CONSTITUTIONALITY OF STATE AND LOCAL AUTHORITY TO IMPLEMENT MINORITY BUSINESS ENTERPRISE SET-ASIDE UPHELD: *SOUTH FLORIDA CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC. V. METROPOLITAN DADE COUNTY, FLORIDA*

Congress passed the Public Works Employment Act of 1977[1] to remedy the present economic effects of past racial discrimination in the construction industry.[2] More recently, state and local legislatures have enacted programs designed to address the same concern.[3] The purpose[4] of these race-conscious government programs is to increase minority business enterprise (MBE)[5] participation in the national economy.

1. The Public Works Employment Act of 1977, Pub. L. No. 95-28, 81 Stat. 116 (codified at 42 U.S.C. § 6701 (1982)) amended the Local Public Works Capital Development and Investment Act of 1976, Pub. L. No. 94-369, 90 Stat. 999 (codified at 42 U.S.C. 6701 (1984)) to provide federal funds for minority businesses. Representative Mitchell, the Bill's sponsor, noted that only one percent of the funds designated for federal contracts went to minority businesses. 123 CONG. REC. 5327 (1977) (remarks of Rep. Mitchell). For a discussion of the legislative history of the 1977 Act, see generally Fullilove v. Klutznick, 448 U.S. 448, 456-73 91980); Construction Ass'n of W. Pa. v. Kreps, 441 F. Supp. 936, 939-42 (W.D. Pa. 1977), *aff'd*, 573 F.2d 811 (3d Cir. 1978); Levinson, *A Study of Preferential Treatment: The Evolution of Minority Business Enterprise Programs*, 49 GEO. WASH. L. REV. 61 (1980); Note, *The Public Works Employment Act of 1977 and Minority Contracting*, 28 CATH. U. L. REV. 121 (1978).

2. *See generally Fullilove*, 448 U.S. 448 (Congress ear-marked 10% of the federal funds for local public works contracts for minority-owned contractors); Comment, *Fullilove and the Minority Set-Aside: In Search of an Affirmative Action Rationale*, 29 EMORY L.J. 1127 (1980). *See also* Comment, *Minority Construction Contractors*, 12 HARV. C.R.-C.L.L. REV. 673, 693 (1977).

3. *See, e.g.*, Ohio Contractors Ass'n v. Keip, 713 F.2d 167 (6th Cir. 1983) (upholding Ohio statute requiring state officials to set aside a specified percentage of government contracts for bidding by minority business enterprises only).

4. *See* 123 CONG. REC. 7156 (1977) (remarks of Sen. Brooke) (high chronic unemployment among minorities and the scarcity of minority-owned businesses demand this race-conscious legislation).

5. A minority business enterprise (MBE) is a business owned or controlled by one

Such affirmative action programs[6] involve setting aside a specific percentage of government contracts for MBEs.[7] In *South Florida Chapter of the Associated General Contractors of America, Inc. v. Metropolitan Dade County, Florida*,[8] the Eleventh Circuit held that a county ordinance limiting competition for specified county contracts to MBEs did not violate the fourteenth amendment of the United States Constitution.[9] In *South Florida*, a coalition of white contractors and subcontractors[10] sought declaratory and injunctive relief[11] from a Dade County Ordinance[12] designed to aid black-owned businesses. The or-

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or more minorities, including women. For the purposes of the 1977 Act, an "owned and controlled" business means a minority or woman owns at least 51% of the enterprise or, in the case of a publicly-owned business, a minority or woman holds at least 51% of the stock. Additionally, one or more minority or woman must control the daily management of the business. 49 C.F.R. § 23.5 (1984). Minorities are United States citizens who are Blacks, Hispanics, Asian-Americans, American Indians, Eskimos, and Aleuts. 123 CONG. REC. 5098 (1977) (Rep. Mitchell).

6. In general, affirmative action programs employ racial classifications and numerical goals to remedy the effects of past discrimination by facilitating minority group participation in private and government-sponsored programs. *See, e.g.*, Note, *Minority Business Enterprise Set-Aside: The Reverse Discrimination Challenge*, 45 ALB. L. REV. 1139, 1140 n.3 (1981). *See also* N. GLAZER, AFFIRMATIVE DISCRIMINATION: ETHNIC INEQUALITY AND PUBLIC POLICY (1975).

