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An Examination of Equal Protection Analysis in Construction Set-Aside Programs

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AN EXAMINATION OF EQUAL PROTECTION ANALYSIS IN CONSTRUCTION SET-ASIDE PROGRAMS

I. INTRODUCTION

The failure of the Supreme Court to arrive at a consensus opinion in *Fullilove v. Klutznick*[1] has continued to create problems in the area of reverse discrimination.[2] More specifically, the federal courts have had considerable difficulty formulating a consistent approach to the issue of the constitutionality of minority participation programs in construction contract cases. The difficulties various federal courts have had in analyzing these cases are indicative of the shortcomings of the *Fullilove* decision. First, no agreed upon standard of review was put forth in the *Fullilove* case. Justice Powell adopted the traditional strict scrutiny test as the proper standard of review.[3] Justice Stevens, Justice Rehnquist, and Justice Stewart, while not expressly advocating the strict scrutiny standard, adopted an equally stringent analysis. Justices Marshall and Brennan suggested an intermediate level of scrutiny while Chief Justice Burger forwarded no specific standard of review, but rather advocated a more general approach to the issue. Second, the Justices focused their opinion solely upon the narrow issue presented in *Fullilove*. In doing so, they failed to provide language which could be used to expand *Fullilove*'s reasoning into other programs created by authorities other than Congress itself, which initially legislated the program discussed in *Fullilove*.

Surprisingly, while a variety of approaches have been used since the *Fullilove* decision, the ambiguities presented by *Fullilove* have not led to a wide disparity of results. Of the eight cases analyzed in this note, only one fails to recognize the constitutionality of a minority participation program. The similarity of these results would seem to question what purpose would be served by studying the federal courts' use of the various *Fullilove* standards. To do so, however, would be too result oriented. This conclusion would disregard not only what each of the *Fullilove* approaches implies constitutionally, but also what factors are essential to the proper disposition of a case. Since the *Fullilove* decision in

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[1] 448 U.S. 448 (1980).

[2] The term reverse or benign discrimination describes the use of racial classifications to benefit rather than burden particular racial or ethnic minorities. For purposes of this note the term reverse discrimination will be used exclusively.

[3] In deciding cases under the equal protection clause of the fourteenth amendment, the Supreme Court has applied the strict scrutiny standard if a state action discriminates against a suspect class. So far, the Court has given race, alienage, and ancestry, suspect class status. *See* Rice, *The Discriminatory Purpose Standard*, 6 B. C. THIRD WORLD L.J. 1 (1986).

July 1982, only the eight federal court cases analyzed here have raised the constitutional issue of reverse discrimination in a construction situation.[4] Each case not only questions the constitutionality of certain construction bidding requirements with regard to minority participation, but also depends upon the various *Fullilove* standards.[5]

II. *FULLILOVE V. KLUTZNICK*

The fundamental issue in the area of reverse discrimination is how to properly balance equal protection with the need to remedy past racially-based wrongs. Under the Constitution, the equal protection clause of the fourteenth amendment prohibits invidious discrimination by state government, while the due process clause of the fifth amendment provides a similar protection against federal actions.[6] If taken at their narrowest interpretation, these amendments require that the impact of legislation be color-blind; that legislation may not help any one race.[7] This belief is best exemplified by the statement that "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."[8] The theory of reverse discrimination requires a tempering of this idealistic statement with the realization that past discrimination has created a situation which must be rectified. Thus, the compromise between the narrow constitutional interpretation and one which requests a correction of past inequalities results, at least implicitly, in the statement that "racial classifications are not *per se* invalid under the Fourteenth Amendment."[9]

Fullilove v. Klutznick concerned the constitutionality of the minority business enterprise provision (MBE) of the Public Works Employment Act of 1977 (Act).[10] This Act

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[4] In a recent development, the Fourth Circuit Court of Appeals decided on November 25, 1985 that a city's minority utilization plan was valid under Virginia law and the federal and state constitutions. *See* J.A. Croson Co. v. City of Richmond, 45 Fed. Contracts Rptr. 15 (1985). For a discussion of the case, see *infra* note 149.

The case of Alaska Chapter, Associated General Contractors of America, Inc. v. Pierce, 694 F.2d 1162 (9th Cir. 1982), also dealt with minority involvement in a construction situation. However, this case was factually different since the legislation dealt with a preference for Indians. The court based its decision on Morton v. Mancari, 417 U.S. 535 (1974), where the Supreme Court had rejected a traditional equal protection analysis and used the rational basis test. This status was due to the special legal standing of Indian tribes under federal law. Thus, the Ninth Circuit held that,

> In summary, legislation preferring Indians is constitutional when applying the rational basis test "as long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians." *Alaska Chapter*, 694 F.2d at 1170 *citing Mancari*, 417 U.S. at 555.

[5] On November 6, 1985, the Supreme Court heard the case of Wygant v. Jackson Board of Education 54 U.S.L.W. 3339 (1985). In this case, the plaintiffs, eight white teachers, stated that their layoffs under their collective bargaining agreement was a violation of their equal protection rights under the fourteenth amendment. Although this case is factually different from the *Fullilove* situation, the decision by the Supreme Court on this case will obviously have far-reaching effects.

In an earlier case, the Court held that Title VII of the 1964 Civil Rights Act did not prevent the implementation of an affirmative action plan into a private collective bargaining agreement. *See* Firefighters Local Union No. 1784 v. Stotts, 52 U.S.L.W. 4767 (1984).

[6] *Fullilove*, 448 U.S. at 523 (Stewart, J., dissenting).

[7] *Id.*

[8] Hirabayashi v. U.S., 320 U.S. 81, 100 (1943).

[9] *Fullilove*, 448 U.S. at 453 (Burger, C.J., giving the opinion of the Court).

[10] Pub. L. 95-28, 91 Stat. 116 (1977), (amending Local Public Works Capital Development and Investment Act of 1976, 42 U.S.C. § 6701).

authorized the Secretary of Commerce to grant funds to state and local governments for use in public works projects.[11] Under the MBE, at least ten percent of each grant had to be for minority businesses.[12] The plaintiffs, consisting of several groups of construction contractors and subcontractors, filed suit for declaratory and injunctive relief. The plaintiffs claimed that the MBE had not only created specific economic injury to their businesses, but that on its face the MBE was violative of the fourteenth and fifth amendments.

Chief Justice Burger's opinion, which was joined by Justice White and Justice Powell, found the plan to be constitutional. Chief Justice Burger advocated a simple two-step approach which did not follow the traditional equal protection analyses used by Justices Powell or Marshall. The first step was whether the objectives of the legislation were within the powers of Congress. If so, the second step was whether the means employed was constitutionally permissible to achieve the remedial goal.[13]

The main emphasis therefore, of Chief Justice Burger's opinion was upon the power of Congress to create such legislation.[14] Absent such authority, approaching the second step would be unnecessary. As a result, a large portion of his opinion examined the legislative history of the MBE program. His purpose in doing so was to establish definitively the purpose behind the Act. At the end of Justice Burger's opinion there remained little doubt that Congress perceived the purpose of the MBE to be the correction of past racial discrimination.[15] The discussion concerning Congress' actual authority was straightforward.[16] Chief Justice Burger stated, "[h]ere we pass, not on a choice made by a single judge or a school board, but on a considered decision of the Congress and the President."[17]

Having found that Congress possesses the authority to enact race-conscious remedies, the remedy itself must be examined. This inquiry is encompassed in Chief Justice Burger's second step, which questions whether the means used was "narrowly tailored to achieve [Congress'] objective."[18] To determine this, Chief Justice Burger examined a number of factors, none of which were dispositive. Of these factors, three are important to discuss since they recur in a variety of other opinions.[19]

The first and most crucial factor in the second step is whether the program is formulated to right past wrongs. Chief Justice Burger rejected the contention "that in the remedial context Congress must act in a wholly 'color-blind' fashion,"[20] because the

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[11] *Fullilove*, 448 U.S. at 453.

[12] *Id.* at 454. The 1977 Act defined "minority business" as a business owned by at least fifty percent minorities or a business where fifty one percent of the stock was owned by minorities. Minority group members were defined by the same Act as citizens of the U.S. who were Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts. 42 U.S.C. § 103(f)(2).

[13] *Fullilove*, 448 U.S. at 473.

[14] *Id.* at 478.

[15] *Id.* at 467. For a discussion by Chief Justice Burger of the legislative history of the 1977 Act, see *Fullilove*, 448 U.S. at 453-66.

[16] Chief Justice Burger pointed to the spending power, the commerce clause, and the fourteenth amendment as possible bases for Congress' actions. *Id.* at 473-79.

[17] *Id.* It is not clear how other entities should be analyzed. The implication was that programs based on legitimate Congressional authority were quite likely to be found constitutional, while programs promulgated by other authorities were to be more closely examined. The opinion, however, did not expressly preclude the possible constitutionality of programs created by other entities.

[18] *Id.* at 490.

[19] In addition to these major concerns, Chief Justice Burger also rejected the assertion that the MBE program was either underinclusive or overinclusive. The underinclusive argument asserted

Fullilove case dealt "not with the limited remedial powers of a federal court . . . but with the broad remedial power of Congress."[21] Thus, once again Chief Justice Burger deferred to the broad powers of Congress.

A second factor is the existence of a waiver and exemption provision in the MBE program. This factor is significant because the MBE provisions created presumptions 1) that past racial discrimination existed, and 2) that at least ten percent of the federal funds would be set aside to rectify that situation.[22] Thus, the waiver and exemption provision allows these presumptions to be rebutted. A waiver would be granted if good faith efforts had been made to achieve the ten percent set-aside.[23] This factor was deemed by Chief Justice Burger to be of special "significance."[24]

A third factor responded to the contention that the program was a burden to innocent non-minority third parties. Chief Justice Burger rejected this contention in *Fullilove* by asserting that given the overall scope of construction opportunities, "the actual 'burden' shouldered by non-minority firms is relatively light."[25] As proof, Chief Justice Burger relied upon the court of appeal's use of Department of Commerce statistics.[26]

Through this two-step inquiry, Chief Justice Burger implicitly created a standard of review which was somewhat less rigid than the one that was to be espoused by Justice Powell since it allowed for a more flexible attitude to the criteria by which set-aside programs could be judged. Thus, the overall effect of Chief Justice Burger's opinion is that it created a favorable climate for MBE programs.

