



1981

# The Constitutionality of Affirmative Action: Views from the Supreme Court

Jesse H. Choper

*University of California, Berkeley*

Follow this and additional works at: <https://uknowledge.uky.edu/klj>

 Part of the [Civil Rights and Discrimination Commons](#), and the [Constitutional Law Commons](#)  
**Right click to open a feedback form in a new tab to let us know how this document benefits you.**

## Recommended Citation

Choper, Jesse H. (1981) "The Constitutionality of Affirmative Action: Views from the Supreme Court," *Kentucky Law Journal*: Vol. 70 : Iss. 1 , Article 1.

Available at: <https://uknowledge.uky.edu/klj/vol70/iss1/1>

This Article is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact [UKnowledge@lsv.uky.edu](mailto:UKnowledge@lsv.uky.edu).

# The Constitutionality of Affirmative Action: Views from the Supreme Court\*

BY JESSE H. CHOPER\*\*

Race-conscious government programs—variously called affirmative action, benign discrimination, or reverse discrimination—that classify people on the basis of race or ethnicity with the aim of helping, rather than harming, racial and ethnic minorities have now existed for over a decade. Yet, although each current Supreme Court Justice except Justice O'Connor has addressed the issue, there is still no authoritative opinion of the Court on whether such programs violate the constitutional guarantee of equal protection of the laws.

## I. THE UNCERTAIN MESSAGE OF *BAKKE*

In the main, the Court managed to avoid the question altogether until 1978 in the famous case of *Regents of the University of California v. Bakke*.<sup>1</sup> *Bakke* involved a special admissions plan adopted by the Medical School of the University of California at Davis which set aside sixteen places in each entering class of 100 for qualified minority applicants.<sup>2</sup>

A fundamental issue that had to be addressed in *Bakke* was the precise constitutional standard or test to be utilized in determining the legality of the affirmative action plan. Proponents of the Davis program—and of affirmative action generally—had urged that it be judged by the most lenient equal protection test, the so-called “traditional” or “minimum rationality” approach.<sup>3</sup>

---

\* This paper, slightly modified, was delivered as the Roy and Virginia Ray Lecture at the University of Kentucky College of Law, April 8, 1981. I wish to express my thanks to Dean Thomas P. Lewis for his kindness and hospitality at the time.

\*\* Professor of Law, University of California, Berkeley; B.S. 1957, Wilkes College; LL.B. 1960, University of Pennsylvania; D.Hu. Litt. 1967, Wilkes College. I want, as usual, to thank my colleague, Paul J. Mishkin, for reviewing an earlier draft.

<sup>1</sup>438 U.S. 265 (1978).

<sup>2</sup> *Id.* at 275.

<sup>3</sup> See generally W. LOCKHART, Y. KAMISAR & J. CHOPER, CONSTITUTIONAL LAW: CASES—COMMENTS—QUESTIONS 1246-58 (5th ed. 1980) [hereinafter cited as LOCKHART].

Under that test, which the Supreme Court applies to most discriminations, a classification is upheld so long as it is rationally related to a constitutionally permissible state interest.<sup>4</sup> No Justice of the Supreme Court, however, has agreed that this is the appropriate test by which to judge affirmative action programs.

At the other end of the Court's equal protection spectrum is the so-called "strict scrutiny" approach. Under that standard, which the Court regularly applies to government action that discriminates *against* racial and ethnic minorities, the discrimination is invalid unless it is *necessary* (not merely rationally related) to further a *compelling* (not simply a permissible) state interest.<sup>5</sup>

In *Bakke*, only five members of the Court spoke to the constitutionality of affirmative action.<sup>6</sup> Four—Justices Brennan, White, Marshall, and Blackmun—took the position that benign racial or ethnic discrimination should be judged by a middle level equal protection standard—one somewhere between the minimum rationality test, under which virtually everything passes muster, and the strict scrutiny test, under which virtually nothing passes muster.<sup>7</sup> Their view was that race-conscious affirmative action must be *substantially* related to an *important* state interest.<sup>8</sup> They added that this important state interest must be articulated by the government agency that adopts the program.<sup>9</sup>

Employing this standard, these four Justices voted to uphold the set-aside of sixteen places in the Davis program. They reasoned that remedying the present effects of past societal discrimination against racial and ethnic minorities is a sufficiently important interest to sustain affirmative action programs.<sup>10</sup> But they emphasized that they would invalidate such benign discrimination if it stigmatized anyone on the basis of race or ethnicity,

---

<sup>4</sup> See, e.g., *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

<sup>5</sup> See LOCKHART, *supra* note 3, at 1264 (Note 1), 1278 (Note 1).

<sup>6</sup> The four Justices who joined Justice Powell to comprise the majority in *Bakke*—Chief Justice Burger, and Justices Stewart, Rehnquist and Stevens—agreed that the Davis program was unlawful, but did so on the ground that the set-aside was barred by Title VI of the Civil Rights Act of 1964 which forbids racial or ethnic discrimination in any program that receives federal financial assistance. 438 U.S. at 408 (Stevens, J., concurring in part and dissenting in part).

<sup>7</sup> 438 U.S. at 357-62.

<sup>8</sup> *Id.* at 359.

<sup>9</sup> *Id.* at 362-63.

<sup>10</sup> *Id.* at 362.

or if it singled out those poorly represented in the political process to receive the brunt of the burdens imposed.<sup>11</sup> This qualification is important to note since it may be shown in some future affirmative action case that the beneficiaries of the program are in some way stigmatized or, more likely, that those who are bearing the brunt of the program are themselves members of a poorly represented minority group. If so, Justices Brennan, White, Marshall, and Blackmun—who are generally relied upon to sanction affirmative action—may nonetheless vote to invalidate the program.