7. Sponsors of the Public Works Employment Act of 1977 argued that the desire for competitive bidding between the relatively new minority-owned businesses and older, more established companies mandated federal set-aside programs. 123 CONG. REC. 5327 (1977) (remarks of Rep. Mitchell).

8. 723 F.2d 846 (11th Cir. 1984), *cert. denied*, 105 S. Ct. 220 (1984).

9. U.S. CONST. amend. XIV ("No State shall make or enforce any law which shall . . . deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

10. South Florida Chapter of the Assoc. Gen. Contractors of Am., Inc. v. Metropolitan Dade County, Florida, 552 F. Supp. 909 (S.D. Fla. 1982). The following three groups joined as plaintiffs: South Florida Chapter of the Associated Contractors of America, Inc., Engineering Contractors Association of South Florida, Inc., and Air Conditioning, Refrigeration, Heating and Piping Association, Inc.

Each group is a nonprofit corporation organized in Dade County, Florida, to represent the interest of its members, many of whom regularly receive Dade County construction contracts. *Id.*

11. 723 F.2d at 849. The plaintiffs pleaded as an action seeking relief pursuant to 28 U.S.C. § 1343(a)(14) (1982).

12. Dade County, Fla., Ordinance No. 82-67 (July 20, 1982) implements the policy the Board of County Commissioners adopted to increase black participation in the economy.

The Ordinance has an extensive history. The May 1980 Liberty City riots convinced Dade County officials to examine the economic opportunities of black businesses in the area. The consultants and committees investigating the problem concluded that black

dinance contains a set-aside provision[13] that reserves a specific number of contracts for competition solely among black-owned businesses, and a goals provision[14] that apportions a predetermined dollar amount of selected contracts to black-owned subcontractors.[15]

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business development in Dade County lagged far behind white and hispanic business, as well as that of blacks in many major American cities. Consequently, the reports urged the establishment of affirmative action programs. *See* 552 F. Supp. at 915-16.

Acknowledging these findings, the Dade County Commission adopted a resolution noting that past discrimination adversely affected the competitive position of black businesses. Resulting was a "statistically significant disparity between the county's black population, and both the number of black businesses within the County and those receiving county contracts." *Id.* at 916. When the plaintiffs filed this suit, the Census Bureau estimated Dade County's black population to be 17.2%. MBE's constituted 1% of Dade County's business. The County awarded only 2% of the contracts (3.7% of the funds appropriated) to black-owned businesses. *Id.* at 914.

The resolution concluded that "Dade County has a compelling interest in promoting a sense of economic equality for all residents of the County" by "stimulating the black business community, which . . . is not likely to benefit significantly in the absence of specific measures to increase its participation in county business." *Id.* at 916 (citing Resolution No. R-1672-81).

The Board of County Commissioners then adopted a policy aimed at establishing programs to increase black participation in the County's economy. 552 F. Supp. at 916. The Commission enacted Ordinance No. 82-67 to implement that policy. *Id.* at 919.

13 The Ordinance stipulated the following set-aside requirements:

> Set-asides may only be utilized where prior to invitation for bid, it is determined that there are sufficient licensed Black contractors to afford effective competition for the contract. In each contract where set-asides are recommended, staff shall submit its recommendation and the basis therefor to the Board for its initial review and determination whether waiver of competitive bidding for such contract is in the best interest of the County.

Id. at 921 (Dade County, Fla., Ordinance No. 82-67, § 10-38(d)(2) (July 20, 1982)).

14. *Id.* (Dade County, Fla. Ordinance No. 82-67, § 10-38(d)(1) (July 20, 1982)). The goal is based on the demand for subcontractors and the supply of black contractors.

