certain skilled trades in the construction industries and has resulted from exclusionary hiring practices, see, e.g., 41 C.F.R. § 60-5.10 (1977), the plans require hiring goals and timetables for specified trades. See, e.g., 41 C.F.R. § 60.5.21(a) (1977).

55. See *Contractors Ass'n v. Secretary of Labor*, 442 F.2d 159, 163 (3d Cir.), cert. denied, 404 U.S. 854 (1971).

56. 442 F.2d at 171, 173-74, 176-77. The court cited the past exclusionary practices of the unions, *id.* at 173, and the federal government's "vital interest" in having available the largest pool of qualified manpower possible, *id.* at 171, in upholding the plan's requirement of good faith efforts by federal contractors to achieve specific goals of minority employment in the particular trades. See also *Southern Ill. Builders Ass'n v. Ogilvie*, 471 F.2d 680 (7th Cir. 1972) (Illinois *Ogilvie* Plan); *Weiner v. Cuyahoga Community College Dist.*, 19 Ohio St. 2d 35, 249 N.E.2d 907, 908 (1969), cert. denied, 396 U.S. 1004 (1970) (Cleveland Plan); *Joyce v. McCrane*, 320 F. Supp. 1284 (D.N.J. 1970) (Newark Plan).

57. 98 S. Ct. 2733, 2754-55 n.40 (1978). One of the other cases reaffirmed in *Bakke* was *Associated Gen. Contractors of Mass., Inc. v. Altshuler*, 490 F.2d 9 (1st Cir. 1973), cert. denied, 416 U.S. 957 (1974). In that case, the court upheld a state-imposed 20% minority hiring goal in a federally-funded state construction project. Although a federal affirmative action plan (Boston Plan) did exist, the state made independent findings that minority membership in the unions (and therefore in the construction trades) was disproportionately low and that the Boston Plan was inadequate to redress such disparities. The state's plan differed in that it required a percentage goal for the entire project and not just within specific trades, and that it required contractors to take every possible measure to reach the goal, as opposed to the Boston Plan's good faith effort requirement. *Id.* at 12. The court cited the consistent general purposes behind each plan, *id.* at 14, the state's specific findings of historic minority exclusion, *id.* at 12-14, the compelling need to remedy such a "serious racial imbalance," *id.* at 18, the reasonableness of the percentage figure, *id.*, and adequate notice to the

In addition, the use of racial quotas to overcome the effects of past discriminatory patterns and practices in the areas of both employment⁵⁸ and legislative apportionment⁵⁹ has withstood constitutional attack. In education, the Supreme Court has upheld the use of approximate racial ratios in student and faculty assignments⁶⁰ in order to remedy the present effects of

contractor and a meaningful opportunity to prove the requisite compliance efforts, *id.* at 19. The First Circuit's reliance on statistics, however, as evidence of discrimination, must be evaluated in light of *Washington v. Davis*, 426 U.S. 229 (1976) (statistics alone do not prove discrimination).

58. In employment, an affirmative action override has been adjudged permissible in the area of promotional opportunities for minorities and women, subsequent to the employer's admission of previous discriminatory patterns and practices, and pursuant to a negotiated consent decree. *EEOC v. AT&T*, 556 F.2d 167 (3d Cir. 1977), *cert. denied*, 98 S. Ct. 3145 (1978). The override provides that when any Bell System company cannot achieve its prescribed minority/women promotion target (based on the availability of minorities and women in the relevant labor market) through utilization of normal selection standards, it *must* pass over more qualified or more senior candidates in favor of minorities who possess at least basic qualifications. 556 F.2d at 171-72. The court responded specifically to the charge that such a racial quota was unconstitutional. Employing the "strict scrutiny" test traditionally used for racial classifications, the court found the "substantial" state interest in "remedying the effect of a particular pattern of employment discrimination upon the balance of sex and racial groups" justified the discrimination inherent in the plan. *Id.* at 179. Recognizing that discrimination is often difficult to prove on a case by case basis, and that the identification of those deterred from seeking employment or promotion due to reports of racially discriminatory practices can be impossible, the Third Circuit held the remedy fashioned in this case to be constitutionally permissible because it was "reasonably calculated to counteract the detrimental effects a particular identifiable pattern of discrimination has had upon the prospects of achieving a society in which the distribution of jobs to basically qualified members of sex and racial groups is not affected by discrimination." *Id.* See also *Davis v. County of Los Angeles*, 566 F.2d 1334, 1342-44 (9th Cir. 1977), *cert. granted*, 98 S. Ct. 3087 (1978) (device of accelerated goals or quotas based on race to remedy the effects of past discrimination is constitutional).