Justice Powell, while seeing Chief Justice Burger's opinion "as substantially in accord with my own views,"[27] nevertheless found that strict scrutiny was the proper standard of review. In doing so, Justice Powell differed from Chief Justice Burger in that he placed greater emphasis on the need to articulate judicial standards of review in conventional terms.[28]

Justice Powell argued that the MBE program should be reviewed under the traditional strict scrutiny classification since, "immutable characteristics . . . are irrelevant to

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that the program was limited to only certain minority groups and was not available to all disadvantaged minorities. *Id.* at 485. With regard to the underinclusive argument, Chief Justice Burger reasoned that the purpose of Congress was not to give a preferred status to certain minority groups but rather to provide a program which would create equity in a given stiuation. *Id.* at 485. The overinclusive challenge argued that the MBE provisions created benefits for businesses which were not specifically affected by identifiable prior discrimination. *Id.* at 486. To the contention of overinclusiveness, Chief Justice Burger replied that "such questions of specific application must await future cases." *Id.* at 486. He reasoned that the challenge presented by plaintiffs in *Fullilove* did not involve any specific challenge to any one contract, rather it challenged the MBE program per se. Chief Justice Burger did state that overinclusiveness still was a consideration and that the MBE program, "cannot pass muster unless, . . . it provides a reasonable assurance that application of racial or ethnic criteria will be limited to accomplishing the remedial objectives of Congress . . . . " *Id.* at 487.

[20] *Id.* at 482.

[21] *Id.* at 483.

[22] *Id.* at 487.

[23] *Id.* at 488.

[24] *Id.* at 487.

[25] *Id.* at 484.

[26] *Id.* These statistics showed that in 1977 4.2 billion dollars in federal grants were conditioned upon the MBE provision. This figure was only 2.5 percent of the 170 billion dollars spent on construction. Thus, only .25% of the total amount spent on construction, or ten percent of the 4.2 billion dollars, was accountable to the MBE program.

[27] *Id.* at 496 (Powell, J., concurring).

[28] *Id.* at 495-96.

almost every governmental decision."[29] Under the strict scrutiny classification, the governmental objectives must be accomplished in accordance with a compelling state interest. While Justice Powell reflected Chief Justice Burger's view, as well as the opinion of all of the other Justices, that racial preference *per se* was not a compelling state interest, he did state that attempts to right past wrongs could be considered such an interest.[30]

To be legitimate under the strict scrutiny test, according to Justice Powell, a remedy must comply with three requirements.[31] First, the governmental body must have had the authority to create a remedy. Second, actual evidence of the past discrimination must have existed. Third, the means selected must have been narrowly drawn to fulfill the governmental interest.[32] To this third requirement, Justice Powell noted that five factors had to be considered in order to find that the means selected were narrowly drawn: 1) the efficacy of alternative remedies, 2) the planned duration of the remedy, 3) the relationship between the percentage of minority workers to be employed and the percentage of minority group members in the relevant population, 4) the availability of waiver provisions, and 5) the effect of the set-aside upon innocent third parties.[33]

Despite the stringency of the test, Justice Powell found that the MBE program was constitutional. Like Chief Justice Burger, Justice Powell placed a great deal of emphasis not only on the fact that Congress had passed the Act, but also that Congress undeniably possessed the right to find constitutional violations.[34]

The second requirement of Powell's test was satisfied more easily. Relying on the extensive legislative history of section 103(f)(2) of the Act contained in Chief Justice Burger's opinion, Justice Powell found that "Congress reasonably concluded that private and governmental discrimination had contributed to the negligible percentage of public contracts awarded minority contractors."[35]

As in Chief Justice Burger's analysis, the finding that the governmental authority possessed the power to legislate was the major obstacle. The "means" aspect of the test, the third aspect of Justice Powell's test, was easily hurdled, even though it was much more specific. The MBE program contained all of the five factors outlined by Justice Powell.[36]

The differences between Justice Powell's and Chief Justice Burger's opinion seems to be one simply of form. Justice Powell's statement that " . . . in our quest to achieve a society free from racial classification, we cannot ignore the claims of those who still suffer from

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[29] *Id.* at 496.

[30] *Id.* at 497-98. Justice Powell reasoned that "if the set-aside merely expresses a congressional desire to prefer one racial or ethnic group over another, § 103(f)(2) violates the equal protection component in the Due Process Clause of the Fifth Amendment." *Id.*

[31] *Id.* at 499.

[32] *Id.* at 498.

[33] *Id.* at 510, 514. Justice Powell found the fifth factor, the effect of the set-aside upon innocent third parties, to be "crucial." None of the five, however, were held to be controlling.

[34] *Id.* at 499. Unlike Chief Justice Burger's opinion, Justice Powell, while granting that Congressional power existed under the commerce clause, placed greater emphasis upon the enforcement provisions of the Civil War amendments. *Id.* at 500. More importantly, Justice Powell opined that the thirteenth , fourteenth, and fifteenth amendments gave Congress the "unique" Constitutional power to legislate with regard to past discrimination. *Id.*

[35] *Id.* at 503. Further, Justice Powell noted that, when compared to the exactitude required of judicial or administrative adjudication, "Congress may paint with a much broader brush than may this Court." *Id.* at 506 *citing* Oregon v. Mitchell, 400 U.S. 112, 284 (1970) (Stewart, J., concurring in part, dissenting in part).

[36] *Fullilove*, 448 U.S. at 514, 515.

the effects of identifiable discrimination."[37] This statement is applicable to Chief Justice Burger's opinion as well. The need for legislative authority to right past discrimination is vital to the disposition of both of the decisions. While Justice Powell's opinion does not specifically mention "Congress", both he and Chief Justice Burger rely extensively on the fact that the legislation was an act of Congress. This emphasis carries with it the expectation that "the degree of specificity required in the findings of discrimination and the breadth of discretion in the choice of remedies may vary with the nature and authority of a governmental body."[38] Nevertheless, neither Justice considers what discretion another governmental body would have in formulating remedial programs.

In addition, both Justice Powell and Chief Justice Burger, when contemplating the "means" to the legislation, review the same factors. Chief Justice Burger's method, however, is merely a rejection of challenges to the MBE program. Justice Powell's strict scrutiny test requires the examination of five factors.

This difference in form is nevertheless crucial. As discussed above, Chief Justice Burger's opinion allows for a less formalized approach to the issue of reverse discrimination. By choosing to not follow traditional equal protection analysis, Chief Justice Burger implicitly created an analysis in which minority set-aside programs could be found constitutional in a simpler fashion. Conversely, by its very nature, it is much more difficult to find that a race-conscious remedy is constitutional under Justice Powell's analysis. Strict scrutiny implies a stringent, if not negative, attitude toward the program at the outset of the analysis. Though Justice Powell found the MBE program to be constitutional, the need to find a compelling state interest requires an exacting analysis. Justice Powell questioned how readily the strict scrutiny test could be applied when taken out of the narrow confines of the *Fullilove* case. If the standard could not be so easily applied, then the use of strict scrutiny would create an additional obstacle towards finding such a plan constitutional. As Justice Marshall stated in *Regents of the University of California v. Bakke*, " 'Strict scrutiny' [is] scrutiny that is strict in theory, but fatal in fact."[39]

In *Fullilove*, Justice Marshall wrote a concurrence joined by Justices Brennan and Blackmun. Justice Marshall's main point was that while "racial classifications are prohibited if they are irrelevant,"[40] reverse discrimination must be treated differently.[41] He argued that this leniency should be allowed despite possible disadvantages to whites since whites as a class do not possess the "traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment . . . ."[42]

Justice Marshall chose, as he did in *Bakke*, an intermediate level of scrutiny. The inquiry should therefore be, "whether racial classifications designed to further remedial purposes serve important governmental objectives and are substantially related to the achievement of those objectives."[43] The concurring opinion rejected the more lenient

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[37] *Id.* at 517 (Powell, J., concurring).

[38] *Id.* at 505 n. 14.

[39] Regents of the University of California v. Bakke, 438 U.S. 365 (1978) (Marshall, J., concurring in part, dissenting in part); *Fullilove*, 448 U.S. at 519 (Marshall, J., concurring).

[40] *Id.* at 519 (Marshall, J., concurring) *quoting Bakke*, 438 U.S. at 357 (Marshall, J., concurring in part, dissenting in part).

[41] *Fullilove*, 448 U.S. at 519.

[42] *Id.* quoting *Bakke*, 438 U.S. at 357.

[43] *Fullilove*, 448 U.S. at 519.

rational basis test because of the concern that certain racial programs stigmatize rather than aid a "powerless segment of society."[44]

Other than his concern over stigmatization, Justice Marshall's opinion stressed that the need to right past wrongs should outweigh the narrow interpretation of the fourteenth amendment of the Constitution. However, Justice Marshall's viewpoint arguably is too forgiving to programs such as the MBE. Justice Powell stated that, "[d]ifferent standards of review applied to different sorts of classifications are less likely to be legitimate than others."[45] If Justice Powell was correct, then racial classifications, benign or otherwise, should be placed at a higher level of scrutiny than what Justice Marshall advocated.

The dissent by Justices Stewart and Rehnquist was exemplified by one statement: "Under our Constitution, any official action that treats a person differently on account of his race or ethnic origin is inherently suspect and presumptively invalid."[46] The dissent opined that Congress must obey the Constitution, and that on its face the MBE program was unconstitutional because it was one of racial preference which the Constitution prohibited.[47] In addition, even if the program were for compensation of a social, economic, or educational disadvantage, no race possessed a "monopoly" on these problems.[48] The dissent either did not consider or did not find relevant the reality of past discrimination and the need to rectify it. It did not expressly set a standard of review, although, in fact, it did apply a criteria as stringent as Justice Powell's.