An excellent example of innocent minority groups burdened by otherwise altruistic endeavors is found in the case of *United Jewish Organizations v. Carey*,<sup>12</sup> which involved a redistricting system in New York in which the plaintiffs were Hasidic Jews. Before redistricting, the Hasidim had been concentrated in one senate district which had a white majority and where the Hasidic Jews constituted an important voting bloc.<sup>13</sup> To achieve better racial balance, the redistricting plan had divided the Hasidic Jews between two senate districts, both of which had nonwhite majorities.<sup>14</sup> The Hasidim did not contend that this result was motivated by anti-Semitism and most of the Justices did not focus on that issue. Nevertheless, the case pointed to a result often attendant to the political process, namely, that those bearing the brunt of an affirmative action program will themselves belong to a poorly represented, identifiable minority group.

Justice Powell was the only other member of the Court to address the constitutionality of affirmative action in *Bakke*. He took the view that *all* racial classifications should be subject to strict scrutiny—that is, to be valid they must be necessary to the furtherance of a compelling state interest.<sup>15</sup> Insofar as college and professional school admissions were concerned, Justice Powell found a compelling interest in advancing diversity in the student body.<sup>16</sup> Further, he reasoned that it may well be necessary to give

---

<sup>11</sup> *Id.* at 361.

<sup>12</sup> 430 U.S. 144 (1977).

<sup>13</sup> *Id.* at 152.

<sup>14</sup> *Id.* at 151-52.

<sup>15</sup> 438 U.S. at 288-305.

<sup>16</sup> *Id.* at 311-14.

a "plus" to race or ethnic background in the admissions process to achieve such desired heterogeneity.<sup>17</sup> Thus, five members of the Court in *Bakke*—Justices Brennan, White, Marshall and Blackmun, along with Justice Powell—permitted some use of racial or ethnic criteria in admissions to public higher education.

Nevertheless, Justice Powell voted to strike down the set-aside of sixteen places in the Davis program. Such a practice was, he reasoned, more than simply giving a "plus" for race or ethnicity.<sup>18</sup> He would find the use of a racial-ethnic *quota* valid only if used to remedy a past constitutional or statutory violation against the racial or ethnic minority now being benefited.<sup>19</sup> Further, he said, the constitutional or statutory violation being remedied had to be identified by a properly authorized government body.<sup>20</sup>

In Justice Powell's view, the *Bakke* program did not meet that standard. First, it had been enacted by the Medical School faculty pursuant to a grant of authority from the University's Board of Regents, neither of which had "the authority and capability" to identify constitutional or statutory violations.<sup>21</sup> Second, even if the Regents were properly authorized, Justice Powell said that they had not identified any constitutional or statutory violation since the Medical School "had no history of discrimination."<sup>22</sup> Rather, Justice Powell contended, the Regents and the Medical School faculty were merely seeking to remedy general societal discrimination against racial and ethnic minorities, a purpose for which racial-ethnic quotas cannot be utilized.<sup>23</sup>

## II. THE SEARCH FOR CLARIFICATION IN *FULLILOVE*

The other major Supreme Court decision on affirmative action—less well known than *Bakke*, but equally important—is *Fullilove v. Klutznick*.<sup>24</sup> It involved the Public Works Employment Act of 1977,<sup>25</sup> in which Congress appropriated \$4 billion to

---

<sup>17</sup> *Id.* at 317-18.

<sup>18</sup> *Id.* at 318-20.

<sup>19</sup> *Id.* at 307.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 309.

<sup>22</sup> *Id.* at 296 n.36.

<sup>23</sup> *Id.* at 310.

<sup>24</sup> 448 U.S. 448 (1980).

<sup>25</sup> Public Works Employment Act of 1977, Pub. L. No. 95-28, 91 Stat. 116.

state and local governments for construction projects. Specifically at issue was the "minority business enterprise" (MBE) provision of the Act, which stipulated that ordinarily at least ten percent of the funds granted be expended for minority businesses.<sup>26</sup> The statute defined "minority business enterprise" as one with at least fifty percent ownership by "citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts."<sup>27</sup>

The program at issue in *Fullilove* was similar to the Davis program in *Bakke* in that both involved a set-aside or specific quota—sixteen places in the Davis Medical School class in *Bakke*, and ten percent of the funds in *Fullilove*. By a vote of six to three, the Court held that the MBE provision did not violate the equal protection component of the due process clause of the fifth amendment. As has become increasingly true, especially when the issue is controversial, there was no opinion for the Court. Rather, there were two principal opinions in *Fullilove*, written on behalf of a majority of the Court with three Justices subscribing to each.

Justice Marshall, joined by Justices Brennan and Blackmun, voted to uphold the program.<sup>28</sup> This voting bloc came as no surprise since these Justices had clearly established their position in *Bakke* that affirmative action quotas are valid so long as they are substantially related to an important and articulated government interest.<sup>29</sup> Justices Marshall, Brennan, and Blackmun had no trouble finding that the MBE provision met this standard.

The other principal opinion in *Fullilove*, announcing the judgment of the Court, was by Chief Justice Burger, joined by Justices White and Powell.<sup>30</sup> Of great significance were the votes

---

<sup>26</sup> 42 U.S.C. § 6705(f)(2) (1976 & Supp. III 1979).

<sup>27</sup> *Id.*

<sup>28</sup> *Fullilove v. Klutznick*, 448 U.S. at 517 (Marshall, J., concurring).

<sup>29</sup> *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. at 359 (Brennan, White, Marshall & Blackmun, JJ., concurring in part and dissenting in part). See notes 7-11 *supra* and accompanying text for a discussion of the views of these Justices in *Bakke*.

<sup>30</sup> 448 U.S. at 453. Justice White's vote to uphold the MBE provision was anticipated because of his participation with the Brennan "group of four" in *Bakke*. 438 U.S. at 324. The intriguing question to ponder with respect to Justice White in *Fullilove* relates to internal decisionmaking, i.e., why did he join the Burger opinion rather than the Marshall opinion which echoed the *Bakke* analysis to which Justice White subscribed? Perhaps the

of Chief Justice Burger and Justice Powell to uphold the MBE provision since their positions in *Fullilove* raise to six the number of Justices committed to the view that the Constitution does not prohibit *all* race-conscious affirmative action. It should be apparent that their views require careful study because each represents the potential fifth vote necessary to sustain future affirmative action programs.<sup>31</sup> Before examining their positions, however, let us briefly identify the views of the three dissenting Justices in *Fullilove*.