In contrast, the training plan employed in *Weber v. Kaiser Alum. & Chem. Corp.*, 563 F.2d 216 (5th Cir. 1977), *petition for cert. docketed*, No. 78-435 (Sept. 14, 1978), requiring the admission of one minority worker to the training program for every white worker admitted until the percentage of minority craft workers reached the approximate percentage of the minority population in the surrounding area, was invalidated under Title VII of the Civil Rights Act. The program was undertaken voluntarily by Kaiser in an attempt to comply fully with the requirements of Exec. Order No. 11,246. The court's ruling was based on a finding that there had been no history of discriminatory hiring or promotion at Kaiser, and that the plan was therefore not an equitable remedy, but an unlawful racial preference prohibited by Title VII. *Id.* at 224. See also *Detroit Police Officers' Ass'n v. Young*, 446 F. Supp. 979 (E.D. Mich. 1978) (voluntarily implemented racial quota promotion plan violates Title VII).

59. In the area of legislative apportionment, the Supreme Court recently upheld the use of specific racial numerical quotas in drawing election district boundaries. *United Jewish Orgs. v. Carey*, 430 U.S. 144 (1977). The Court held that in order to ensure compliance with § 5 of the Voting Rights Act of 1965, a state may deliberately create black majorities in certain election districts through the realignment of district boundaries. *Id.* at 161.

60. See *Swann v. Board of Educ.*, 402 U.S. 1, 22-25 (1971) (student assignment); *United States v. Montgomery Bd. of Educ.*, 395 U.S. 225, 235-37 (1968) (faculty assignment).

purposeful past discrimination. However, absent a finding of previous discrimination, a voluntarily assumed set-aside of scholarship funds for "minority" students by a university has been held violative of Title VI by a lower court.⁶¹ In *Regents of the University of California v. Bakke*,⁶² one of the most controversial civil rights cases in a number of years, the Supreme Court held that a medical school's special admissions program for minority applicants, by totally foreclosing consideration of nonminorities, was illegal, but that race may nevertheless be used as a factor in the admissions process.⁶³ Although the full meaning and impact of the Court's decision may not be clearly understood for several years, Justice Powell's plurality opinion emphasized several items relevant to the use of racial quotas by the federal government in employment. He reiterated that any racial distinction is "inherently suspect" and requires the "most exacting scrutiny."⁶⁴ He stressed that findings of racially discriminatory practices were a prerequisite to instituting a remedial program based on race, and distinguished the preferential hiring cases under Executive Order 11,246 as based on the determination of previous discrimination made by a legislative or administrative body.⁶⁵ He also emphasized that congressionally authorized administrative actions are not affected by the decision,⁶⁶ and reaffirmed "the special competence of Congress to make findings with respect to the effects of identified past discrimination and its discretionary authority to take appropriate remedial measures."⁶⁷ In addition, four jus-

61. See *Flanagan v. President & Directors of Georgetown College*, 417 F. Supp. 377 (D.D.C. 1976). Even though white students could fall within the minority classification on the basis of social or economic disadvantage, the court held that because access to the "favored" category was more difficult for whites than for blacks, the set-aside constituted discrimination proscribed by both Title VI and the Constitution. *Id.* at 382. The court also cited the lack of any finding that the university had been guilty of past discrimination. *Id.* at 384.

62. 98 S. Ct. 2733 (1978).

63. *Id.* at 2764. Although nonminorities made application under the economically disadvantaged criteria, the University conceded they were never actually considered in the special admissions program.

64. *Id.* at 2749. However, it is not clear whether Justice Powell was prescribing the traditional "strict scrutiny" test or a slightly less stringent one. See *id.* at 2756-57.

65. *Id.* at 2754-55 & n.40. These cases are cited in notes 55-57 *supra*. Since the University was not charged with any such responsibility, it is unclear whether the Court would have allowed the special admissions program to stand even had there been findings of previous discrimination made by the University.

66. *Id.* at 2755 n.41.

67. *Id.* He cited *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968) and *Katzenbach v. Morgan*, 384 U.S. 641 (1966), as examples of Congress passing appropriate legislation under its section 5, fourteenth amendment and section 2, thirteenth amendment powers to remedy the effects of previous discrimination. 98 S. Ct. at 2755. In *Katzenbach v. Morgan*, the Supreme Court upheld § 4(e) of the Voting Rights Act, 42 U.S.C. § 1973b(e) (1976), as an appropriate exercise of congressional powers under § 5 of the fourteenth amendment, even

tices separately approved the MBE provision in the Public Works Employment Act, and cited other congressional enactments requiring race-conscious measures in order to remedy disadvantages suffered by racial minorities.⁶⁸ They also noted that Congress, fully aware of the relevance of Title VI, limited its application in the Public Works Employment Act by passage of the subsequent and more specific remedial legislation.⁶⁹