Justice Stevens also dissented, but on slightly different grounds. While admitting that past discrimination had occurred, he reasoned that a history of discrimination was not sufficient reason to "justify such a random distribution of benefits on racial lines."[49] Justice Stevens believed "racial characteristics may serve to define a group of persons who have suffered a special wrong and who, therefore are entitled to special reparations."[50] Therefore, the MBE program was fatally flawed, for not only did it fail to prove previous incidents where minority businesses were specifically denied access[51] but also it did not apply to any minority in particular.[52] Justice Steven's opinion creates a situation which in reality would be too difficult to properly legislate. It requires an unreasonably high standard of past discriminatory findings.

III. *UNIVERSITY OF CALIFORNIA V. BAKKE*

Bakke,[53] decided in June 1978, was the first Supreme Court case which seriously considered the reverse discrimination issue. Most of the opinions given in the *Fullilove* case were first enunciated in *Bakke*.

The case arose because Bakke, a white male, failed to gain admittance to the Medical School of the University of California at Davis (Davis) in both 1973 and 1974. At that time, Davis had two admission programs. The regular admission program, under which every-

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[44] *Id.*
[45] *Id.* at 498 (Powell, J., concurring).
[46] *Id.* at 523 (Stewart, J., dissenting) *citing* Mclaughlin v. Florida, 379 U.S. 184, 192 (1964).
[47] *Id.* at 529.
[48] *Id.*
[49] *Id.* at 539 (Stevens, J., dissenting).
[50] *Id.* at 537.
[51] *Id.* at 539.
[52] *Id.* at 538.
[53] 438 U.S. 265 (1978).

body could apply, summarily rejected any applicant with a grade point average of 2.5 or lower on a scale of 4.0.[54] The special admissions program, operated by a different committee, was used to consider "economically and/or educationally disadvantaged" applicants.[55] Though "disadvantaged" was never defined, no white applicant was accepted by the special admissions committee.[56] Furthermore, the grade point average requirement of 2.5 was waived for the special applicants. These candidates were not compared to the general admission students. The number of spots reserved for the special applicants was dependent upon the class size. In 1973, when the class size was fifty, the prescribed number of special admissions was eight. In 1974, when the overall student body was doubled to 100, the special admission also doubled to sixteen.[57]

When Bakke, who applied in both 1973 and 1974 under the general admissions program, was rejected in 1974, he filed suit. He claimed that the special admissions program discriminated against him in violation of his rights under the equal protection clause of the fourteenth amendment,[58] Article I, section 21 of the California Constitution,[59] and Section 601 of Title VI of the Civil Rights Act of 1964.[60]

The decision of the Supreme Court was split with regard to the two issues presented in the case: 1) whether the program was illegal and therefore Bakke should be admitted to Davis, and 2) whether race could be a consideration in an admissions program. The opinions also differed over whether the fourteenth amendment or Title VI was controlling. Justice Powell announced the Court's decision. Though his opinion was supported in part by all the Justices, it was not completely supported by any of the Justices.

Justice Powell advocated, as he would later in *Fullilove*, the strict scrutiny standard. Powell stated that "[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination."[61] Classifications which touch an individual's race or ethnic background must therefore only be allowed if they are precisely tailored to serve a compelling governmental interest.[62] Justice Powell based his examination upon the fourteenth amendment. Title VI was unimportant to the extent that it "must be held to proscribe only those racial classifications that would violate the equal protection clause or the fifth amendment."[63]

By stringently supporting the equal protection clause, Justice Powell rejected Davis' contention that the discrimination could not be suspect if it were "benign."[64] According to

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[54] *Id.* at 273.
[55] *Id.* at 274.
[56] *Id.* at 276.
[57] *Id.* at 274.
[58] *Id.* at 278.
[59] *Id.* Article 1 § 21 of the California Constitution states,
No special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the Legislature; nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens. (repealed and added to Art. 1, § 7 of the California Constitution).
[60] *Id.* § 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d) states,
No person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefit of, or be subjected to discrimination under any program or activity receiving federal assistance.
[61] *Bakke*, 438 U.S. at 291.
[62] *Id.* at 299.
[63] *Id.* at 287.
[64] *Id.* at 294.

Justice Powell, to attach such "transitory considerations" to the equal protection clause would mean that such classifications "may vary with the ebb and flow of political forces."[65]

Having decided on the level of review, Justice Powell then examined the purposes behind the special program. Davis claimed that the program provided a substantial state interest by: l) reducing the deficit of minorities in the medical profession, 2) countering the effects of societal discrimination, 3) increasing the number of physicans who will practice in underserviced communities, and 4) obtaining educational benefits derived from an ethnically diverse student body.[66] Three of these points were rejected by Justice Powell.

Justice Powell found the first point invalid.[67] The second point was too broad in that it covered "societal" and not specific discrimination. The authority to cure societal discrimination was not within the power of Davis.[68] The third point was discounted, since no evidence existed that Davis' plan was to aid the underserved community.[69] The fourth factor, however, Justice Powell found to be within the confines of Davis' academic authority.[70] The question thus became whether the program's method of creating diversity was necessary.[71]

In response, Justice Powell stated that the assignment of a fixed number was not the proper method.[72] Instead, he advocated the Harvard College program in which "race or ethnic background may be deemed a 'plus' yet not insulate the individual from comparison with other candidates."[73]

Justices Brennan, White, Marshall, and Blackmun concurred in part. They also found that Davis' special admission program was constitutional, and that race could be used as a consideration.[74] First, they claimed that racial classifications made for remedial purposes must only serve important governmental objectives, thus creating an intermediate level of scrutiny.[75] Having found that the special program did serve an important governmental objective, these Justices then considered whether the special committee stigmatized any racial groups.[76] Finding none, they had no problem in finding the plan constitutional.

Justice Stevens, with the Chief Justice, Justice Stewart and Justice Rehnquist, joining, concurred in part with Justice Powell's opinion and dissented in part. This opinion, however, found the special program illegal under Title VI and not under the equal protection clause as Justice Powell had opined. After first stating that "a private action may be maintained under Title VI,"[77] Justice Stevens continued by strictly construing the legislative history of the act. The opinion relied upon the remarks of Senator Pastore made during the debate over passage of Title VI. Pastore said that under Title VI it was

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[65] *Id.* at 298.
[66] *Id.* at 307.
[67] *Id.* at 309.
[68] *Id.*
[69] *Id.* at 310.
[70] *Id.* at 312.
[71] *Id.* at 315.
[72] *Id.* at 316.
[73] *Id.* at 317.
[74] *Id.* at 379 (Brennan, J., concurring in part, dissenting in part).
[75] *Id.* at 361.
[76] *Id.* at 373.
[77] *Id.* at 419 (Stevens, J., concurring in part, dissenting in part).

not "permissable to say 'yes' to one person, but 'no' to another, only because of the color of the skin."[78] Thus, Justice Stevens believed that "we are dealing with a distinct statutory prohibition" and it "prohibits the exclusion of individuals from federally funded programs because of race."[79] As a result, race, according to these Justices, could not be a consideration in an admissions program.

The result of these opinions is that five Justices found the special program illegal. Under the strict scrutiny standard, Justice Powell believed the program was unconstitutional according to the equal protection clause. Justices Stevens, Rehnquist, Stewart, and the Chief Justice opined that it was illegal because of Title VI. A different five Justices, however, held that race could be considered in the admissions procedures. Along with Justices Brennan, Marshall, White, and Blackmun, Justice Powell again found support under the equal protection clause.

Bakke's effect on *Fullilove* is obvious. It was with this case that the Justices were able to first formulate their opinions concerning reverse discrimination. Later, in *Fullilove*, they clarified those positions. It is therefore important to note the changes and/or developments that occurred between the two decisions.

Justice Powell's opinions are consistent. Beyond the obvious fact that both opinions advocated strict scrutiny, Justice Powell considered similar principles in both opinions. Davis' lack of authority to remedy societal discrimination was in step with Justice Powell's test in *Fullilove*. Only Congress should be given such wide latitude to cure society's problems. After examining the source, Justice Powell investigates the means. In *Bakke*, he did not find them defined narrowly enough. Though it is true that Justice Powell did not create a "test" in *Bakke*, the same criteria exist in both cases.

Justice Brennan's opinions in *Bakke* and *Fullilove* also do not differ significantly. Interestingly, in *Fullilove*, Justice White no longer sided with those Justices who advocated an intermediate level of scrutiny. He instead agreed with Chief Justice Burger. The significance of this shift is that only three of the Justices now support the use of a lesser standard in reverse discrimination cases.

Justice Steven's opinion made the greatest change from *Bakke* to *Fullilove* since in *Bakke* the constitutional question was not addressed. Nevertheless, only Chief Justice Burger seems to make a fundamental theoretical change in his *Fullilove* opinion. The rest of the Justices remain entrenched in a strict and narrow reading of reverse discrimination cases.

IV. Federal Court Cases Since *Fullilove*

The controversial nature of *Fullilove* and *Bakke* thus created a variety of viewpoints. The cases examined in this note reflect this disparity. All of these cases are similar to *Fullilove* in that they involve the constitutionality of a set-aside program for minorities in construction contract situations. At the same time, they are often crucially different in that a different legislative or administrative body other than Congress enacted the set-aside program. Therefore, the essential issue is often whether the enacting body has the authority to right past discriminatory wrongs. These cases can be generally divided into three categories. The first category includes three district court cases which apply Justice Powell's strict scrutiny test. The second category contains another two cases,[80] and

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[78] *Id.* at 418.

[79] *Id.*

[80] *See infra* note 149.

they by and large espouse the method suggested by Chief Justice Burger. The third category has three cases, one of which has since been vacated on other grounds by the Supreme Court. These cases attempt to synthesize the various *Fullilove* opinions.