15. Under the ordinance, the county issued a notice opening the Earlington Heights Station (part of a billion dollar rapid transit system financed with federal, state, and local funds) for bidding solely among black-owned contractors, with a 50% goal for black-owned subcontractors. 552 F. Supp. at 917-18, 923. The Earlington Heights Station, located in a black community, was the last of 20 stations originally planned for the Metrorail System. The county manager proposed a review of the Earlington Heights Station under the following administrative procedures stipulated in the Ordinance: first, each county public works department submits its recommendations for black set-asides and goals on each construction project in its field; second, a contract review committee reviews each department's recommendations and then submits a final recommendation on black set-asides and goals to the county commission for final action; third, prior to implementing a black set-aside program, the Board of County Commissioners must conclude the proposed set-aside program is "in the best interest of the County" and worth waiving formal bid procedures. *Id.* at 922.

Following their study, the contract review committee recommended that the County Commission waive formal competitive bidding, and set aside the Earlington Heights

Plaintiffs alleged that this race-conscious plan violated both Dade County's Home Rule Charter[16] and the fourteenth amendment's equal protection clause.[17] The district court applied strict judicial scrutiny[18]

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contract for competitive bidding solely among black contractors. The committee also suggested a 50% black subcontractor participation goal. *Id.* at 923.

The Dade County Commission passed Resolution R-1350-82, which adopted the Committee's proposal and mandated that the 100% set-aside for the contract and 50% subcontractor goal provision apply to the Earlington Heights Station. *Id.* at 924 (Dade County, Fla., Res. R-1350-82 (1982)).

16. DADE COUNTY, FLA., Section 4.03(D) Home Rule Charter provides:

> Contracts for public improvements and purchases of supplies, materials, and services other than professional shall be made whenever practical on the basis of specifications and competitive bids. Formal sealed bids shall be secured for all such contracts and purchases.... The Board [of County Commissioners], upon recommendation of the Manager, may by resolution adopted by two-thirds vote of the members present, waive competitive bidding when it finds this to be in the best interest of the county.

Id.

Plaintiffs contended the ordinance's waiver of formal competitive bidding procedures violated the Dade County Home Rule Charter. Metropolitan Dade County possesses special home rule powers. *See* FLA. CONST. art. VIII § 6. Pursuant to this constitutional provision, the citizens of Dade County employed a Home Rule Charter that enumerates several unique municipal powers. 552 F. Supp. at 927 n.17. *See also* FLA. STAT. ANN. § 125.01 (West Supp. 1985).

17. *See supra* note 9 and accompanying text. Because affirmative action programs favor minority groups, the majority claims they unjustly discriminate in reverse. *See* Note, *Minority Business Enterprise Set-Aside*, *supra* note 6, at 1141.

18. Government actions creating classifications based on race are suspect, therefore subject to "strict" judicial scrutiny, and will fail unless necessary to achieve a compelling governmental interest. *See, e.g.*, Hunter v. Erickson, 393 U.S. 385 (1969) (disproportionate impact of the law fell on minority citizens); Loving v. Virginia, 388 U.S. 1 (1967) (antimiscegenation statutes violate the equal protection clause of the fourteenth amendment); Yick Wo v. Hopkins, 118 U.S. 356 (1886) (application of a facially neutral statute that burdens one race negates the statute's validity).

Professor Gunther characterizes strict scrutiny as " 'strict' in theory but 'fatal' in fact." See Gunther, *The Supreme Court, 1971 Term—Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972). Only once has the Supreme Court sustained racial discrimination after applying strict scrutiny. *See* Korematsu v. United States, 323 U.S. 214 (1944) (the Court upheld a military order excluding Japanese-Americans from specified West Coast areas following the Japanese attack on Pearl Harbor). *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW at 1000-02 (1978) [hereinafter cited as L. TRIBE].