III. THE PUBLIC WORKS EMPLOYMENT ACT OF 1977

The Public Works Employment Act of 1977,⁷⁰ extending and amending an earlier public works act,⁷¹ was designed not only to provide additional funding for badly needed public facilities but also to funnel more accurately such funds into the areas of greatest unemployment.⁷² The MBE provision within the Act was first introduced from the floor of the House

though Congress had made no specific findings of the need for or purpose of the provision. Section 4(e) of the Act provides that no person who has completed sixth grade in an American school can be disqualified from voting by a Spanish language literacy test. Just as with the MBE provision in the Public Works Employment Act, § 4(e) had been introduced during floor debate on the full Voting Rights Act, and therefore no committee hearings took place nor were any reports made concerning the section. Nevertheless, the Court in *Katzenbach* deferred to Congress as the proper branch to weigh competing considerations, and refused to review the congressional determination. It recognized that certain "realities [are] familiar to the legislators" in requiring only a reasonable basis on which Congress could have acted to justify the provision. 384 U.S. at 653. The Court reiterated that § 5 of the fourteenth amendment is a "positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation" is necessary to secure fourteenth amendment guarantees. *Id.* at 651.

68. *Bakke*, 98 S. Ct. at 2778-79 & n.25 (Brennan, White, Marshall, & Blackmun, JJ., concurring & dissenting).

69. *Id.* at 2778-79. Justices Stevens, Burger, Stewart and Rehnquist found the special admissions program at the medical school unlawful on purely statutory grounds, as violative of Title VI. *Id.* at 2815. "Race cannot be the basis of excluding anyone from participation in a federally funded program." *Id.* at 2813-14. In so deciding, these justices stated that Title VI might proscribe actions which the Constitution does not. *Id.* at 2813. They did not address the question of the program's constitutionality.

70. 42 U.S.C.A. §§ 6701 to 6710 (West Supp. 1978). See note 11 *supra*.

71. Local Public Works Capital Development & Investment Act of 1976, 42 U.S.C.A. §§ 6701-6710 (West Supp. 1977). The Secretary of Commerce was given the responsibility of dispensing the funds through the Economic Development Administration, *Id.* at § 6701, and priority was to be given to those state or local governments with unemployment rates over the national unemployment rate. *Id.* at 6707(c). Concerned with the "long lag time sometimes associated with public works programs," Congress intended the projects to be funded and construction to begin quickly. H.R. REP. NO. 1077, 94th Cong., 2d Sess. 3 (1976).

72. See H.R. REP. NO. 20, 95th Cong., 1st Sess. 2 (1977). Provisions ensuring prompt implementation were again included, 42 U.S.C.A. §§ 6705(d), 6707(h)(1) (West Supp. 1978). Other provisions include a "Buy American" requirement, *Id.* at § 6705(f)(1)(A), two veterans preferences, *Id.* at § 6706, and an Indian tribe and Alaskan Native villages set-aside, *Id.* at § 6707(a)(1).

by Representative Parren Mitchell during debate on the full bill to amend and extend the program.⁷³ In introducing the provision, Rep. Mitchell noted the failure of existing programs to aid MBEs and emphasized that the minority business requirement was "the only way we are going to get the minority enterprises into our system."⁷⁴ A similar provision was also introduced by Senator Edward Brooke during consideration of the Senate version of the bill.⁷⁵ In support of the provision, Sen. Brooke categorized it as "a legitimate tool to insure a participation by hitherto excluded or unrepresented groups," as necessary "because minority businesses have received only 1 percent of the Federal contract dollar, despite repeated legislation, Executive orders, and regulations mandating affirmative efforts to include minority contractors in the Federal contracts pool."⁷⁶

The MBE provision has been attacked on both statutory and constitutional grounds in numerous lawsuits across the country.⁷⁷ Although a handful of suits are still pending, a majority of the courts have either denied preliminary injunctions or reached final decisions of constitutionality.⁷⁸ In *Fullilove v. Kreps*,⁷⁹ the first district court decision on the merits to hold the provision constitutional, the court employed the strict scrutiny equal protection test traditionally used with "suspect" classifications.⁸⁰ Conceding the lack of a specific congressional purpose to aid minorities in the formal legislative history of the Act, the court looked instead to what it termed the "debate rhetoric" and the "societal and legislative context" of the provision⁸¹ to find a compelling interest in resolving the problem of

73. See 123 CONG. REC. H1436 (daily ed. Feb. 24, 1977).

74. *Id.* at H1437. He stated that the provision was "designed to begin to redress this grievance that has been extant for so long" and was necessary in order to give "local political subdivisions . . . the added impetus to do those things that are right and fair." *Id.* at 1440. Representative Biaggi (D.N.Y.) argued that the Public Works Employment bill could be inequitable to MBEs without the provision and cited data on the underrepresentation of MBEs in federal contracting. *Id.* Representative Conyers (D. Mich.) supported the provision as a method of remedying the situation in which MBEs "get the 'works'" when trying to bid on contracts and have not been able to compete effectively through no fault of their own. *Id.*

75. See 123 CONG. REC. S3910 (daily ed. March 10, 1977).

76. *Id.*

77. See note 16 *supra* and cases discussed therein.

78. *Id.*

79. 443 F. Supp. 253 (S.D.N.Y. 1977), *aff'd*, 584 F.2d 600 (2d Cir. 1978).