### A. *The Dissents in Fullilove*

The clearest dissenting stance is that of Justices Stewart and Rehnquist. In an opinion authored by Justice Stewart,<sup>32</sup> they came very close to adopting the view articulated in the elder Justice Harlan's dissent in *Plessy v. Ferguson*,<sup>33</sup> that the equal protection clause demands that government be color-blind.<sup>34</sup> Justices Stewart and Rehnquist argued that *all* racial discriminations are invalid, with the limited exception that a court of equity may impose burdens on a racial basis in order to remedy the actual effects of a prior legal violation against a racial or ethnic group in order to make the identified victims whole.<sup>35</sup> This single qualification to an otherwise blanket condemnation of racial discrimination can be illustrated in two contexts: employment and education.

First, suppose a court finds that an employer has discriminated against black employees, thus violating Title VII of the Civil Rights Act of 1964. That court, in the view of Justices Stewart and Rehnquist, could remedy such injustice by increasing the seniority of the victimized black workers and reducing the seniority of those white workers who presumably had been

---

best explanation for this somewhat surprising voting arrangement is that Justice White sought to lend sufficient numerical strength to the Burger opinion so as to allow the Chief Justice to announce the judgment of the Court.

<sup>31</sup> Chief Justice Burger and Justice Powell each wrote separate opinions with Justice Powell joining Chief Justice Burger and writing for himself as well.

<sup>32</sup> 448 U.S. at 522 (Stewart, J., dissenting).

<sup>33</sup> 163 U.S. 537 (1896).

<sup>34</sup> *Id.* at 539 (Harlan, J., dissenting).

<sup>35</sup> *Fullilove v. Klutznick*, 448 U.S. at 525 n.4 (Stewart, J., dissenting).

the beneficiaries of the prior discrimination. Second, with respect to education, suppose a court finds deliberate racial segregation of public schools, a violation of the fourteenth amendment. That court, according to Justices Stewart and Rehnquist, could order the busing of children in order to eradicate the educational segregation, even though such a course of action would impose a transportation burden on white children. Apart from this very narrow exception, however, Justices Stewart and Rehnquist take the view that government affirmative action programs that allocate benefits or burdens on the basis of race or ethnicity violate equal protection.

Justice Stevens cannot be categorized as easily as Justices Stewart and Rehnquist. Although he, too, dissented in *Fullilove*,<sup>36</sup> he is, at least in theory, a potential fifth vote to sustain other affirmative action programs. Justice Stevens objected to the MBE provision on two grounds: substantive and procedural.

Substantively, in Justice Stevens' view the MBE set-aside did not reflect careful tailoring, and his position that Congress had painted with too broad a brush in enacting "this slapdash statute"<sup>37</sup> was substantiated on several grounds. One argument—potentially very controversial—was that the MBE provision included minority groups who have not been as disadvantaged, and certainly not disadvantaged in the same way, as black Americans.<sup>38</sup> Justice Stevens reasoned that blacks have suffered a peculiar kind of discrimination, relying on Justice Marshall's separate opinion in *Bakke* which recited this country's long and tragic history of discrimination against blacks in contrast to prejudicial behavior towards other racial and ethnic minorities.<sup>39</sup> The MBE provision, however, lumps together Spanish-speaking citizens, Orientals, Indians, Eskimos, Aleuts, and Negroes for the same special benefit.

Further, Justice Stevens read the MBE provision as including *all* black enterprises, whether or not they had been wrongfully excluded from the market for public contracts.<sup>40</sup> Particularly in

---

<sup>36</sup> *Id.* at 532 (Stevens, J., dissenting).

<sup>37</sup> *Id.* at 539 (Stevens, J., dissenting).

<sup>38</sup> *Id.* at 537-39 (Stevens, J., dissenting).

<sup>39</sup> *Id.* at 537 (Stevens, J., dissenting) (citing *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. at 387 (Marshall, J., dissenting)).

<sup>40</sup> *Id.* at 540-41 (Stevens, J., dissenting).



the construction industry, he argued, there may be many black businesses that have not been disadvantaged because of the twenty year period that federal anti-discrimination laws have successfully combatted the problem of racial prejudice.<sup>41</sup> Justice Stevens also argued that the program helps the least disadvantaged minority group members in that it primarily benefits those who have accumulated enough capital to be in the construction business in the first place.<sup>42</sup> This, he concluded, is a "perverse form of reparation for members of the injured classes."<sup>43</sup> These points, and others not elaborated here, strongly suggest that Justice Stevens' vote will be extremely difficult to obtain to uphold future affirmative action programs.

From a procedural viewpoint, Justice Stevens also objected to Congress' decisionmaking process in enacting the MBE provision.<sup>44</sup> Before upholding a law that distributes benefits or imposes burdens along racial or ethnic lines, he would require substantial consideration by the legislative body of both the need for and the scope of such a program.<sup>45</sup> This was also a factor important to Chief Justice Burger and Justice Powell, to whose opinions we now turn in search of the fifth vote necessary to sustain future affirmative action plans.

### B. *Chief Justice Burger and Justice Powell in Fullilove: Is Either the Needed Fifth Vote?*

Contrary to media reports and law review commentaries on *Fullilove*,<sup>46</sup> I find that the opinions of Chief Justice Burger and Justice Powell upholding the MBE provision were extraordinarily qualified. Chief Justice Burger, echoing Justice Powell in *Bakke*, wrote that *any* racial classification requires "a most searching examination"<sup>47</sup> by the Court and that the MBE program itself might "press the outer limits of congressional author-

---

<sup>41</sup> *Id.* at 539-40 (Stevens, J., dissenting).

<sup>42</sup> *Id.* at 538-41 (Stevens, J., dissenting).

<sup>43</sup> *Id.* at 538 (Stevens, J., dissenting).