Equal protection analysis involves two levels of review in addition to strict scrutiny—rational basis and intermediate level scrutiny. The rational basis test requires only a rational relation between the classification and the government's objectives. The test, which applies to economic regulations, results in judicial deference to the legislature. *See, e.g.*, City of New Orleans v. Dukes, 427 U.S. 297 (1976) (economic regulations are rationally related to goals of legislature). Courts invoke intermediate level scrutiny most often in cases involving sex-based classifications. To survive a constitutional at-

to the ordinance and upheld its "goals" provision but rejected the set-aside provision.[19] The court of appeals, modifying the lower court's decision, held the entire ordinance constitutional both on its face and as applied to the particular construction project.[20]

Only twice has the Supreme Court ruled on the merits in cases involving equal protection challenges to race-conscious remedial government programs.[21] The Court first addressed the constitutionality of an affirmative action program in *Regents of the University of California v. Bakke*.[22] In *Bakke*, a fragmented Court rejected the university's special

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tack, such a classification must bear a substantial relation to an important governmental interest. *See, e.g.*, Craig v. Boren, 429 U.S. 190 (1976) (sex-based classification used to determine statutory drinking age not substantially related to important governmental interest).

19. 552 F. Supp. at 933-43. The district court found the goals provision valid because it was reasonably related to the objective of increasing black participation in county construction contracts. *Id.* at 939. The court struck the set-aside provision, however, asserting that the means were inappropriate to serve the "compelling governmental interest of remedying the present effects of past identified discrimination." *Id.* at 935. The court examined several factors in reaching its conclusion: first, the court argued that there were alternative, less intrusive means under which the county could achieve its compelling interest, for example, county assistance to black contractors in preparing bids. *See id.* at 935-36. Second, the court observed that the ordinance failed to specify a durational limit and therefore might extend beyond the achievement of its objectives. *Id.* at 936. Third, the Court found an unreasonably high correlation between the number of black workers hired under the ordinance and the percentage of blacks in the population. *Id.* at 936-37. Fourth, the court pointed out that the ordinance failed to provide a waiver procedure which enables aggressive white contractors to be excluded from the set-aside provision. *Id.* at 937-38. Last, the court noted that the set-aside program adversely affected third parties, for example, white contractors, solely because of race. *Id.* at 938.

20. 723 F.2d at 851-52. The court of appeals adopted an approach similar to that announced by Chief Justice Burger in *Fullilove*. *See infra* notes 41-49 and the accompanying text. Instead of invoking one of the three levels of scrutiny, the appellate court balanced the goal of remedying past discrimination with the concern that the means chosen be narrowly tailored to achieving the legislative purpose. *Compare Fullilove*, 448 U.S. at 490.

21. The Court also has granted certiorari to three cases in which it did not rule on the merits. *See* Boston Firefighters Union Local 718 v. Boston Chapter, NAACP, 461 U.S. 477 (1983) (vacated and remanded judgment of court of appeals for consideration of mootness in light of legislation enacted since the appellate court's decision); Minnick v. California Dept. of Corrections, 452 U.S. 105 (1981) (recent developments in the law and ambiguities in the record regarding the extent to which race is a factor in promotion decisions preclude a hearing on the merits); DeFunis v. Odegaard, 416 U.S. 312 (1974) (equal protection issue in law school admissions program held moot because school permitted petitioner to complete law school regardless of the Court's ruling).

22. 438 U.S. 265 (1978).

admissions program, but upheld the state's right to consider race as a factor in admissions decisions.[23]

Writing for the Court, but speaking only for himself, Justice Powell rejected the university's claim that remedial classifications which benefit minorities are not suspect.[24] Justice Powell applied strict scrutiny[25] and found the university's admissions program was not necessary to

23. *Id.* The University of California-Davis Medical School, using a special admissions procedure, reserved 16 out of 100 places in each entering class for minority students. The university twice rejected Allan Bakke's admissions application. Bakke, whose admission scores exceeded those of some students admitted under the special program, claimed that the admissions program violated the fourteenth amendment equal protection clause as well as Title VI of the 1964 Civil Rights Act.

The nine Justices wrote six separate opinions and failed to agree on a majority view. Four Justices upheld the constitutionality of the admissions policy. *Bakke*, 438 U.S. at 324 (opinion of Brennan, J., joined by White, J., Marshall, J., and Blackmun, J.). Four other Justices did not address the constitutional issue because they found the plan violated Title VI of the Civil Rights Act of 1964. *Id.* at 408 (opinion of Stevens, J., joined by Burger, C.J., Stewart, J., and Rehnquist, J.). Justice Powell, in a separate opinion, held the Davis plan unconstitutional, but approved the consideration of race as a factor in admissions decisions. *Id.* at 288. Thus, Powell's opinion combined with the Stevens quartet to hold the plan unconstitutional, yet combined with the Brennan quartet to approve the university's power to consider race as a factor in admission decisions.