A. *The Justice Powell Approach*

The Middle District Court of Alabama in *Central Alabama Paving, Inc. v. James*[81] was the first federal court to apply to a construction bidding case the strict scrutiny standard used in *Fullilove*. The central issue of the case revolved around Department of Transportation (DOT) regulations adopted in 1980. These regulations required the Alabama Highway Department to submit by October 1, 1980 fixed percentage goals for MBE's. If the figures were not presented, then Alabama would not receive any federal funding.

The challenge to the regulation made by Central Paving, a contractor, was twofold. First, the original and third party plaintiffs objected to the goals set by the DOT on the grounds that it violated the federal competitive bid statute.[82] The second contention was that a DOT regulation which stated that if a bidder submits a bid which reaches the MBE and Women's Business Enterprise (WBE) levels, then another bid which did not achieve those levels, though lower, could not be considered.[83] The specific language in question stated that if any contractor offered a reasonable price which met the MBE contract "the recipient (the State Highway Department) shall [then] presume conclusively that all competitors that fail to meet the goal have failed to exert sufficiently reasonable efforts and consequently are ineligible to be awarded the contract."[84] Thus a presumption was created within the rules against those bidders who had failed to achieve the MBE levels.

In construing the *Fullilove* opinions, the Alabama district court found the DOT regulations to be unconstitutional.[85] Though not expressly stated, the approach used was clearly the traditional strict scrutiny test.[86] The district court followed the three-step test that Justice Powell had followed in *Fullilove*. It examined first whether the DOT had the authority to require a set-aside for minority businesses.[87] The court found that it did not. Relying on their interpretation of *Fullilove*, the court stated,

> an administrative agency attempting to impose a race conscious remedy must have express Congressional authorization for such actions before those ac-

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[81] 499 F. Supp. 629 (M.D. Ala. 1980).

[82] *Id.* at 633. 23 U.S.C. § 112(b) states that "[c]ontracts for the construction of each project shall be awarded only on the basis of the lowest responsive bid sumitted by a bidder meeting established criteria of responsibility."

[83] *Id.* at 632.

[84] *Id. citing* 45 Fed. Reg. 21,188 (1980).

[85] *Id.* at 636.

[86] Evidence of the court's preference is seen by the fact that the court first discussed Justice Steven's dissent and then Justice Powell's opinion. Finally, it discussed Chief Justice Burger's opinion. The court failed to even mention Justice Marshall's concurrence.

[87] *Id.* at 637. The DOT attempted to claim authority by:

1. Section 905 of the Railroad Revitalization and Regulatory Reform Act of 1976 (45 U.S.C. § 803);
2. Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000(d) *et seq.*);
3. Section 30 of the Airport and Airway Development Act of 1970 (Pub. L. 91-258, 84 Stat. 219);
4. The Urban Mass Transportation Act of 1964 (Pub. L. 88-365, 78 Stat. 302);
5. Title 23 of the U.S. Code (relating to federal highways); and
6. The Federal Property and Administrative Services Act of 1949 (40 U.S.C. § 471 *et seq.*).

> tions can be found consistent with the requirements of equal protection. Defendants here lack such an express Congressional mandate.[88]

Similarly, the court found that if the agency had been given express authorization, at least the second requirement of the strict scrutiny test would have to be considered.[89]

The court went on to state that regardless of the first requirement, the DOT also failed with respect to the second; the need to expressly show past discrimination.[90] The DOT, in a prior hearing, had already admitted that no findings of past discrimination in relation to highway contracts had been made.[91] The failure of the agency to pass these two requirements sealed the regulation's fate.

By applying the strict scrutiny test as espoused by Justice Powell, the district court in its analysis did not need to reach the details of the DOT regulations. It paid only minimal attention to the means aspect of the test: "Furthermore, defendants have made no showing that they considered the desirability, appropriateness, or effectiveness of this particular program over that of other alternatives."[92]

Although *Central Alabama* properly followed the procedure enunciated by Justice Powell, the court's primary consideration of Congress' power was overemphasized. The Supreme Court in *Fullilove* did not state that no other governmental body could pass legislation relating to past discrimination. Indeed, both Justice Powell and Chief Justice Burger mentioned the possibility of other governmental bodies authorizing similar programs, although the opinions did not consider what the standard of review should be.[93] The district court did grant that if administrative agencies could offer sufficent evidence of "detailed legislative considerations" or conscious conferral of authority, then it could create race conscious remedies.[94] Nevertheless, the court's holding implies that only under the most overwhelming evidence would such a grant be allowed. Therefore, the opinion of the *Central Alabama* court narrowly interpreted the Justice Powell approach. It did, however, faithfully follow the strict scrutiny test.

While challenging the result reached in *Central Alabama*, the case of *M.C. West, Inc. v. Lewis*,[95] decided in the Middle District Court of Tennessee, was in many respects a decision necessitated by changes made in the DOT regulations subsequent to the *Central Alabama* case. In response to non-minority contractors who strongly criticized the "conclusive presumption" aspect of the DOT regulations,[96] the Secretary of Transportation amended the regulations on April 27, 1981. The key section within the amended regulation stated that,

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[88] *Central Alabama*, 499 F.Supp. at 637.

[89] *Id.* at 636. The court pointed to the case of Hampton v. Mow Sun Wong, 426 U.S. 88 (1976). In this case, a Civil Service Commission regulation prohibiting non-U.S. citizens from employment in the U.S. Civil Service was found to be unconstitutional. Although the regulation had not been enacted by Congress, the delegation of the authority by Congress was much more "explicit" than in *Central Alabama*.

[90] *Central Alabama*, 499 F.Supp. at 638.

[91] *Id.* at 632. The hearing was held on September 26, 1980. At the hearing, all parties were present. Further, a number of depositions, affidavits, exhibits and briefs were brought into evidence. On the basis of the evidence, the preliminary injunction against the DOT was granted.

[92] *Id.* at 639.

[93] *Fullilove*, 448 U.S. at 515 n.14 (Powell, J., concurring).

[94] *Central Alabama*, 499 F. Supp. at 638.

[95] 522 F. Supp. 338 (M.D. Tenn. 1981).

[96] *Central Alabama*, 499 F. Supp. at 632.

> the recipient shall, in the solicitation, inform competitors that [he] will be required to submit MBE participation information to the recipient and that the award of the contract will be conditioned upon satisfaction of the requirements . . . [97]

The court noted that except for the case at bar, the government believed that with the removal of the presumption, challenges to the regulation had all been settled.[98] Plaintiffs in this case moved for a preliminary injunction against the amendments to the regulations.

Like *Central Alabama*, the district court used Justice Powell's method to find the constitutionality of the race conscious remedy. The *M.C. West* court's use of the strict scrutiny test in this case was due to its reliance upon *Fullilove* and *Central Alabama*, which though not controlling, discussed the same issues and regulations. Therefore, as in *Central Alabama*, the court in *M.C. West* first had to question whether the agency had the authority to promulgate the regulation.[99] Though noting that *Central Alabama* had relied upon Congress' sole role as a proper body to create race-conscious remedies, the district court contemplated the authority granted to the judicial and executive branches.[100] While admitting that the executive " . . . is not a law making or an adjudicatory body," the court reasoned that " . . . it is fairly charged with the duty to fairly execute the laws."[101] Despite this excursion into the executive branch, the court rejected the government's reliance on Executive Order 11,246.[102] The court held that this Order should be enforced by the Secretary of Labor. No evidence existed, however, that the Secretary possessed any express authority over the Secretary of Transportation to promote the Order.[103] The court also rejected the government's argument that various statutes granted the DOT authority.[104]

The court held that the DOT did possess the power to create the regulation under the Small Business Act and Executive Order 11,625.[105] Generally, Executive Order 11,625 empowered the Secretary of Commerce to "coordinate . . . the plans, programs and operations of the Federal Government which may contribute to the establishment, preservation, and strengthening of minority business enterprise."[106] The court applied this Order to the Secretary of Transportation by citing the portion of Executive Order 11,625 which requested that each federal department and agency "continue all current efforts to foster and promote minority business enterprises and to support the program, and [to] cooperate with the Secretary of Commerce in increasing the total Federal effort."[107]

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[97] *M.C. West*, 522 F. Supp. at 339 *citing* 46 C.F.R. § 23461 (1981) (amending 49 C.F.R. § 23.45 (1980)).

[98] *Id.* at 339 n.1.

[99] *Id.* at 343.

[100] *Id.*

[101] *Id.*

[102] *Id.* at 344. The Order stated that a contractor agrees not to "discriminate against any employer or applicant . . . because of race, color or religion, sex or national origin [and to] take affirmative action to ensure that applicants are employed."

[103] *Id.*

[104] *Id.* The lists of acts which the DOT claimed to give them authority was similar to the one used by them in *Central Alabama*, 499 F. Supp. at 637 (*see supra* noté 87). Only the sixth Act, the Federal Property and Administrative Service Act of 1949, was omitted.

[105] *M.C. West*, 522 F. Supp. at 346.

[106] *Id. citing* Executive Order 11,625 § 1(a)(1)(1971).

[107] *M.C. West*, 522 F. Supp. at 346 *citing* Executive Order 11,625 § 3(e) (1971).