<sup>44</sup> *Id.* at 549 (Stevens, J., dissenting).

<sup>45</sup> *Id.* at 549-54 (Stevens, J., dissenting).

<sup>46</sup> See, e.g., *The Supreme Court, 1979 Term*, 94 HARV. L. REV. 75, 125-38 (1980).

<sup>47</sup> *Fullilove v. Klutznick*, 448 U.S. at 491. See also *id.* at 496 (Powell, J., concurring) ("Racial classifications must be assessed under the most stringent level of review. . .").

ity.”<sup>48</sup> Indeed, as shall be suggested below, the Chief Justice may have even stretched the record at some points to justify his rationale for sustaining the statute in *Fullilove*.

Why did the Chief Justice and Justice Powell write so narrowly? On the one hand, they may simply have wished to go no further than necessary to uphold this program, not wanting to commit themselves beyond it. On the other hand, one could fairly speculate that Chief Justice Burger and Justice Powell were laying a foundation for striking down other affirmative action schemes.<sup>49</sup> In any event, the narrowness of their opinions is evinced by a number of factors.

### 1. *Special Powers of Congress*

In *Fullilove*, both Chief Justice Burger and Justice Powell stressed that the MBE provision—at least as applied to the action of state and local governments—was enacted by Congress pursuant to its power to enforce equal protection under section five of the fourteenth amendment,<sup>50</sup> perhaps implicitly suggesting that the identical program might not pass muster if enacted by a state legislature or by a federal or state administrative agency.<sup>51</sup> The Chief Justice said that no organ of government has greater power than Congress to remedy the present effects of past racial or ethnic discrimination,<sup>52</sup> a theme echoed by Justice Powell, who observed that Congress had a “unique constitutional power”<sup>53</sup> in this regard, strongly implying that the Civil War amendments gave Congress singular authority to employ race-conscious remedies.<sup>54</sup> Such a posture draws one to a basic ques-

<sup>48</sup> *Id.* at 490.

<sup>49</sup> Indeed, on the same day that the Court decided *Fullilove*, it granted certiorari in *Minnick v. California Dep't of Corrections*, 448 U.S. 910 (1981), a case challenging an affirmative action plan for women and minority employees in the California prison system. Though the case was eventually dismissed on procedural grounds, *Minnick v. California Dep't of Corrections*, 452 U.S. 105, 127 (1981), there are several grounds, as shall be observed, by which that plan can be distinguished from the program upheld in *Fullilove*.

<sup>50</sup> *Fullilove v. Klutznick*, 448 U.S. at 478; *id.* at 508-10 (Powell, J., concurring).

<sup>51</sup> It is interesting to note in this regard that the California prison employment plan in *Minnick* was adopted by the State Department of Corrections. 452 U.S. at 107-08.

<sup>52</sup> *Fullilove v. Klutznick*, 448 U.S. at 483.

<sup>53</sup> *Id.* at 500. The “special competence” of Congress in this regard was alluded to by Justice Powell in his *Bakke* opinion. 438 U.S. at 302 n.41.

<sup>54</sup> *Fullilove v. Klutznick*, 448 U.S. at 508-10, 516 (Powell, J., concurring).

tion: is there a constitutional principle by which Congress can be permitted to enact a program which would violate equal protection if adopted by a state legislature or by a federal or state administrative agency? There is one decision articulating a doctrine that would permit the Court to hold that it is one thing for Congress to enact a preference for minorities (such as the MBE provision), but that it is altogether another thing for a federal administrative agency to do so, even pursuant to a broad delegation from Congress.

*Hampton v. Mow Sun Wong*<sup>55</sup> involved a Federal Civil Service Commission rule generally denying resident aliens civil service employment. Despite the fact that "under the traditional standards governing the delegation of authority the Civil Service Commission was fully empowered"<sup>56</sup> to make such a rule, the Court fashioned a novel doctrine that has lain dormant since then. The Court assumed that Congress or the President might themselves expressly mandate discrimination against aliens in this way, but it held that as a matter of due process Congress and the President could not broadly authorize a federal administrative agency to affect the "important liberty"<sup>57</sup> at stake unless that agency had special competence or "direct responsibility"<sup>58</sup> over the matter.

The *Mow Sun Wong* doctrine could easily be extended to situations involving state administrative agencies; indeed, Justice Powell seemed to take this conceptual path in *Bakke* when he urged that the University of California Board of Regents was not a properly authorized body to adopt a race-conscious affirmative action plan.<sup>59</sup> Interestingly, Justice Powell cited *Hampton v. Mow Sun Wong* for that proposition,<sup>60</sup> reflecting his perception of the special type of governmental body that may take this very sensitive kind of action.

The next step in this conceptual process is determining whether the legislative-administrative agency dichotomy can also be

---

<sup>55</sup> 426 U.S. 88 (1976).

<sup>56</sup> *Id.* at 123 (Rehnquist, J., dissenting).

<sup>57</sup> *Id.* at 116.

<sup>58</sup> *Id.* at 103.

<sup>59</sup> See notes 20-21 *supra* and accompanying text for a discussion of Justice Powell's view in *Bakke* regarding the properly authorized body to adopt a race-conscious program.

<sup>60</sup> *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. at 309.

extended to apply to a distinction between Congress and a state legislature. Surely, one would surmise, the California legislature, in contrast to the Regents of the University, is a properly authorized body to remedy past societal discrimination. Nonetheless, there is a constitutional principle potentially available to the Court that might be employed in a ruling that Congress has greater power than a state legislature to adopt an affirmative action program benefiting racial and ethnic minorities.