24. *Id.* at 294. By setting aside 16 special seats, the university's admissions program preferred certain minority students at the expense of white students, who were prevented from competing for the designated seats. Such foreclosure excluded some white students from a state-provided benefit they might otherwise enjoy. Classifications that deny certain groups benefits that others receive solely because of race are suspect. *Id.* at 305. *Cf.* McLaurin v. Oklahoma State Regents for Higher Education, 339 U.S. 637, 641-42 (1950) (after admitting a student to a state graduate school, a state cannot treat him differently from other students solely because of his race).

25. 438 U.S. at 290. Justice Stone first articulated the underlying theory for applying strict scrutiny to racial classifications in a footnote in *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938):

> [L]egislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation [may] be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. [Citing cases on restrictions on voting, speech, assembly] . . . [S]imilar considerations [may] enter into the review of statutes directed at particular religions, . . . or national, . . . or racial minorities. . . . [P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry. . . .

Id. See L. TRIBE, *supra* note 18, at 1001. *See also* Korematsu, 323 U.S. 214, 216 (1944) ("[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny.")

achieve the stated objectives.[26] A court applying strict scrutiny will hold a race-classification scheme constitutional only if the classification is "necessary" to accomplish a "compelling" interest.[27] In *Bakke*, Justices Brennan, White, Marshall, and Blackmun,[28] however, advocated an intermediate level of scrutiny.[29] Under this middle level approach, the governmental action is constitutional if the classification is "substantially related" to achieving "important" governmental objectives.[30]

Although Justice Powell and the Brennan quartet disagreed on the level of scrutiny to apply, they did agree that *Bakke* affirmed the con-

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26. 438 U.S. at 306. The objectives of the university's admissions program were: (1) to reverse the historic deficit of minorities in medical school and in the medical profession; (2) to remedy the effects of societal discrimination; (3) to increase the number of physicians practicing in underserved areas; and (4) to promote educational benefits that flow from a diverse student body. *Id.*

27. 438 U.S. at 305. *See, e.g.*, Washington v. Davis, 426 U.S. 229 (1976) (racial classifications are suspect only if they are predicated on a racially discriminatory intent); Alexander v. Louisiana, 405 U.S. 625, 632 (1972) (once the plaintiff establishes discriminatory intent, the burden shifts to the defendant, who must prove that the same result would have been reached absent discriminatory intent).

28. 438 U.S. at 357-62 (Brennan, J., concurring and dissenting).

29. *See generally* Craig v. Boren, 429 U.S. 190 (1976) (sex-based classifications must be substantially related to important governmental interests). The Burger Court adopted intermediate level scrutiny as an alternative to the rational basis and strict scrutiny standards instituted by the Warren Court. A court applies intermediate scrutiny when important but not fundamental interests are at stake, and when sensitive but not suspect classifications are involved. *See, e.g.*, Trimble v. Gordon, 430 U.S. 762 (1977) (intermediate level of scrutiny applied to strike down statute prohibiting illegitimate children from inheriting from their fathers by intestate succession). Courts use this middle level test most frequently in sex discrimination cases. *See, e.g., Craig v. Boren, supra*. A majority of the Court, however, has never applied it in reverse discrimination cases. *See Bakke*, 438 U.S. at 359 (opinion of Brennan, White, Marshall, and Blackmun, J.J.); Fullilove v. Klutznick, 448 U.S. 448 (1980) (opinion of Marshall, Brennan and Blackmun, J.J.). *See generally* Minority Business Enterprise Set-Asides, *supra* note 6, at 1146-48; L. TRIBE, *supra* note 19, at 1082-83.