Support for the Order was further strengthened by the Small Business Act.[108] Within the Act the realization of past discrimination was stated, and therefore, according to the court, the concerns of the Powell wing were satisfied.[109] Through this analysis, the court held that the Small Business Act granted the DOT authority to regulate in this case. According to the court, the purpose of the Small Business Act referred to procurement of equipment.[110] However, federal assistance programs such as the MBE's provide services. The difference in meaning between the providing of services and a procurement was admitted by the court when it stated that the "chain of authority is not pristine."[111] Nevertheless, the court held that "[W]hen the Government exercises its procurement function with the purpose of remedying discrimination against minorities it is more like a program of federal assistance then pure procurement."[112]

The court in addressing the second step held that the amended regulations passed the "finding of past discrimination" requirement. The court, basing its finding on a factor not available in *Central Alabama*, found evidence of past discrimination on the grounds of the comments "received from nearly 400 sources" which caused the amendment to the regulations.[113] The court was then swayed by the effects of the "good faith requirement" when considering the means test.[114] The court believed that the good faith remedy in the present regulation was so narrow that specific findings were essentially unnecessary.[115] The court held in this case that the regulation in question passed the means test; it did not create any unnecessary burdens upon non-minority third parties.[116]

Throughout its decision, the court struggled to fit the regulation into the boundaries of a strict scrutiny analysis. The *M.C. West* case best exemplifies the problems which are posed by using the strict scrutiny standard of review on reverse discrimination cases. The court, presumably swayed by the simplicity and narrowness of the regulation, found that it was constitutional. Nevertheless, to do so under the *Central Alabama* precedent, the court had to find a granting authority; an authority not found in *Central Alabama*. This forced the Court to expand its focus into the area of Executive Orders. By doing so, it necessarily stretched the intended narrowness of the strict scrutiny test as espoused by Justice Powell in *Fullilove*. The court in essence created a rebuttal to the implied negativism of the Justice Powell approach towards such programs. The result of such a theoretical expansion was that the coherence of the strict scrutiny test, when faced with a different setting, become less well focused and more uncertain.

The third case to apply the strict scrutiny standard was *Michigan Road Builders Association, Inc. v. Milliken*.[117] Plaintiff brought this case on the contention that P.A. 1980, No. 428, M.C.L.A. § 450.77 et seq. (P.A. 428) was facially invalid. P.A. 428 was enacted by the Michigan legislature on January 13, 1981. The program, similar in goal to the congressionally created Act involved in *Fullilove*, was an attempt to increase participation

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[108] 15 U.S.C. § 631(e)(1)(A)-(G) *Id.*

[109] *Id.*

[110] *Id.* at 347.

[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] *Id.* at 349.

[115] *Id.* at 348. The court did show concern as to whether or not this remedy would have any effect on minority participation. *Id.* at 348 n.10.

[116] *Id.*

[117] 571 F. Supp. 173 (E.D. Mich. 1983).

of minority and women-owned businesses.[118] P.A. 428 established a procurement policy which set interim goals for both MBE's and WBE's.[119]

The court expressly stated that the standard of review in the case at bar should be that of strict scrutiny.[120] The precedence for this conclusion was the Sixth Circuit's decision in *Bratton v. City of Detroit*.[121] The court reasoned that in order to make its decision, it had to "examine *Fullilove* and the appropriate cases of the Sixth Circuit to determine the precise meaning of strict scrutiny within the context of legislative enactments which . . . favor a minority class."[122] Through their analysis, the court curiously combined the *Fullilove* opinions of Justices Powell and Marshall by concluding that "[t]his Court is persuaded that the opinions of Justices Powell and Marshall are so closely aligned to the rule of the Sixth Circuit that this Court should not, and indeed, cannot deviate from the law of this Circuit."[123] The court's conclusion therefore was that by their inspection of the *Bratton* case "the State must demonstrate a significant interest in ameliorating the past effects of present discrimination rather than the 'compelling interest' standard . . . ."[124]

Thus, having decided on a standard of review, the court proceeded with the requirements articulated by the *Bratton* decision. The court did not need however, to examine the first step of the test since the plaintiff did not argue that the Michigan legislature was not an appropriate authority to enact race-conscious remedies. The plaintiff did contest the second requirement, whether any specific findings of past discrimination existed, and the court began its analysis at that point. The court first cited *Bratton* for expressing the method by which to uncover specific findings of past discrimination: "the discriminatory intent may be established by any evidence which logically supports the inference that state action or policies were adopted for invidious purpose."[125]

The court then held that in this case, "evidence of a prior discrimination need not exceed that level which was articulated in *Bratton*."[126] The court analogized the position of the Michigan legislature as the "[u]ltimate policy making body of the State" with that of Congress' position and concluded that the finding by the Michigan legislature need not

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[118] *Id.* at 175 (citing PA 428 § 450.772(2)).

[119] *Id.* For minority owned business, the goal for increasing minority procurement was as follows:

> the goal for 1980-1981 shall be 150% of the actual expenditures for 1979-1980; the goal for 1981-1982 shall be 200% of the actual expenditures for 1980-1981; the goal for 1982-1983 shall be 200% of the actual expenditures for 1981-1982, the goal for 1983-1984 shall be 116% of the actual expenditures for 1982-83, and this level of effort at not less than 7% of expenditures shall be maintained thereafter.

[120] *Id.* at 176.

[121] 704 F.2d 878 (6th Cir. 1983). In *Bratton*, the plaintiff, a class of white police sargeants, claimed that the adoption of a voluntary affirmative action program by the Detroit Police Department violated their rights under Title VI (42 U.S.C. § 2000), 42 U.S.C. § 1983, and the fourteenth amendment. The Sixth Circuit stated that the proper standard of review was strict scrutiny although it also stated that "Justice Marshall's opinion in *Fullilove* clearly reaffirms the analysis generally relied upon in the initial formulation of this Circuit's approach to affirmative action." *Id.* at 885-86. The court did note, however, that the *Bratton* case addressed a "materially different context" than *Fullilove*. *Id.* The *Fullilove* issues were distinct from the employment context of *Bratton*.

[122] *Michigan Road Builders*, 571 F. Supp. at 176.

[123] *Id.*

[124] *Id.* at 176.

[125] *Id.* at 178.

[126] *Id.*

[127] *Id.*

rise to the level required for administrative or judicial bodies.[127] The court then delved into the legislative history of P.A. 428 to determine specifically whether the Michigan legislature's enactment was actually based on findings of past discrimination. After a lengthy exploration into the legislative history of P.A. 428, the court concluded that the Michigan legislature's decision was properly based upon evidence which logically inferred that racial discrimination existed prior to the enactment.[128]

The court's reliance upon the *Bratton* precedent led it to create a conglomeration of factors for the analysis of the means test. It held that to find the remedy legitimate, it had to discover 1) whether any group had been stigmatized by the legislation, and 2) whether it had been reasonably drawn.[129] Under the second factor the court cited *Fullilove* and found that the factors which made the MBE constitutionally permissable were: 1) the program was strictly remedial, 2) it functioned prospectively, 3) the plan was open only to qualified MBEs, 4) technical assistance was to be provided as needed, 5) it provided for a waiver, 6) it included an administrative mechanism to prevent unjust participation, and 7) the program was appropriately limited in extent and duration.[130] P.A. 428 satisfied each one of these considerations and thus the Court held that the legislation was constitutionally permissible.

The analysis of the court in *Michigan Road Builders* is flawed. Though expressly stating the intention to follow the strict scrutiny standard, the court instead created its own approach to *Fullilove*. Its dependence on the opinion of Justice Marshall in *Fullilove* to support strict scrutiny is, at very best, questionable. An intermediate standard requiring an important governmental objective is quite different and less restrictive than a standard of strict scrutiny and the need for a compelling state interest. Furthermore, the traditional test of strict scrutiny is whether a compelling state interest exists and not whether a significant interest exists. In *Michigan Road Builders*, the court expressly rejected the use of a compelling state interest standard.

The approach to the means aspect of the test is also confusing. The factor of a stigma being attached to the program is clearly that of Justice Marshall.[131] In *Bakke*, Justice Powell rejected stigma as being relevant to an equal protection analysis.[132] The next factor, whether it is reasonably created, is of the court's own making and not a criterion used by Justice Powell. From the seven factors listed by the *Michigan Road Builders* court only two were espoused by Justice Powell. Three of Justice Powell's factors were ignored. *M.C. West*, while ignoring most of the factors enunciated by Justice Powell, did at least consider the crucial fifth factor of the "burden" on third parties. *Central Alabama*'s analysis required no such finding, since there, the court held that at the very first step of the test the regulation failed. Since the DOT was not an appropriate body to authorize such legislation, the means did not have to be examined. The other five factors listed in *Michigan Road Builders* also showed the confusion present in the opinion. Nowhere in *Fullilove* is the provision of technical assistance listed as a requirement towards finding the "reasonableness" of the remedy.

Although it is not expressly necessary for the court to follow Justice Powell's five factors, its failure to do so raises two concerns. First, it may be evidence of the court's

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[128] *Id.* at 187.
[129] *Id. citing Bratton*, 704 F.2d at 887.
[130] *Michigan Road Builders*, 571 F. Supp. at 188.
[131] *Fullilove*, 448 U.S. at 519 (Marshall, J., concurring).
[132] *Bakke*, 438 U.S. at 294 n. 34.

inability to grasp the narrowness of Justice Powell's opinion. Second, it proves that the Justice Powell opinion, when placed in a factual situation different than that of *Fullilove*, is extremely difficult to apply.

The court's difficulty therefore lies in its interpretation of the strict scrutiny standard. If they did not set such a standard, their analysis, though disjointed, could have been more credible yet without precedence. To create a strict standard and to not follow the form articulated by Justice Powell leads to a confusing and problematic position.

These cases present many problems. They do not show any indication that the strict scrutiny test as advocated by Justice Powell can be applied to reverse discrimination cases in a manner which would make the courts' analyses and decisions simpler to reach. Used as precedents, these three cases would not possess much credibility. Parts of the *Central Alabama* holding were simultaneously mooted by the 1981 amendment while the rest were challenged and overcome by the *M.C. West* case. Still, *Central Alabama*, in spite of its narrow analysis was the only case which faithfully articulated the Justice Powell approach. The *M.C. West* decision, in turn, found the program constitutionally valid only after it went against the holding of *Central Alabama*. Furthermore, in its search for a granting authority, it went beyond the realm of congressional authority and into the power of the executive branch. Finally, *Michigan Road Builders*, while espousing strict scrutiny, did not follow the strict scrutiny standard.