80. 443 F. Supp. at 257. When a "suspect" class is involved, this standard of review requires that a challenged provision be either "necessary" or the most narrowly drawn means by which to achieve a compelling state interest. *Id.* See *Korematsu v. United States*, 323 U.S. 214 (1944) (race held to be suspect classification requiring "most rigid scrutiny"). See also *Graham v. Richardson*, 403 U.S. 365 (1971) (alienage is a suspect class).

81. This includes the ample empirical data available to Members of Congress and their knowledge of numerous antidiscrimination measures taken by the government in recent years. 443 F. Supp. at 257-59. Citing *Katzenbach v. Morgan*, 384 U.S. 641 (1966), the

racial discrimination against MBEs in many areas of the country.⁸² The court also concluded that the means adopted by Congress to resolve this problem were necessary, given the consistent failure of previous programs, the nature of this program, and the lack of less obtrusive but still effective alternatives.⁸³

The *Fullilove* decision was affirmed by the Second Circuit in an opinion handed down after *Bakke*. On appeal, it was not disputed that a compelling state interest was served by remedying past discrimination.⁸⁴ Instead, appellants argued that there had not been a sufficient legislative record to support the lower court's conclusion about the set-aside.⁸⁵ The Second Circuit ruled, however, that in view of the extensive legislation during the past few years aimed at eradicating racial discrimination, no other purpose could be ascribed to it.⁸⁶ In a recent decision, however, the absence of legislative findings was explained by the United States District Court in Rhode Island as evidence of a clear consensus that such a remedy was required.⁸⁷ The court disputed the need for making "judicial-like" findings of past discrimination prior to enacting remedies.⁸⁸ Moreover, the court identified three separate constitutional sources of congressional power which could justify the use of such benign racial classifications.⁸⁹

court emphasized that the crucial issue was not whether Congress had made a specific finding of previous racial discrimination in the construction industry, but was whether such a finding could have been justified. 443 F. Supp. at 259-60 n.15.

82. *Id.* at 260.

83. *Id.* at 260-62. Important considerations were the short-term nature of the program and the reasonableness of the 10% figure. *Id.* at 261-62. In addition, the court found incredible the plaintiffs' argument that the MBE requirement violated the Civil Rights Acts of 1866 and 1964, for if race sensitive remedial measures could not be taken to correct racial discrimination's effects, "minority groups would forever be frozen into the status quo." *Id.* at 262.

84. *Fullilove v. Kreps*, 584 F.2d 600, 603 (2d Cir. 1978); see *Bakke*, 98 S. Ct. at 2757-59. The Second Circuit found it unnecessary to determine whether such a compelling state interest was needed to justify the discriminatory allocation of federal funds since it believed the provision could pass whatever scrutiny could be applied to it.

85. 584 F.2d at 603.

86. *Id.* at 604-05. The court indicated that it would be less deferential toward a similar provision if mandated by a state legislature or by an administrative agency since these bodies do not share Congress' competence for ameliorating the effects of past discrimination. *Id.* at 604 (citing *Bakke*, 98 S. Ct. at 2755).

87. *Associated Gen. Contractors v. Kreps*, 450 F. Supp. 338, 348 n.4 (D.R.I. 1978).

88. The court noted that Congress is so familiar with the history of racial discrimination that reciting detailed findings of fact is unnecessary. *Id.* at 348 n.4, 354-55. In addition, the court indicated that traditional judicial deference should be exercised in the context of congressional findings of racial imbalance and discrimination. *Id.* at 355. However, the court agreed with the *Fullilove* decision that the provision passed even the strict scrutiny test. *Id.* at 357.