30. *See Bakke*, 438 U.S. at 359. The terms "substantially related" and "important governmental objective" identifying the intermediate level of review. This standard falls between the rational basis and strict scrutiny tests. *See, e.g.*, Note, *Minority Business Enterprise Set-Aside, supra* note 6, at 1147 n.35. *See generally* L. TRIBE, *supra* note 19, at 1082-83.

Justices Brennan, White, Marshall and Blackmun found that state's have a legitimate interest in eliminating the present effects of past racial discrimination. *Bakke*, 438 U.S. at 362. Thus, the university's plan passed muster under the intermediate level of scrutiny they advocated. *See generally* Choper, *The Constitutionality of Affirmative Action: Views from the Supreme Court*, 70 KY. L.J. 1, 2 (1981).

stitutionality of state governmental efforts to achieve equality.[31] The Brennan group stressed that *Bakke* is important because it allows governments to consider race when remedying the effects of past discrimination.[32] Courts interpreting congressional legislation designed to rectify the present effects of past discrimination support the conclusion that states may also adopt race-conscious programs designed to increase minority participation in the economy.[33] The Brennan group reasoned that if Congress can enact race-conscious remedial legislation under section five of the fourteenth amendment, then the states can enact similar regulations pursuant to section one of the fourteenth amendment.[34] The fourteenth amendment permits states to employ race-conscious programs designed to rectify the effects of racial discrimination[35] because such programs strive for equal opportunity.

The Court next confronted the affirmative action issue in *Fullilove v. Klutznick*.[36] In *Fullilove*, a group of white contractors and subcontractors sued to enjoin enforcement of the MBE provision of the Public

31. *Bakke*, 438 U.S. at 320 (opinion of Powell, J.); 438 U.S. at 324 (opinion of Brennan, White, Marshall, and Blackmun, J.J.).

32. *Id.* at 325. Justice Brennan distinguished remedial governmental actions from legislation that demeans or insults minorities. Justice Brennan then added that the ability to enact race-conscious programs exists when an appropriate legislative, judicial, or administrative body finds past discrimination. *Id.* at 325. Justice Powell also stressed that the appropriate governmental body must conclude past discrimination existed, but he stated that the university lacked the authority to make such a finding. *Id.* at 309-10.

33. *Id.* at 363. *See* International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977) (retroactive seniority system may be awarded as relief from discriminatory hiring practices). *See also* Franks v. Bowman Transportation Co., 424 U.S. 747 (1976) (identifiable applicants who were denied employment because of race are eligible for retroactive seniority status); North Carolina State Bd. of Education v. Swann, 402 U.S. 43 (1971) (state statutes may not prohibit involuntary busing). The Brennan group in *Bakke* noted that *Teamsters* and *Franks* imply that affirmative race-conscious programs comport with the equal protection clauses of the fifth and fourteenth amendments. 438 U.S. at 368. Justice Brennan and his colleagues interpreted *Teamsters* and *Franks* as recognizing Congress' power to prescribe preferential treatment for racial minorities to rectify past discrimination.

34. 438 U.S. at 368. *See supra* note 9 (text of fourteenth amendment).

35. 438 U.S. at 368. The Brennan quartet emphasized that a contrary interpretation of the fourteenth amendment conflicts with the notion of a state's competence to enact regulations consistent with federal policy, absent congressional preemption of the field. *Id.* Justice Brennan observed that "[t]o use the Fourteenth Amendment as a sword against such State power would stultify the Amendment." (quoting Railway Mail Ass'n v. Corsi, 326 U.S. 88, 98 (1945) (Frankfurter, J., concurring)).

36. 448 U.S. 448 (1980).