Beyond the analytical problems in all three cases, the greater problem lies in their use of strict scrutiny. It must be remembered that in *Fullilove*, six Justices of the Supreme Court found that an MBE-type program which allowed a ten percent set-aside, in a construction bidding situation, was constitutional. Cases with similar fact patterns, which depend upon the weight of the *Fullilove* decision, should also pass constitutional muster. Indeed, two of the three cases in this section have found the plan constitutional. A standard with the stringency of strict scrutiny presumes at the outset a negative reaction. Rebutting the presumption is to invite hazards in analysis. The result is that in spite of favorable holdings for such programs, the path of a strict scrutiny test follows creates a pall over all MBE programs.

This argument could be considered too result oriented. Even so, the standard of strict scrutiny is still not the best standard of review for reverse discrimination cases. The weakness of Justice Powell's opinion is not its philosophical beliefs. The problem is its rigidity. It does not allow the various courts to decide cases similar in theory but vitally different in reality. This difference is seen in terms of who the authorizing body was that enacted the set-aside program. The attempts to create a more flexible standard from the Justice Powell approach creates inconsistencies; decisions as stringent as *Central Alabama* or as loosely held as *Michigan Road Builders*.

B. *The Chief Justice Burger Approach*

The strength of Chief Justice Burger's opinion is that its approach allows for a wide variety of factors to be considered. It is not burdened by any traditional method of analysis and it does not require the specific following of any one approach. Indeed, it claims that its analysis would fit any of the standards used by the other Justices.[133] While it possesses many of the same considerations as Justice Powell's opinion, under Chief Justice Burger there is no need to find a compelling state interest.

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[133] *Fullilove*, 448 U.S. at 492 (Burger, C.J., opinion).

The case of *Ohio Contractors Association v. Kreip*[134] did not expressly state any particular standard of review. The court followed general guidelines similar to the approach used by Chief Justice Burger. Further, by not explicitly following the standard adopted by Justice Powell, the court fell under the implied standard expressed by Chief Justice Burger.

The case arose due to the Ohio General Assembly's passing of an MBE act in November 1980. The contested provision of the act required the director of the Department of Administrative Services to find "a number of [state construction] contracts whose aggregate value is approximately five percent of the total estimated value of the contracts" and set aside that total for minority businesses only.[135] Further, approximately fifteen percent of the estimated total value of all state contracts for purchases of equipment or supplies were to be set aside for minority businesses.[136]

The Sixth Circuit reversed the decision of the district court and held that the plan was constitutional. The Sixth Circuit in reaching this decision did not expressly chart what factors it had to consider. Rather the court first examined whether specific findings of past discrimination had been made by the Ohio legislature. While noting that none of the concurring Justices in *Fullilove* would have declined to acknowledge the importance of the need for findings, the court held that the district court was "too restrictive" in its approach.[137] The district court had held that since the preamble to the program did not expressly recite any purpose of the legislature to identify and correct past racial wrongs, then the legislature had no right to authorize the program. The Sixth Circuit, taking instead Chief Justice Burger's approach, found that the "backdrop" of the legislative history of the provision and the floor debate regarding the proposals, made it clear that the purpose of the legislation was the correction of past racial wrongs.[138]

The court had a more difficult time finding the Ohio legislature an appropriate authority. It first recounted its interpretation of Justice Powell's use of the word "unique" when describing Congress' role. The court stated, "we believe he [Justice Powell] meant the power [of Congress] was 'notable' or 'unequaled', not 'sole' or 'exclusive'."[139] It then noted examples of other public bodies which had enforced provisions such as school desegregation and the Detroit Board of Police Commission.[140] The court then compared the power granted to Congress by the fifth amendment to enact such legislation with the fourteenth amendment's ability to do the same to the state government.[141]

In examining the means aspect of the case, the court found that it passed muster. It chose the four factors used by the district court: 1) the lack of a durational limitation, 2) the creation of an undue burden, 3) the possibility of unjust participation, and 4) the availability of a less intrusive means.[142]

The issue of durational limitations was of the most interest. The district court had found the lack of a sunset provision to be fatal.[143] The Sixth Circuit found that the "Ohio

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[134] 713 F.2d 167 (6th Cir. 1983).

[135] *Id.* at 169 *citing* Ohio Revised Code § 125-081(A).

[136] *Id.*

[137] *Id.* at 170.

[138] *Id.*

[139] *Id.* at 172.

[140] *Id.* The court cited the Supreme Court holding in United Jewish Organizations v. Carey, 430 U.S. 144 (1977) to prove the former, while pointing to its own case of Detroit Police Officers v. Young, 608 F.2d 671 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981), as evidence of the latter.

[141] *Kreip*, 713 F.2d at 172.

[142] *Id.* at 173-74.

[143] *Id.* at 175. Chief Justice Burger also discussed the limited duration period of the MBE in *Fullilove*. *See Fullilove*, 448 U.S. at 489.

act is subject to continuing reassessment and reevaluation. The record discloses that in 1981, the General Assembly passed legislation . . . clarifying the . . . requirement and adding operational details to the waiver provision."[144] Thus, the court held that "so long as the necessity for reassessment and reevaluation of a race-conscious remedial measure is recognized," the act did not need an ending date.[145]

Judge Engel dissented to the opinion.[146] The dissent, which agreed with district court, was based on the narrow grounds that the Ohio MBE act failed to provide any durational limits.[147] Although not stating any standard of review, Judge Engel opined that in its present form the act presented, "a very real danger of fostering a dependancy upon favoritism which is inimical to general policies of equality."[148]

This case is an example of the importance of form in finding the constitutionality of a program. The court evidently did not wish to place reverse discrimination under strict scrutiny standards. This was proven by the court's belief that the district court's approach was too stringent. Chief Justice Burger's opinion provided the court a level of judicial scrutiny which was theoretically below the strict scrutiny level, but still substantially above the intermediate level of review. Furthermore, Chief Justice Burger's opinion gave the court the ability to analyze the factors posed by the district court and to reject their holdings. Thus, the court did not have the burden of rebutting the implicit presumption that existed in the strict scrutiny standard. A formal test would not have allowed for a proper discussion of another court's opposing viewpoint.

The one case which did expressly attempt to parallel its analysis with that of Chief Justice Burger's was *South Florida Chapter of the Associated General Contractors of America, Inc. v. Metropolitan Dade County, Florida*.[149] The Dade County ordinance and resolution contested in this case arose from the Dade County Commission's action on findings of the 1980 Liberty City disturbances.[150] The studies showed that race relations would worsen if business opportunities in the black community did not improve.[151] As a result the Commission on July 20, 1982 passed Ordinance 82-67, which was designed to foster black economic growth.[152] The regulations under the Ordinance stated "Black subcontractor goals are to be based on the greatest potential for Black subcontractor participation and

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[144] *Id.*

[145] *Id.*

[146] *Id.* at 176 (Engel, J., dissenting).

[147] *Id.*

[148] *Id.*

[149] 723 F.2d 846 (11th Cir. 1984) *cert. denied* — U.S. —, 105 S.Ct. 220, 83 L.Ed.2d. 150 (1984). In the recent case of J.A. Croson Co. v. City of Richmond, 45 Fed. Contracts Rptr. 15 (1985), the J.A. Croson Co. challenged the Minority Business Utilization Plan of the City of Richmond. The court followed the Eleventh Circuit's reasoning in *Dade County* and found the plan constitutional. The court called the Eleventh Circuit's factors a "synthesis" of the *Fullilove* opinions despite that court's labelling the approach as similar to Chief Justice Burger's opinion.

[150] Eight reasons were given in the Report of the Governor's Dade County Citizens Committee for the black community's civil disturbances in Liberty City. The reasons were:

> (1)poverty, unemployment and underemployment; (2) slum housing and living conditions; (3) functional illiteracy; (4) the perception among Blacks of the local criminal justice system; (5) inadequate youth recreational facilities and activities; (6) political deprivation; (7) hard core juvenile delinquency; and (8) the general failures of society, *quoted in Dade County*, 552 F. Supp. at 915.

[151] *Dade County*, 723 F.2d at 848.

[152] *Id.*

shall relate to the potential availability of Black-owned firms in the required field of expertise."[153] The Dade County Commission found the Earlington Heights station, which was part of a billion dollar rapid transit system, to be subject to the Ordinance. The Commission held that competitive bidding would be limited solely to the black population. As a result, the Commission passed Resolution No. R-1350-82(R-1350), which enacted a 100% set-aside for the bidding for the contract and a fifty percent goal for the subcontracting work.[154]

After reviewing the various opinions of *Bakke* and *Fullilove*, the Eleventh Circuit relied on what it considered to be the "common concerns" of the Justices: l) that the governmental body had the authority to pass such legislation; 2) that adequate findings had been made; and 3) that the remedy was narrowly tailored to fit the objectives.[155] In doing so, the court stated that, "This approach is most closely akin to that set out in Chief Justice Burger's opinion in *Fullilove*."[156] The court approved of the importance of balancing the need to right past wrongs against the harm to third parties but it rejected the use of a formal "test".[157]

The court relied on the *Kreip* reasoning to reject the "unique" role of Congress in determining the credibility of the Commission.[158] More specifically, it found authority in the Home Rule Charter which expressly gave the county power to waive competitive bidding.[159] Furthermore, the court found that Dade County had made adequate findings of past discrimination. The court relied on the various findings made by the district court of the Commission's use of certain studies in enacting its Ordinance.[160]

The means part of the analysis was also easily dispensed with. In evaluating the Dade County Ordinance the court reasoned that the three tiers of administrative review that a set-aside project had to pass were sufficient to prevent unjust participation and "undue burden" on third parties.[161] In addition, the periodic review and assessment of the program was found to provide a competent complement to the three-tiered review.[162]

The essential issue of this case and the difference between it and the other cases was that the court, after finding the Ordinance constitutional, had to find whether the program, R-1350 in particular, was constitutionally applied. In finding that the project was constitutionally acceptable, the Eleventh Circuit rejected the district court's holding. The lower court had stated that a 100% set-aside on the station created an unfair burden on third parties.[163] The district court then held that the fifty percent figure was a goal, not a set-aside, and therefore was constitutionally acceptable.[164]