89. *Associated Gen. Contractors v. Kreps*, 450 F. Supp. 338, 346-47 (D.R.I. 1978). These congressional powers, derived from the Constitution, are (1) the spending power, to

Lower court denials of preliminary injunctions generally have been upheld by courts of appeals.⁹⁰ One district court, however, has found the MBE provision unconstitutional as applied. In *Wright Farms Construction, Inc. v. Kreps*,⁹¹ the Vermont district court concluded that a specific finding of previous discrimination is a prerequisite to the permissible use of racial quotas.⁹² The court found no such discrimination against minorities in the state of Vermont and was unable to point to any such determination by Congress.⁹³ The court, however, specifically limited its decision to the facts of that particular case.⁹⁴

A district court in California has, in addition, held the MBE provision unconstitutional on its face.⁹⁵ The government appealed the decision di-

be exercised for the common good (art. I, § 1, cl. 1), (2) the power to prevent federal, state, and local governments from involvement in private discriminatory practices (amend. XIV, § 5), and (3) the power to eradicate "the badges and incidents of slavery" (amend. XIII, § 2). *Id.* The court found that Congress could rationally have determined, given the pervasive discrimination in the construction industry and the disproportionately low percentage of minority participation in federal contracting, that contracts under the Public Works Employment Act would be awarded to firms which discriminate against MBEs. In the court's view, the symbiotic relationship between the discriminating contractor and the federal government implicates the government in such discrimination and triggers congressional remedial enforcement powers under § 5 of the fourteenth amendment. *Id.* at 349. The court also noted that Congress has the power to "eliminate the vestiges of the badges and incidents of slavery which place black businessmen and workers in disadvantageous positions when they compete for [federal] monies." *Id.* at 363. In this situation, "Congress has declared that white contractors may not reap 100% of the benefits of governmental contracts merely because they can outbid minority contractors in a situation also created by socioeconomic forces tainted by racial discrimination." *Id.* at 364. Thus, the court reasoned that the thirteenth amendment would be a "mere paper guarantee if Congress were powerless to assure the black person an equal chance to earn [a] dollar." *Id.* at 364.

90. See note 16 *supra*.

91. 444 F. Supp. 1023 (D. Vt. 1977).

92. *Id.* at 1037. "The use of quotas is constitutional only to the extent that it is remedial." *Id.*

93. *Id.* at 1038-39. In fact, the court cited 1977 statistics showing that the Spanish-speaking population of Vermont has a higher median income than the nonminority population, and that a greater percentage of nonminority families earn below the poverty level than do black families. *Id.* at 1040. In addition, minorities comprise less than one percent of the state's population. *Id.*

94. The court pointedly refused to express an opinion as to the constitutionality of the provision as applied to any other case. *Id.* at 1042. The court distinguished the MBE set-aside from a "carefully conceived remedial scheme" such as the Voting Rights Act, and cited the absence of an opportunity to rebut the presumption of discrimination and the recognizably adverse impact on nonminorities such as the plaintiff. *Id.* at 1039. It is interesting to note that the plaintiff in this case was one corporation made up of only two people, not a group of construction associations as in all other cases, and the injury plaintiff was able to establish was considerably more substantial. See, e.g., *EEOC v. Sheet Metal Workers Local 28*, 532 F.2d 821, 828 (2d Cir. 1976) (effects of remedial program shall not concentrate upon a small, identifiable group of nonminority persons).

95. *Associated Gen. Contractors v. Secretary of Commerce*, 441 F. Supp. 955 (C.D. Cal.

rectly to the Supreme Court, which vacated and remanded the case for consideration of mootness, since all of the funds authorized and appropriated under the Act had been obligated when the district court's judgment was entered.⁹⁶ On remand, the district court determined that the issue was not moot, and reiterated its holding that the set-aside is facially unconstitutional.⁹⁷ The court acknowledged, however, that its finding of unconstitutionality directly conflicts with the ruling of the several circuit courts which have passed on this question.

IV. THE FUTURE OF THE MBE SET-ASIDE

It appears that the MBE provision in the Public Works Employment Act of 1977 has been an effective affirmative action tool. The Economic Development Administration projects that MBE participation in the program will have exceeded fourteen percent when all projects are completed.⁹⁸ As a measure primarily functioning to increase MBE involvement in a federal grants program, it must be considered a success.⁹⁹

The provision's treatment by the courts is instructive regarding its future usefulness. Of those courts which have reached final decisions, most have found it constitutional based on a number of factors: (1) the sufficiently compelling state interest of increasing the level of MBE involvement in

1977), *vacated and remanded*, 98 S. Ct. 3132-33 (1978), *aff'd on remand*, No. 77-3738 (C.D. Cal. Oct. 20, 1978).

96. On the question of mootness, the district court relied upon a series of Supreme Court decisions holding that an otherwise moot case, "capable of repetition, yet evading review," can be heard. *See, e.g.,* Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515 (1911). The court found that although all the currently appropriated funds under the Act had already been obligated, there was nevertheless a reasonable expectation that Congress would enact appropriation bills with similar minority set-asides in the near future. Additionally, the future set-aside would likely "evade review" because of the speed with which the appropriations are usually spent. Finally, the court found that the Government had not met the stringent tests for mootness outlined in *United States v. W. T. Grant Co.*, 345 U.S. 629 (1953) and *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199 (1968).