This doctrine has its genesis in the case of *Katzenbach v. Morgan*,<sup>61</sup> where the Warren Court held that Congress has broad power under section five of the fourteenth amendment to define what constitutes a violation of equal protection.<sup>62</sup> Pursuant to that power, Congress can outlaw practices as being violative of equal protection even though the Court itself would not find an equal protection violation.<sup>63</sup> The dissenters in *Morgan* argued that the majority had created a two-way street—that once Congress is given power to define what constitutes a violation of equal protection, Congress cannot be limited to expanding equal protection but may also contract the equal protection decisions of the Supreme Court.<sup>64</sup> But, in a famous footnote, the majority denied that its rationale gave Congress the power to dilute—as well as to expand—the Court's equal protection judgments.<sup>65</sup>

The *Morgan* decision is now sixteen years old and the Court's composition has changed markedly over that time. Subsequent opinions by various Justices have construed the reach of *Morgan's* holding, concerning the power of Congress to define the substance of the fourteenth amendment differently than the Court, in various ways.<sup>66</sup> In all, one can fairly surmise that the ruling's present status is uncertain.

Despite this uncertainty, suppose that the Kentucky legislature enacted a minority set-aside just as Congress did in *Fullilove*. A majority of the Court *might* reason that, under section

---

<sup>61</sup> 384 U.S. 641 (1966).

<sup>62</sup> *Id.* at 648-49.

<sup>63</sup> *Id.* at 649.

<sup>64</sup> *Id.* at 668 (Harlan, J., dissenting).

<sup>65</sup> *Id.* at 651-52 n. 10.

<sup>66</sup> See *City of Rome v. United States*, 446 U.S. 156 (1980); *Oregon v. Mitchell*, 400 U.S. 112 (1970).

five of the fourteenth amendment, Congress, but only Congress, has power to reconcile the competing demands of equal protection by using racial and ethnic criteria to remedy past societal discrimination against disadvantaged minorities. Correlative to that pronouncement, the Court *might* assert that if a state legislature imposes burdens on a racial or ethnic basis, even on members of the majority in order to help disadvantaged minorities, such legislation violates the equal protection clause of section one of the fourteenth amendment. This distinction would be grounded on the premise that the Supreme Court is in a special posture when it interprets the scope of Congress' power to define equal protection under section five of the fourteenth amendment, and that it must give special deference to Congress' conclusion that its race-conscious program does not violate equal protection. Yet the Court need give no such deference to a state legislature, the question whether a racial or ethnic classification enacted by a state legislature violates equal protection being the Court's alone. One can only speculate as to whether this argument would persuade a majority of the present Court.

In addition to perceived special congressional power under the fourteenth amendment, Chief Justice Burger and Justice Powell seemed to find a special discretion in Congress with respect to legislative factfinding capacity as well. The Chief Justice placed great emphasis on the fact that Congress had "abundant evidence" before it that minority firms had been disadvantaged by past discrimination which resulted in present discriminatory effects.<sup>67</sup> Justice Powell concluded that there was "a reasonable congressional *finding*" of such discrimination.<sup>68</sup> Such an evidentiary focus could be a significant ground for distinguishing subsequent cases if the legislative body that enacts the affirmative action program does not have "abundant evidence" or makes no "findings."

The perplexing aspect of this argument is that a review of the evidence Congress actually had before it leads to the conclusion that "abundant" is a most generous adjective. The fact is that the MBE provision was introduced in both the House and Senate as a

---

<sup>67</sup> Fullilove v. Klutznick, 448 U.S. at 477-78.

<sup>68</sup> *Id.* at 503 n.4 (Powell, J., concurring) (emphasis added).

floor amendment, never previously considered by any congressional committee.<sup>69</sup> There was some floor discussion that “cited the marked statistical disparity that in fiscal year 1976 less than 1% of all *federal* procurement was concluded with minority business enterprises,”<sup>70</sup> but the MBE provision dealt with funds to be used for *state* and *local* government public works projects. Thus, the principal evidence directly presented to Congress at the time was only indirectly related to the problem at hand.<sup>71</sup>

In support of his conclusion that Congress had “abundant evidence” regarding state and local contracting, Chief Justice Burger relied mainly on a House Committee on Small Business report that had been presented in connection with other proposed legislation eight weeks before the MBE provision was introduced on the floor of the House.<sup>72</sup> This 1977 report of the Small Business Committee, Chief Justice Burger emphasized, summarized a 1975 report of another House subcommittee that dealt with the low participation of minority businesses in *federal* construction.<sup>73</sup> The Chief Justice observed that the 1975 subcommittee report had, in turn, taken “full notice” of reports submitted to Congress by the General Accounting Office and the Civil Rights Commission, the latter of which detailed the barriers that existed for minority businesses respecting federal, state and local government contracts.<sup>74</sup> Justice Powell referred essentially to the same evidence.<sup>75</sup>

In fairness to Chief Justice Burger, he did not simply say “this is abundant evidence.” Rather, after stating the facts recited above, he concluded that Congress—unlike a court or an administrative agency—is not required to make a formal and complete “record” and can take informal cognizance of other information presented to its constituent parts.<sup>76</sup> That is, Congress as a whole is

---

<sup>69</sup> *Id.* at 458.

<sup>70</sup> *Id.* at 459 (emphasis added).

<sup>71</sup> See also *id.* at 478 (“[M]uch of this history related to the experience of minority business in the area of federal procurement. . .”).

<sup>72</sup> This report, however, “was not mentioned by anyone during the very brief discussion” of the MBE amendment. *Id.* at 550 n. 25 (Stevens, J., dissenting).

<sup>73</sup> *Id.* at 465.

<sup>74</sup> *Id.* at 466.

<sup>75</sup> *Id.* at 504-05 (Powell, J., concurring).