The circuit court found the lower court's distinction between the fifty percent goal and the set-aside questionable.[165] In essence, the court saw no significant difference. As

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[153] *Id.*
[154] *Id.* at 849.
[155] *Id.* at 851.
[156] *Id.* at 852.
[157] *Id.*
[158] *Id.*
[159] *Id. citing* Metropolitan Dade County, Florida, Home Rule Charter § 4.03(D) (as amended through Oct. 5, 1978).
[160] *Dade County*, 723 F.2d at 853 (citing findings made by the district court. 552 F. Supp. at 917).
[161] *Dade County*, 723 F.2d at 853.
[162] *Id.*
[163] *Dade County*, 552 F. Supp. at 941.
[164] *Id.*
[165] *Dade County*, 723 F.2d at 856.

long as the set-asides were narrowly tailored to the Ordinance, the remedy would pass scrutiny.[166] More importantly, the court ruled that the totality of the project, not just the Earlington Heights section, had to be considered.[167] Under this consideration, the Earlington Heights project constituted less than one percent of the total cost of the project.[168] Taking that percentage and relating it to the fact that seventeen percent of the population of Dade County was black, the court held, "the effect of the set-aside and the subcontractor goal is not disproportionate."[169]

This case produced no major analytical problems. The court simply considered the factors Chief Justice Burger found relevant and applied them. The court's decision reflected Chief Justice Burger's underlying theme that in reaching a decision on race-conscious remedies, a balancing of factors must occur. A balance must occur between the remedy and the harm done to third parties. The court did this with their consideration of the Earlington Heights project. Nevertheless, like Chief Justice Burger's opinion in *Fullilove*, once the Eleventh Circuit stated its approach, its holding was hardly surprising.

A more interesting aspect of *Dade County* is the possibility that even using the most stringent and narrow opinion of *Fullilove*, this Ordinance probably would have been found to be constitutional. Justice Stevens' dissent in *Fullilove* centered mostly on the fact that the remedy of an MBE program was not sufficiently specific. In *Dade County*, the Ordinance was a direct result of a specific occurrence which exemplified past discrimination. The remedy was not general. It applied only to blacks and not to any other minority group. Given the narrowness of this remedy, the surprising aspect of the case is that the lower court, even though it applied the strict scrutiny standard, found the Ordinance unconstitutional.

Chief Justice Burger's opinion while not stating an exact standard of review, does create an implied one. These construction cases reflect this implied standard that race-conscious remedies should not be considered as stringently as they would be under strict scrutiny, but somewhere definitely above the standards required by Justice Marshall. The lack of an express standard of review allowed the courts to bring in considerations relevant to their particular cases. The analysis of both the *Kreip* and *Dade County* cases do not produce the complicated and confused reasoning evident in *Michigan Road Builders* or *M.C. West*. It would seem that Chief Justice Burger's opinion allows for a simpler if not more logical method of analyzing reverse discrimination in construction bidding situations.

The only possible drawback is that Chief Justice Burger's position fails to give sufficient guidance to the lower courts. It is important that courts remain within the guidelines imposed by his opinion. To not follow Chief Justice Burger's approach, or the tests required by Justices Powell or Marshall is to skirt the constitutional issue. This in essence is what the next three cases reflect.

C. *The Synthesis Approach*

The courts in the following cases expressly state that they need not enter the analytical labyrinth created by *Fullilove*. Instead, they combine the common concerns of all of the opinions of *Fullilove*. By doing so, these courts commonly believe that their

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[166] *Id.*
[167] *Id.* at 855.
[168] *Id.*
[169] *Id.*

analysis would be applicable under any of the standards of review used in *Fullilove*. This viewpoint differs, however, from Chief Justice Burger's similar statement in *Fullilove*. Chief Justice Burger's opinion at least implicitly created a level of scrutiny even if it pursued a path independent from other Justices. The cases analyzed here attempt only to synthesize the Justices' opinions from *Bakke* and *Fullilove*. This approach is one which appears to be taking on increasing popularity, despite its lack of a theoretical foundation.

The first attempt to use the synthesis approach was in the case of *Pettinaro Construction Company, Inc. v. Delaware Authority for Regional Transit*.[170] Plaintiffs in this case contested provisions set forth by the Delaware Authority for Regional Transportation (DART). DART was established as a local transportation authority by an act of the state legislature. On June 4, 1975, DART, in conjunction with the U.S. Department of Transportation, solicited bids for the construction of an operations center. Originally, the project manual, which contained in Paragraph 16, the bidding specifications for the project, stated the requirement that a contractor "use its best efforts" in seeking minority business subcontracting work.[171] This phrase was later changed to require that fifteen percent of the subcontracts had to go to minority business enterprises.[172] Pettinaro Construction Co., the plaintiff, though turning in the lowest bid, failed to achieve the fifteen percent figure.[173] The contract was therefore given to Ehret of Delaware, Inc., the lowest bidder who had complied with the percentage requirement. While claiming that it had made a good faith effort to comply with Paragraph 16, Pettinaro contended that the stipulation was not justified by any compelling state interest.

The opinion of the court stated that both parties in their arguments had "synthesized" the *Bakke* and *Fullilove* decisions and concluded that to pass constitutional muster the court had to find that: 1) the program was supported by a finding by a competent legislative body that unlawful discrimination against minority businesses had occurred, and 2) that the remedy was narrowly drawn.[174] The court then noted that the motion to be decided was one for summary judgment by the plaintiff, and therefore a heavy burden was to be placed upon them.[175] Because of the limited nature of a summary judgment motion, the court held that it needed only to find questions of material fact.[176] If it did find factual disputes then, "it must leave resolution of these issues to another day and deny the moving party's motion for summary relief."[177] The important constitutional issue created an additional burden on the plaintiff[178] and made the court's examination of the motion "particularly exacting."[179] For the court to grant Pettinaro's motion, the court held that there must have been "undisputed evidence that the racial preference imposed in this case was not supported by a legitimate finding of prior discrimination by a competent body and was not designed to redress the present effects of this past discrimination."[180]

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[170] 500 F. Supp. 559 (D. Del. 1980).
[171] *Id.* at 560 (citing Docket Item 32, p.3, paragraph 16).
[172] *Id.* at 561.
[173] *Id.* at 562.
[174] *Id.*
[175] *Id.* at 563 (citing FED. R. CIV. P. 56c).
[176] *Id.* at 563.
[177] *Id.*
[178] *Id.*
[179] *Id.*
[180] *Id.* at 564.

On the basis of the two requirements and in consideration of the motion, the court held that summary judgement had to be denied. It based its decision on the "stringent standards," and against the "backdrop of complex constitutional issues, provided by *Bakke* and *Fullilove*."[181]

In its decision, the court took under examination the challenges put forth by the plaintiff. First, the plaintiff contended that no findings of past discrimination had been made.[182] Second, Pettinaro claimed that none of the offices of the federal or state government was vested with the proper authority.[183] In either instance, the court found that these claims were not factually supported.[184] In addition, the fact that the defendant disputed the claims was sufficient to deny summary judgment. The court concluded by stating, "the court must be assured of an adequate factual record, and cannot rest a decision granting summary relief on the basis of bald assertions unsupported by any cogent factual predicate."[185]

The analysis used in this case is not that useful when investigating the constitutional issue because the court's concern for the summary judgement motion substantially changes the court's constitutional analysis. Nevertheless, it is important to note that the court's use of the term "stringent standards" was not evidence of the court's adoption of the Justice Powell opinion. The phrase was used in the opinion more as a descriptive phase rather than a term of art. The court did not require and did not follow any of the tests for strict scrutiny. Instead the court simply synthesized the factors from Justice Powell's and Chief Justice Burger's opinions and generally investigated the objectives and the means of the legislation.

The *West Michigan Broadcasting Company v. Federal Communications Commission* (FCC) case[186] arose from an FCC plan to do a comparative evaluation of two construction permit applications to establish a new FM radio station in Hart, Michigan. The comparative evaluation process of the FCC, through which the two applications were processed, contained six considerations.[187] Considerations of the factors resulted in high marks for both West Michigan, the eventual plaintiff, and Waters Broadcasting Corporation. Due to this equality, the FCC was forced to consider the particular attributes of the owners of each applicant. These attributes contained two factors: l) the integration of local ownership with management, and 2) the integration of minority ownership with management.[188] For the first factor, West Michigan received "substantial enhancement"[189] to its

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[181] *Id.*

[182] *Id.*

[183] *Id.* at 565.

[184] *Id.*

[185] *Id.*

[186] 735 F.2d 601 (D.C. Cir. 1984).

[187] *Id.* at 604. These are:

1. Diversification of control of the media of mass communication;
2. Full-time participation in station operation by owners;
3. Proposed program service;
4. Past broadcast record;
5. Efficient use of frequency;
6. Character.

These considerations evolved from the FCC's use in 1965 of its Policy Statement on Broadcast Hearings, 1 F.C.C.2d 393 (1965).

[188] *Id.* at 606.

[189] *Id.*

application because of the owner's local residence and community involvement. Waters, however, was only given a "moderate enhancement" in the same category.[190] For the second factor, Waters, a minority owned company, received a "substantial enhancement" and was awarded the permit.[191] West Michigan challenged the FCC's award of the grant to Waters.