As to the merits of the case, the court concluded that Justice Powell's opinion in *Bakke* mandated invalidation of the set-aside. Under *Bakke*, "while affirmative action is permissible, racial quotas are impermissible and unconstitutional." Although Congress' interest in promoting minority employment in the construction industry is legitimate, the court concluded that there are less intrusive means than the ten percent quota for accomplishing these ends. *Associated Gen. Contractors v. Secretary of Commerce*, No. 77-3738 (C.D. Cal. Oct. 20, 1978).

97. *See* notes 68-69 and accompanying text *supra*; note 111 *infra*.

98. Conversation with Lewis Podolske, Programs Specialist, Office of Assistant Secretary, Economic Development Administration in Washington, D.C., (Aug. 4, 1978). This translates into over \$560,000,000 in federal funds to MBEs. *See* note 31 *supra*.

99. It will be left to other analyses to evaluate other aspects of the program, such as the frequently criticized MBE certification procedure (which apparently facilitates the involvement of non-bonafide MBEs) and the complex problem of MBE failures.

federal contracts and programs in order to remedy the effects of past discrimination,¹⁰⁰ (2) the abysmal failure of previous remedial programs using less intrusive means,¹⁰¹ (3) the resultant need for a different and especially ambitious remedial scheme,¹⁰² and (4) the reasonableness of the ten percent figure, given the availability of MBE firms in the types of work to be done.¹⁰³ As further justification, the courts have pointed to the short-term nature of the program and its specifically expeditious schedule,¹⁰⁴ both of which serve the Act's objectives of reducing existing unemployment and providing public facilities as quickly as possible. These two factors contributed largely to the granting of only prospective relief by those few courts which found the provision unconstitutional.¹⁰⁵

The court challenges have been strongest in their attack on the adequacy of legislative findings of previous discrimination against MBEs. Arguing that such findings are an essential prerequisite to the lawful fashioning of such a race-specific remedy and are absent in the legislative history of this Act, the Vermont federal district court concluded in *Wright Farms* that the provision was unconstitutional as applied.¹⁰⁶ This case is important not only because of its singular determination of unconstitutionality, but also because it points out a troubling aspect of the provision. The ten percent minority requirement applies nationwide and is not adjustable to the specific remedial requirements of particular geographic areas.¹⁰⁷ Although the ten percent figure is an entirely reasonable one on a national scale, as a majority of the courts have concluded, it is arguably inapposite in an area in which less than one percent of the population is minority.¹⁰⁸ Most of the courts, however, have accepted what legislative history exists from the

100. See, e.g., notes 82 & 84 and accompanying text *supra*.

101. See, e.g., text accompanying note 83 *supra*.

102. See, e.g., notes 83, 87 & 88 and accompanying text *supra*.

103. See, e.g., note 83 *supra*.

104. *Id.* All grants have been obligated under the program, and Congress must approve any extension; therefore, the legislature can evaluate, at that time, whether the MBE provision remains necessary and reasonable. This element of oversight is critical to such an ambitious program. See also note 11 *supra*.

105. A significant local benefit inures in such a program, and the courts were reluctant to impose retroactive relief, given the counterproductivity such relief would have on the local economies. See, e.g., *Associated Gen. Contractors v. Secretary of Commerce*, 441 F. Supp. 955, 970-71 (C.D. Cal. 1977), *vacated and remanded*, 98 S. Ct. 3132 (1978).

106. 444 F. Supp. 1023 (D. Vt. 1977). See notes 91-94 and accompanying text *supra*.

107. Although a waiver of this figure may be obtained in some cases, the EDA GUIDELINES, *supra* note 12, indicate that the waiver is quite difficult to obtain. See note 13 *supra*.

108. This argument presupposes that the most fair and reasonable MBE participation rate is that which most closely approximates the actual minority representation in the relevant labor market. This makes no allowance for the increased minority influx which might take place as areas provide more minority employment opportunities.

floor debates¹⁰⁹ and have also factored in Congress' general awareness of the history of racial discrimination in this country and the general societal context surrounding the bill's enactment.¹¹⁰

One additional and significant distinction between this provision and those racial quotas or goals which have been struck down as unconstitutional¹¹¹ is the combined legislative and executive support it has received.¹¹² Not only does it have the important congressional mandate,¹¹³ but the executive branch has repeatedly called for increased MBE participation in federal contracts and grants, and specifically supports this provision.¹¹⁴ Moreover, MBE set-asides are supported by legislative determinations of both a compelling state interest to be served and the necessity for this provision. As such, the MBE set-aside appears to be the type of remedial measure which a majority of the Supreme Court would find acceptable.¹¹⁵

It is important to put the Act itself into perspective. It provides public

109. See notes 73-76 and accompanying text *supra*.

110. See, e.g., notes 81, 85, 86, & 88 and accompanying text *supra*. Even without the evidence of past and present racial discrimination, the statistical evidence alone is sufficient to support an inference that discriminatory treatment has impeded minority access to business ownership. See *Hazelwood School Dist. v. United States*, 433 U.S. 299, 307-08 (1977); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 340 n.20 (1977).