<sup>76</sup> *Id.* at 478.

charged with knowledge of prior committee reports, that incorporate subcommittee reports, referring to reports of the Civil Rights Commission.<sup>77</sup> Justice Powell, in his separate opinion, echoed this rationale, which assumes that Congress has full knowledge of all that its committee reports contain even when not directly related to the subject at issue.<sup>78</sup>

This suggests, then, another possible ground for distinguishing *Fullilove* from a future case—one that involves an affirmative action plan adopted by a body other than Congress—namely, that Congress has greater leeway in regard to the kind of record that must be compiled. The Court could decide to give greater deference to Congress' perception of "abundant evidence" than to that of a state legislature enacting a similar race-conscious plan.<sup>79</sup>

## 2. *Type of Relief Sought*

Chief Justice Burger also emphasized that the MBE provision was being challenged on its face. He explained that the plaintiffs were associations of construction contractors and subcontractors, not seeking money damages for any specific injury suffered, but asking only for prospective relief—a declaratory judgment that the MBE provision was invalid and an injunction against any further set-aside of funds.<sup>80</sup> In a footnote, however, Chief Justice Burger acknowledged that the complaint did allege three instances in which nonminority firms would have been awarded contracts were it not for the MBE provision.<sup>81</sup> But, he said, this injury was asserted only to establish that the plaintiffs had standing, not to seek redress for the injury.<sup>82</sup> Thus, since the statute was being challenged only on its face, the Chief Justice reasoned that doubts as to its future applications must be resolved in Congress' favor.<sup>83</sup>

---

<sup>77</sup> *See id.*

<sup>78</sup> *Id.* at 502-03 (Powell, J., concurring).

<sup>79</sup> *See id.* at 515-16 n.14 (Powell, J., concurring) ("The degree of specificity required in the findings of discrimination . . . may vary with the nature and authority of a governmental body.").

<sup>80</sup> *Id.* at 480.

<sup>81</sup> *Id.* at 480-81 n.71.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 481.

Whether Chief Justice Burger can persuasively distinguish an allegation of injury used to establish standing from an allegation of injury used to show that the MBE provision as applied has resulted in specific constitutional violations may well appear problematic. But the distinction's significance becomes clearer upon consideration of how the Chief Justice interpreted other features regarding the scope of the MBE provision so as to imply that virtually no constitutionally cognizable injury was being suffered by any nonminority firm.

### 3. *Limited Duration and Extent of the Program*

Another facet of *Fullilove* which served to further qualify the Burger and Powell opinions was the limited duration of the program. The Chief Justice characterized it as "a pilot project,"<sup>84</sup> with the consequence that any miscarriage of justice will have only a "transitory economic impact."<sup>85</sup> This sentiment was mirrored by Justice Powell when he observed that the MBE provision "is not a permanent part of federal contracting requirements."<sup>86</sup> This temporal factor provides a basis for distinguishing a longer term affirmative action program, even one promulgated by Congress. Indeed, it is not irrelevant to observe that in *United Steelworkers of America v. Weber*,<sup>87</sup> which held that a privately bargained affirmative action plan for employment did not violate the racial discrimination bar of Title VII of the Civil Rights Act of 1964, the Court's opinion—written by Justice Brennan and joined by Justices White, Marshall, and Blackmun (as well as by Justice Stewart)—highlighted the fact that the program was only "a temporary measure."<sup>88</sup>

Not only is the program in *Fullilove* not of unlimited duration but, as Chief Justice Burger noted, the program is "limited in extent" as well since only ten percent of all construction project grants were involved.<sup>89</sup> Discussing this factor more fully, Jus-

---

<sup>84</sup> *Id.* at 489.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 513 (Powell, J., concurring).

<sup>87</sup> 443 U.S. 193 (1979).

<sup>88</sup> *Id.* at 208. For a discussion of the implications of *Weber* for the constitutionality of affirmative action plans generally, see J. CHOPER, Y. KAMISAR & L. TRIBE, *THE SUPREME COURT: TRENDS AND DEVELOPMENTS 1978-1979* at 47-50 (1979).

<sup>89</sup> *Fullilove v. Klutznick*, 448 U.S. at 489.



tice Powell found the ten percent allocation reasonable because it falls roughly halfway between the percentage of minorities in the population as a whole (about seventeen percent) and the percentage of minority contractors (four percent).<sup>90</sup> The logic of that averaging process may be questionable, but it underscores the significance of the point for Justice Powell.<sup>91</sup>

#### 4. *Absence of a Burdensome Effect*

Both the Burger and Powell opinions in *Fullilove* also pointed out that the burdens imposed on innocent parties (that is, nonminority firms who had not engaged in racial discrimination) are "relatively light"<sup>92</sup> and "not sufficiently significant."<sup>93</sup> Both Justices cited statistics showing that the amount of funds under the MBE provision flowing to minority businesses, which comprised four percent of the nation's contractors, had amounted to only one-fourth of one percent of all construction funds spent annually in the United States.<sup>94</sup> The role which this evidence played especially in Justice Powell's reasoning is evident from his characterization of the effect on "innocent third parties" as a "crucial factor."<sup>95</sup>

This concern with burdensome effects on innocent parties could well be an important future issue since it had surfaced regularly throughout the Court's affirmative action jurisprudence even prior to *Fullilove*. As early as the *United Jewish Organizations* case, no less than five of the seven members of the Court voting to sustain New York's race-conscious redistricting scheme—Justices Stewart, White, Powell, Rehnquist, and Stevens—had emphasized that the plan neither "minimize[d]

---

<sup>90</sup> *Id.* at 513-14 (Powell, J., concurring).

<sup>91</sup> In this vein, one can contrast the program in *Fullilove* with the California prison plan in *Minnick*. In *Minnick*, the employment goal for racial and ethnic minorities was over 35%, obviously a very different percentage than that at work in *Fullilove*. 452 U.S. at 109. Furthermore, the concern with the extent of affirmative action programs was even manifest in the dissenting opinion in *Bakke* where the Brennan "group of four" observed that the 16% set-aside of the Davis program represented "a percentage less than that of the minority population in California." 438 U.S. at 374 n.58 (Brennan, White, Marshall & Blackmun, JJ., concurring in part and dissenting in part).

<sup>92</sup> *Fullilove v. Klutznick*, 448 U.S. at 484.

<sup>93</sup> *Id.* at 515 (Powell, J., concurring).

<sup>94</sup> *Id.* at 484 n.72; *id.* at 514 (Powell, J., concurring).

<sup>95</sup> *Id.* at 514 (Powell, J., concurring).