In discussing this factor on constitutional grounds, the court found the plan legal.[192] The court only considered what it found to be the highlights of the *Bakke* and *Fullilove* opinions. It also expressly stated that the FCC plan did not need to enter the various paths of the opinions of the Supreme Court.[193] The two major considerations which the court discussed in finding the program constitutional were: 1) the fact that the minority consideration was only one of the many criteria, and 2) Congress' approval of the FCC plan.[194]

To support the use of the first consideration, the court pointed to the similar factor in Justice Powell's opinion in *Bakke*.[195] The court held that "clearly, under Justice Powell's approach the FCC's goal of bringing minority perspectives . . . could legitimize the use of race as a factor in evaluating permit applicants."[196] The court analogized the FCC plan with Justice Powell's support of the idea that "race or ethnic background may be deemed a 'plus' in a particular applicant's file."[197]

The second consideration was even more easily supported. The court noted that Congress had explicitly mandated that the FCC follow a minority promotion program.[198] Given this congressional approval, the court then discussed the importance of congressional authority in the decisions in *Fullilove*.[199] The court further noted that Congress had explicitly found evidence of "severe underrepresentation in the media of mass communications."[200] With these similarities the court concluded that "an administrative agency [such as the FCC] can certainly follow Congress' lead in an effort to further implement Congress' concerns."[201]

The Ninth Circuit in *Schmidt v. Oakland Unified School District*[202] discussed the constitutional issue involved in reverse discrimination. However, the Supreme Court vacated the Ninth Circuit's decision on June 21, 1982.[203] Nevertheless, it is at least academically interesting to examine how the Ninth Circuit tackled the constitutional issue by using the synthesis approach. In *Schmidt*, the policy being challenged was the affirmative action plan (AAP) adopted by the Oakland Unified School District (District). This program was

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[190] *Id.*

[191] *Id.*

[192] *Id.* at 613. The plaintiff also raised non-constitutional arguments based on the FCC's prior policy towards minority ownership, on the FCC's treatment of Water's owner's residence and on the contention that Hart, Michigan had an unsubstantial black population. *See id.* at 608-12.

[193] *Id.* at 613.

[194] *Id.* at 614-15.

[195] *Id.* at 614.

[196] *Id.*

[197] *Id.* at 615 *citing Bakke*, 438 U.S. at 317-18.

[198] *Id.* at 612.

[199] *Id.* at 615.

[200] *Id.* at 616.

[201] *Id.*

[202] 662 F.2d 550 (9th Cir. 1981) *vacated on other grounds Schmidt*, 457 U.S. 594 (1982).

[203] In a per curiam opinion, the Supreme Court held that the circuit court had overstepped its bounds by ignoring the state-law question. The Court held that "[i]f the affirmative action plan is invalid under state law, the Court of Appeals need not have reached the federal constitutional issue." *Id.* at 595. Thus, the Court vacated and remanded the Ninth Circuit's decision.

applied to construction contracts solicited by the District. The District was required under the California Educational Code to award to "the lowest responsible bidder" any contract for work over $12,000.[204] The District defined a "responsible bidder" in construction contracts over $100,000 to be one who must use minority owned businesses for at least twenty five percent of the dollar amount of the total bid.[205]

In 1977, the plaintiff submitted a bid for the refurbishing of the Oak Grove Campus of Oakland Technical High School. The plaintiff, a white controlled company, submitted the lowest bid. Under this bid, sixteen percent of the work was to go to Jot Brown, Inc., a minority owned business. Since the plaintiff did not fulfill the twenty five percent requirement, the contract was taken from it and was given to the next lowest, AAP qualified bidder. Summary judgment was granted to the defendants in the lower court.

The Ninth Circuit agreed with the district court's decision.[206] While expressly rejecting any need to find any applicable standard,[207] the court still followed the three basic considerations used by both Chief Justice Burger and Justice Powell in *Fullilove*. First, the court discussed the plaintiff's contention that the District did not have an important interest in remedying these discriminatory effects.[208] Furthermore, the District, according to the plaintiff, did not have the authority to remedy these effects.[209]

The court's response was twofold. It first noted that the effect of the AAP was focused to remedy the discriminatory impact of one specific industry.[210] The program was not a shotgun approach towards healing a societal problem, an approach which was clearly rejected by Justice Powell in *Bakke*.[211] The court then held that the District and its executive arm, the School Board, were the perfect bodies to "assert an interest in remedying the effects of past discrimination in this particular industry."[212] The court found that if the District were to perpetuate discriminatory actions within its own construction contracts, it would "seriously undermine it credibility in the community . . . thereby impairing its capacity to educate."[213] Thus, the District's authority was sufficient to create the AAP.

The second step was seen as the most important. The court held that specific findings of past discrimination had to be proven. To do so, the court pointed not only to a variety of meetings which had been held to implement more minority participation, but also to statistical evidence that many residents in Oakland were underrepresented in the construction field.[214] Furthermore, the court pointed out that the School Board had ample expertise in evaluating school construction bids and was therefore a competent body to make such findings.[215]

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[204] *Schmidt*, 662 F.2d at 553 *citing* California Educational Code § 39640.

[205] *Id.*

[206] *Id.* at 555.

[207] *Id.* at 557.

[208] *Id.* at 558. The use of the term is used either incorrectly or generically. From Justice Powell's viewpoint, the state should have a compelling state interest before a program can pass such scrutiny.

[209] *Id.*

[210] *Id.*

[211] *Id. citing Bakke*, 438 U.S. at 309.

[212] *Schmidt*, 662 F.2d at 559.

[213] *Id.*

[214] *Id.* The court, citing Superintendent Love, stated that from 1947 to 1975, the year the AAP was adopted, 135 construction contracts were awarded over the $100,000 amount. Only one was awarded to a minority contractor.

[215] *Id.*

Having considered the authority of the District, the court then approached the means aspect of the AAP. The court considered three factors of the program most pertinent. With each, they found support for it within the opinions of *Bakke* and *Fullilove*. The fact that the program applied only to those meeting a minimum standard was supported by the *Bakke* decision.[216] In *Bakke*, Justice Brennan's opinion stated "approvingly" that the percentages adopted by Davis did not exceed the percentage of minorities in the California population.[217] Similarly, the twenty five percent figure used in the AAP was not too high when compared to the fact that as of July 1, 1970, 34.5% of the population in Oakland were non-white.[218] The AAP not only considered race as one of many factors in the entire bidding process as suggested by Justice Powell in *Bakke*,[219] but also possessed a waiver provision as stressed by Chief Justice Burger in *Fullilove*.[220] With the examination of these factors, and with the judicial support of *Bakke* and *Fullilove*, for these considerations, the plan was clearly found to be constitutional.

The importance of this case is not in its constitutional analysis. The court's holding is merely a potpourri of the different emphases of the Justices' opinions in *Bakke* and *Fullilove* placed within the three considerations advocated by both Justice Powell and Chief Justice Burger in those cases. The relevance of the case is that it was an example of how most reverse discrimination plans in construction contract cases may pass constitutional muster given facts similar to *Fullilove*. Although the court recognized the important differences of a School Board and Congress, the Ninth Circuit fully appreciated its factual similarity to *Fullilove*.[221] Still, this result oriented approach cannot be taken too far. It is still essential for the courts to analyze the cases within the framework of *Fullilove* and not to simply depend on similar fact patterns.

The synthesis approach takes the important considerations of *Bakke* and *Fullilove* that best apply to the particular case. This approach arguably is the proper one in examining reverse discrimination. The rationale behind such an argument would state that since no one standard of review has been decided, then the best method of judging the constitutionality of an MBE-type program is to discern only the major strands of the Justices' opinions in *Bakke* and *Fullilove*.

The weakness of this argument is directly found in its supposed strengh; its synthesizing of opinions. By only taking parts of the various opinions of *Bakke* and *Fullilove*, the logic of each opinion in those Supreme Court cases becomes essentially irrelevant. Admittedly no consensus arose from either *Bakke* or *Fullilove*. But by only using highlights of the opinions, any particular standard of review espoused by a Justice is lost. As a result, the synthesis approach does not fall under any of the constitutional standards but rather avoids using any standard at all.

V. Conclusion

Only one of the eight federal cases which have been decided since the *Fullilove* decision has found an MBE-type program in the area of construction bidding to be unconstitutional. While this fact has little or no bearing upon the constitutional analysis of

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[216] *Id.*
[217] *Id. citing Bakke*, 438 U.S. 324.
[218] *Schmidt*, 662 F.2d at 559.
[219] *Id.*
[220] *Id.* at 560.
[221] *Id.*

these cases, it is an important statistic. What the figure strongly suggests is that minority set-aside programs in construction contract situations stand a good chance of being found constitutional regardless of what standard is used.

However, after this study of construction set-aside cases, it is obvious that issues must be resolved by the Supreme Court. First, a clarification of the Court's stance as to reverse discrimination needs to be accomplished. Second, how this standard is to apply to authorities not explicitly administered by Congress, would hopefully be answered.

A federal court dependent today on the eight cases analyzed here could be confused as to what standard of review to use. Three of the cases, *Central Alabama*, *M.C. West*, and *Michigan Road Builders*, adopted the strict scrutiny test. Another two, *Kreip*, and *Dade County*, utilized Chief Justice Burger's approach which results in a less stringent standard. Three cases, *Pettinaro*, *West Michigan*, and *Schmidt* totally avoided the constitutional issue, while none of the cases advocated Justice Marshall's intermediate level of scrutiny.

Justice Powell's test is hurt by the analytical problems in both *M.C. West* and *Michigan Road Builders*. Only *Central Alabama*, whose authority has since been narrowed and muted, adheres to Justice Powell's test.

The strength of Chief Justice Burger's opinion in *Fullilove* exists because of the applicability of his opinion to a variety of factually different cases. While at least implicitly creating a standard of review, Chief Justice Burger's opinion was broad enough to allow for a fair amount of latitude in interpretation. As a result, courts cannot only apply it to differing factual patterns but can consider special factors relevant to their case. Thus, the strength of Chief Justice Burger's method is that none of the cases which employ it, possess any anlytical faults.

Justice Powell's opinion suffers from this lack of applicability. It is not the stringency of his philosophical views which restrict Justice Powell's test. Indeed, the considerations of congressional authority and the need to find actual evidence of past discrimination are similar to Chief Justice Burger's criteria. Rather the problem results from a combination of how the federal courts have attempted to apply the strict scrutiny standard to the cases and the inherent presumption that seems to exist in this standard against affirmative action programs.

Thus, Chief Justice Burger's approach as articulated in *Fullilove* seems to be the most workable. It properly balances the recognition of the historical lack of minority participation in the construction bidding process against the realization that racial classifications, benign or otherwise, must be carefully scrutinized.

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