111. See, e.g., *Regents of the Univ. of Cal. v. Bakke*, 98 S. Ct. 2733 (1978); *Weber v. Kaiser Alum. & Chem. Corp.*, 563 F.2d 216 (5th Cir. 1977) *petition for cert. docketed*, No. 78-435 (Sept. 14, 1978); *Detroit Police Officers' Ass'n v. Young*, 446 F. Supp. 979 (E.D. Mich. 1978). These cases are discussed in notes 58 & 62-69 and accompanying text *supra*.

112. This provides it with at least an initial presumption of constitutionality. See notes 23 & 29 *supra*. Traditional judicial deference to a coequal branch is then afforded to the legislative determination of the existence of a "compelling state interest" for which the measure is "necessary." It could be argued that no deference is owed when strict scrutiny is triggered. Nevertheless, that deference has been extended in the case of this congressionally authorized provision. See, e.g., notes 81 & 88 *supra*.

113. The significance of such a legislative endorsement is supported by the Supreme Court's decision in *Bakke*. Justice Powell speaks of the appropriateness of the congressional forum for fashioning remedies to identified past discrimination. See notes 64-67 and accompanying text *supra*. It is possible that Justice Powell might have concluded that the legislative history is so lacking in specific findings that Congress did not appropriately fulfill its fact-finding task. However, *Katzenbach v. Morgan*, 384 U.S. 641 (1966), specifically supports the constitutionality of a section of the Voting Rights Act which is as lacking in formal legislative history as is the MBE provision. Moreover, in a separate opinion of *Bakke*, the MBE provision is specifically and approvingly cited by four Justices who also dismiss any conflict between the MBE provision and Title VI. See notes 67-68 and accompanying text *supra*. Four other justices, on the other hand, advocate a wholly different statutory interpretation. See note 69 *supra*.

114. See notes 47 & 48 and accompanying text *supra*.

115. See notes 111 & 113 *supra*. It has been suggested that the use of socially and economically disadvantaged, rather than racial, criteria is easier to defend legally. In industries such as construction, however, the most pressing problems are related directly to race rather than to economic status.

funds to high unemployment areas, with special emphasis on relieving unemployment in the construction industry. It contains a number of "national goals" clauses, preferences and set-asides other than the MBE set-aside,¹¹⁶ most of which reflect a national concern about the high unemployment rates and economically depressed status of certain segments of the American population.¹¹⁷ The MBE provision responds specifically to that concern.¹¹⁸ As a federal grants program, which dispenses funds from all American taxpayers, the Act is especially and appropriately suited to utilization as a tool to further legitimate national policy goals. Congress could, and did, make the determination that this program was the proper vehicle for a particularly ambitious remedial scheme.

As a result of the success of this program in bringing MBEs into the mainstream of federal contracting, it is unfortunate that the use of MBE set-asides will not immediately become more widespread. The part of President Carter's urban policy package which included an MBE set-aside provision for the creation of a three-year Labor Intensive Public Works program has failed to gather sufficient congressional support.¹¹⁹ Somewhat different from the Public Works Employment Act's MBE provision, it provided for a national "set-aside" of ten percent of grant funds for MBEs, with a flexible range between two and fifteen percent for each community depending upon the availability of minority group members in each area.¹²⁰ As such it was adjustable to the diverse requirements of

116. See notes 24 & 72 *supra*.

117. As Rep. Biaggi noted during floor debate, see note 74 *supra*, the MBE provision was required to prevent this program from becoming yet another federally funded project resulting in inequities to MBEs, given the severe underrepresentation of MBEs in federal contracting. The courts which have evaluated the MBE provision have also recognized the extent to which the federal government is implicated in the funding of projects which "perpetuate" the effects of previous discrimination. See note 89 *supra*. It can also be argued that this "perpetuation" is actually discrimination in and of itself.