[n]or unfairly cancel[led] out white voting strength,"<sup>96</sup> nor "undervalued the political power of white voters relative to their numbers."<sup>97</sup> The remaining two Justices—Brennan and Blackmun—concurred with Justice White's observation that the complainants had neither alleged nor proved that the new plan accomplished anything "more than the restoration of nonwhite voting strength" to prior levels.<sup>98</sup> In *Bakke*, Justice Powell distinguished *United Jewish Organizations* and other decisions upholding race-conscious remedies by stressing that the Davis Medical School plan "totally foreclosed" nonminority applicants.<sup>99</sup> And in *Weber*, the Court had emphasized the fact that the collective bargaining plan did "not unnecessarily trammel the interests of the white employees" because it did "not require the discharge of white workers."<sup>100</sup>

There is an unanswered question here, of course: what constitutes a sufficiently heavy burden? In a case such as *Bakke*, in which it can be shown that the race-conscious quota has totally excluded the plaintiff from a substantial benefit, it may be much harder for the Court to conclude that the burden is insubstantial. Yet, Chief Justice Burger, after discussing the modest burden imposed in *Fullilove*, added that Congress may have determined that some nonminority firms who would lose out as a result of the MBE program may have themselves reaped competitive benefit from past discrimination against minorities in contracting.<sup>101</sup> The Chief Justice's recognition that such an "equalizing effect" among minority and nonminority firms may result from race-conscious programs leaves open the possibility that a plan which completely excludes certain groups will not be held unconstitutional.<sup>102</sup> Nonetheless, challengers of future affirmative action

---

<sup>96</sup> *United Jewish Orgs. v. Carey*, 430 U.S. at 165.

<sup>97</sup> *Id.* at 179-80 (Stewart, J., concurring, joined by Powell, J.).

<sup>98</sup> *Id.* at 163.

<sup>99</sup> 438 U.S. at 305.

<sup>100</sup> 443 U.S. at 208.

<sup>101</sup> *Fullilove v. Klutznick*, 448 U.S. at 484-85.

<sup>102</sup> This recognition of a possible equalizing effect was essentially made by the dissenting Justices in *Bakke*:

If it was reasonable to conclude—as we hold that it was—that the failure of minorities to qualify for admission at Davis under regular procedures was due principally to the effects of past discrimination, then there is a reasonable likelihood that, but for pervasive racial discrimination, respondent

plans will not likely forget that Chief Justice Burger and Justice Powell emphasized that the burdens imposed on nonminorities by the MBE preference were relatively light. Nor will they likely forget that in *Bakke*, where the burden was greater, only four Justices voted to sustain the program.<sup>103</sup>

### 5. *Flexibility of the Ten Percent Allocation*

Finally, another factor outlined by Chief Justice Burger in *Fullilove* may well constitute the strongest evidence of the narrowness of the Burger and Powell views. The Chief Justice stressed that the ten percent figure was not inflexible.<sup>104</sup> While the statute in *Fullilove* provided that at least ten percent of the funds be expended for minority firms, it also contained the clause "except to the extent that the Secretary [of Commerce] determines otherwise."<sup>105</sup> Thus, the ten percent quota was not absolute, and regulations and guidelines promulgated pursuant to the statute provided for waivers of and exemptions from the requirement.

Before examining these regulations and guidelines, it is interesting to note how they were characterized by Chief Justice Burger. He stressed Congress' intention that any minority contractor shown not to be suffering from the effects of past discrimination should be excluded from the program, and that the regulations and guidelines would prevent misapplications of Congress'

---

would have failed to qualify for admission even in the absence of Davis' special admissions program.

438 U.S. at 365-66 (Brennan, White, Marshall & Blackmun, JJ., concurring in part and dissenting in part).

<sup>103</sup> In conjunction with the discussion of the absence of a burdensome effect on innocent parties, it should be noted that the Chief Justice also specified that no indication was present that Congress had excluded any equally disadvantaged minority group from participation in the *Fullilove* program. *Fullilove v. Klutznick*, 448 U.S. at 486. This may well be an issue pressed by challengers of future programs. For example, a group of indigent whites or, more persuasively, recent Caribbean, Latin American or Southeast Asian immigrants, may seek inclusion in an affirmative action program. Though not included in most such plans, these groups could argue that while they may not have been disadvantaged in the same way as black Americans, their disadvantage is nonetheless sufficient to place them within any race-conscious program.

<sup>104</sup> *Id.* at 488. Recall that a major issue in *Bakke* was that sixteen places in each Davis Medical School class had specifically been set aside. 438 U.S. at 305.

<sup>105</sup> 42 U.S.C. § 6705(f)(2) (1976 & Supp. III 1979).

goals.<sup>106</sup> Moreover, portions of the Chief Justice's opinion might even be read as suggesting that those entitled to participate in the set-aside need not be members of the six designated racial and ethnic groups.<sup>107</sup>

The Burger opinion pointed to earlier regulations and guidelines under the Small Business Act of 1953, promulgated by the Small Business Administration, which also had a minority group clause that named the same six minorities as the MBE provision—"black Americans, American Indians, Spanish-Americans, oriental Americans, Eskimos, and Aleuts."<sup>108</sup> The Small Business Administration regulations and guidelines made two things very clear. First, if it could be shown that a business within one of the named minority groups was not socially or economically disadvantaged, it was not to be entitled to participate.<sup>109</sup> Second, if an applicant could show deprivation "of the opportunity to develop and maintain a competitive position in the economy because of social or economic disadvantage,"<sup>110</sup> the applicant was also eligible to participate in the Small Business Act affirmative action program even though it was not from one of the named minority groups.<sup>111</sup>

Thus, Chief Justice Burger underscored the fact that "[t]he sponsors of the MBE provision in the House and the Senate expressly linked"<sup>112</sup> it to the Small Business Act and placed "their reliance on prior administrative practice"<sup>113</sup> reflected in the regulations and guidelines of the Small Business Administration. The Chief Justice relied strongly upon this reference to prior legislation to substantiate the flexibility of the MBE provision—both in terms of excluding undeserving members of the designated mi-

---

<sup>106</sup> *Fullilove v. Klutznick*, 448 U.S. at 464.