118. As a supplemental program, the MBE program was designed to put additional people to work, and therefore does not deprive anyone of existing employment. See *Associated Gen. Contractors v. Kreps*, 450 F. Supp. 338, 352 n.7 (D.R.I. 1978). It is also arguable that the Public Works Employment Act does not exclude anyone, but instead requires that federal dollars be more equitably spread to a larger pool of qualified businesses. See *Fullilove v. Kreps*, 584 F.2d at 607-08. The fact that a waiver exists lends support to this interpretation. If there are no qualified MBEs within a reasonable area, the MBE provision is inapplicable. See note 13 *supra*.

119. Bills introduced into the House and Senate incorporating that proposal failed to pass. See S. 3186, 95th Cong. 2d Sess., 124 CONG. REC. S8845 (daily ed. June 8, 1978); H.R. 12993, 95th Cong., 2d Sess., 124 CONG. REC. H5062 (daily ed. June 7, 1978); in addition, a bill by Congressman Roe to provide an extension for the Public Works Employment Act of 1977 also failed to pass the House. H.R. 11610, 95th Cong., 2d Sess., 124 CONG. REC. H2184 (daily ed. Mar. 16, 1978).

120. H.R. 11610 provided in part:

Each grant and subgrantee must spend at least its prescribed share for minority

different communities and areas, and avoided the most troublesome aspect of the Public Works Employment Act's MBE provision.

As a legitimate and highly effective legislative tool for increasing MBE participation in federal contracting programs, this kind of provision should have been more widely adopted. Its legality appears firmly established in the legislative context. Nevertheless, in order to insulate potential legislative programs from constitutional and statutory attack, it is important that Congress document the previous discrimination in the applicable areas, and demonstrate the appropriateness of the remedial scheme to the resolution of the problem. In addition, the statute should specifically clarify its consistency with Title VI and its benign and remedial purpose.

As for the outlook on administrative utilization of the MBE set-aside, it appears it would be acceptable for a federal agency to make a finding of past discriminatory patterns or practices within an industry or within the agency itself, and then to justify the set-aside as a remedial scheme appropriately designed to redress that discrimination.¹²¹ The executive agencies are particularly suited to making such findings and fashioning appropriate remedies since they have specific resources and expertise in their fields which Congress does not. They can also evaluate the need for a procedure such as the MBE set-aside on a contract by contract, or grant by grant, basis as opposed to program-wide application which is done by the legislature. Executive agencies can thereby avoid the challenge of arbitrariness by reacting to specific factual contexts in different ways, each reasonably related to the various requirements.

In the area of federal contracts and grants programs, the legislative and agency-wide adoption of MBE set-asides¹²² would have an immediate beneficial impact on the minority business community. By requiring a specific and reasonable percentage of qualified MBE participation, the set-aside forces contractors to look beyond their tightly established circle of business connections. It also provides MBEs with a chance to prove their

business enterprises, unless the Secretary determines otherwise. Such share shall reflect the percentage of minority-group members within the population residing in the area served by such grantee or in areas from which minority business enterprises might reasonably be expected to travel to perform services on projects activities in the area served by the grantee. The prescribed shares shall be set between 2% and 15%, so that at least 10% of the funds appropriated nationally under this title are targeted for minority business enterprises.

121. See *Regents of the Univ. of Cal. v. Bakke*, 98 S. Ct. 2733, 2754 & n.40 (1978); *but see* note 86 *supra*.

122. These can be employed either as an end unto themselves or as a means to reach a percentage goal, as is the case with the MBE set-aside provision in the Department of Transportation's MBE program. Given the President's call for a tripling of MBE procurement in federal programs by fiscal year 1979, this procedure is especially useful as a means of administrative compliance.

capabilities, an opportunity long denied them, first through overt discrimination and presently through more subtle forces, such as negative stereotypes and expectations on the part of nonminority contractors. The provision also encourages the development of bona fide partnerships with integrated ownership, since businesses with as little as fifty percent minority ownership qualify for the MBE classification. This arrangement provides the minority businessperson with the needed experience and business opportunities while at the same time it provides the nonminority businessperson with the MBE status. In the final analysis, it is necessary to require MBE participation in the established business community in order to change the status quo of extreme MBE underrepresentation.

V. CONCLUSION

After eight years of well-meaning but mostly ineffective affirmative action efforts on the part of the federal government to improve the lot of minority business enterprises, Congress has provided minority business owners with a potentially mighty remedial tool—the MBE set-aside. It has, for the most part, survived an onslaught of lawsuits challenging its constitutionality, and the outlook appears bright for adoption of numerous new applications of its basic theme: a percentage requirement for MBE participation.

Due to its remedial nature, however, the MBE set-aside should not exist forever. When MBEs are finally afforded real equal opportunity to compete for contracts and subcontracts, and when the racial make-up of a business no longer carries with it special favor or disfavor, the minority set-aside will cease to be needed. Until that time, the MBE provision is necessary as a powerful tool to implement important national goals and to foster minority business ownership and development.

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