<sup>107</sup> *Id.* at 486.

<sup>108</sup> *Id.* at 464 (citing 13 C.F.R. § 124.8-1(c)(1) (1977)).

<sup>109</sup> *See* 13 C.F.R. § 124.8-1(c)(1) (1977).

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Fullilove v. Klutznick*, 448 U.S. at 463.

<sup>113</sup> *Id.* at 471.

nority groups<sup>114</sup> and perhaps even in terms of including disadvantaged nonminority firms.<sup>115</sup>

One could argue strongly that the MBE regulations and guidelines do not admit of the interpretation Chief Justice Burger gave them. For example, one guideline provides that a minority firm may be excluded from the preference if it asks an unreasonable price.<sup>116</sup> The Chief Justice interprets "unreasonable price" as one that is noncompetitive *and* that cannot be attributed to the present effects of past discrimination.<sup>117</sup> It would seem that such "unreasonableness" is well-nigh impossible to prove, and that the unreasonable price guideline will exclude virtually no minority firms. Surely, a minority business could persuasively contend that its costs are higher because of past discrimination—that, because of this historical prejudice, it lacks the savvy to master the intricacies of the government contracting process and that for like reasons it has been more difficult for the minority business to establish favorable credit ratings in the past. These arguments and others could serve to trace almost any noncompetitive price to past discrimination.

Another regulation provides that if the prime contractor can show that its best efforts in obtaining minority subcontractors are unavailing, the ten percent requirement may be waived.<sup>118</sup> But this has nothing to do with excluding minority firms that have not suffered from past discrimination (nor with including any other firms that show they are suffering from past discrimination but that do not come within the designated categories).

---

<sup>114</sup> *Id.* at 469-72. For evidence of the sensitivity of Justices Brennan, White, Marshall, and Blackmun to this point as well, see *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. at 377-78.

<sup>115</sup> Chief Justice Burger observed that inclusion of the specified minority groups "demonstrates that Congress concluded they were victims of discrimination. Petitioners did not press any challenge to Congress' classification categories in the Court of Appeals; there is no reason for this Court to pass upon the issue at this time." *Fullilove v. Klutznick*, 448 U.S. at 487-88.

<sup>116</sup> U.S. DEPT OF COMMERCE, ECONOMIC DEVELOPMENT ADMINISTRATION, EDA MINORITY BUSINESS ENTERPRISE TECHNICAL BULLETIN (ADDITIONAL ASSISTANCE & INFORMATION AVAILABLE TO GRANTEES & THEIR CONTRACTORS IN MEETING THE 10% MBE REQUIREMENT) 9-10 (1977) [hereinafter cited as EDA Technical Bulletin].

<sup>117</sup> *Fullilove v. Klutznick*, 448 U.S. at 471.

<sup>118</sup> U.S. DEPT OF COMMERCE, LOCAL PUBLIC WORKS PROGRAM, ROUND II, GUIDELINES FOR 10% MINORITY BUSINESS PARTICIPATION LPW GRANTS (1977).

Finally, Chief Justice Burger adverted to a regulation concerning "unjust participation" by minority firms.<sup>119</sup> He appeared to interpret this as being applicable if a nonminority contractor complains that a minority enterprise about to be given a contract at a noncompetitive price has not suffered from past discrimination.<sup>120</sup> But the parameters of "unjust participation" are nowhere delineated in the regulations, which only establish a procedural structure through which contractors may challenge procurements.<sup>121</sup> The regulation referred to by the Chief Justice would appear to pertain to participation by a firm that is not really a minority enterprise—for example, one that claims that more than fifty percent of its shareholders are minority group persons when in fact such shareholdings are merely a sham.

Therefore, Chief Justice Burger upheld the MBE provision on a "flexibility" limitation that was not clearly present while perhaps laying a foundation to shift his vote in a future case involving a truly inflexible set-aside.<sup>122</sup>

### CONCLUSION

We are left confronting the basic inquiry with which our discussion began: what is the constitutional future of affirmative action? While our analysis certainly indicates that no one can predict with confidence the exact nature of this future, it would seem fair to postulate that the road ahead for many race-conscious programs will not be an easy one.

The Supreme Court's performance in this area has been anything but a paragon of clarity and predictability. When the issue first manifested itself, a sharply divided Court in *DeFunis v. Odegaard*<sup>123</sup> abstained from addressing the question at all. As we observed, the three subsequent affirmative action decisions that

---

<sup>119</sup> *Fullilove v. Klutznick*, 448 U.S. at 487-88.

<sup>120</sup> *Id.* at 488.

<sup>121</sup> EDA Technical Bulletin, *supra* note 116, at 19.

<sup>122</sup> Again one can differentiate the California prison plan in dispute in *Minnick* from the *Fullilove* plan. That plan did not involve a fixed quota, but rather afforded only a "plus" for women and minorities until a predetermined goal was achieved. *Minnick v. California Dep't of Corrections*, 452 U.S. at 108-10.

<sup>123</sup> 416 U.S. 312 (1974).

reached the merits failed to produce an opinion for the Court.<sup>124</sup> The most recent case before the Court involving a race-conscious program—which the Court chose to review after it had been upheld by the state courts<sup>125</sup>—was dismissed on procedural grounds “because of significant ambiguities in the record.”<sup>126</sup> This history reflects the continued uncertainty of at least several of the Justices as to the proper resolution of this sensitive issue and demonstrates that we have by no means heard the last word from the Supreme Court on the constitutionality of race-conscious affirmative action programs.

---

<sup>124</sup> *United Jewish Orgs. v. Carey*, 430 U.S. 144; *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265; *Fullilove v. Klutznick*, 448 U.S. 448.

<sup>125</sup> *Minnick v. California Dep't of Corrections*, 157 Cal. Rptr. 260 (Ct. App. 1979).

<sup>126</sup> *Minnick v. California Dep't of Corrections*, 452 U.S. at 127.