Works Employment Act of 1977.[37] In another plurality opinion,[38] the Supreme Court upheld the MBE set-aside as an appropriate exercise of congressional power to remedy the present effects of past discrimination.[39]

In *Fullilove*, the Court provided three approaches to analyzing equal protection attacks on affirmative action programs.[40] Chief Justice Burger ignored the tests usually employed in equal protection challenges - the strict scrutiny, intermediate-level scrutiny and mere rationality tests.[41] Instead, the Chief Justice developed a two-step analysis. First, he questioned Congress' ability to meet the program's objectives. Second, he examined the constitutionality of the means Congress selected to achieve the program's objectives.[42]

Following an extensive review of the Act's legislative history,[43] Chief Justice Burger concluded that the legislation's objective was to remedy the present effects of past discrimination.[44] Chief Justice Burger found that Congress properly invoked several constitutionally enumerated

37. *See* 42 U.S.C. § 6705(f)(2) (1982). The Supreme Court granted certiorari to resolve a split among the circuits on the issue of the constitutionality of MBE set-asides. *Compare* Constructors Assn. of W. Pa. v. Kreps, 573 F.2d 811 (3d Cir. 1978) (constitutionality of MBE set-aside upheld on the grounds that the plan met a compelling state interest) *and* R.I. Chapter, Ass. Gen. Contractors of America, Inc. v. Kreps, 450 F. Supp. 338 (D.R.I. 1978) (MBE set-aside upheld because it was narrowly tailored in accordance with its goals of remedying past discrimination) *with* Ass. Gen. Contractors of Cal. v. Secretary of Commerce, 441 F. Supp. 955 (C.D. Cal. 1977), *vacated and remanded*, 438 U.S. 909 (1978), *aff'd on remand*, 459 F. Supp. 766 (C.D. Cal. 1978) (MBE set-aside which creates a racial classification rather than providing a remedy for past discrimination violates the equal protection clause of the fourteenth amendment). *See generally* Comment, *Fullilove and the Minority Set-Aside: In Search of an Affirmative Action Rationale*, 29 EMORY L.J. 1127, 1150-57 (1980).

38. Chief Justice Burger, writing for the Court, delivered an opinion in which Justices White and Powell joined. 448 U.S. at 453-95. Justice Powell filed a concurring opinion. *Id.* at 495-517. Justice Marshall filed a concurring opinion in which Justices Brennan and Blackmun joined. *Id.* at 517-22. Justice Stewart filed a dissenting opinion in which Justice Rehnquist joined. *Id.* at 522-32. Justice Stevens filed a dissenting opinion. *Id.* at 532-54.

39. 448 U.S. at 473-91. The MBE set-aside involved in *Fullilove* required recipients of federal grants for construction contracts to subcontract at least 10% of the contract to minority-owned businesses. *See* 42 U.S.C. § 6705(F)(2) (1982).

40. For an excellent discussion of *Fullilove*, see generally Note, *Minority Business Enterprise Set-Asides*, *supra* note 6, at 1152-63.

41. 448 U.S. at 473-92.

42. *Id.* at 473.

43. *Id.* at 453-67.

44. *Id.* at 473.

powers[45] to fulfill this goal. The Chief Justice further concluded that Congress could enact MBE assistance programs that are based on general findings of discrimination in the construction industry.[46]

Chief Justice Burger then examined the means Congress employed. He stressed that Congress must "narrowly tailor"[47] the means to achieve the desired ends. The Chief Justice found the MBE set-aside provision in *Fullilove* to be "tailored" adequately.[48] Thus, in various opinions, seven Justices agreed that the government may impose racial classifications to remedy the present effects of past discrimination.[49]

Justice Powell wrote a separate opinion applying the "strict scrutiny" analysis he articulated earlier in *Bakke*.[50] Justice Powell's approach involved a three-part test to determine the constitutionality of a race-conscious remedy.[51] First, the agency that promulgated a race-

45. *Id.* at 473-78. To justify regulation of subcontracting practices of nongovernmental recipients of federal funds, Chief Justice Burger cited the Article I § 8 commerce power clause. 448 U.S. at 475 (citing Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964)). The power of Congress to promote interstate commerce permits regulation of beneficiaries of such commerce. To justify regulation of state and local recipients of federal funds, Chief Justice Burger cited the fourteenth amendment enforcement power. Chief Justice Burger also interpreted the Public Works Employment Act of 1977 as an exercise of the spending power. 448 U.S. at 475.

46. *Id.* at 478-79.

47. *Id.* at 480.

48. *Id.* at 487-89. The Court found that the program's administrative waiver provision, short duration, and negligible effect on innocent third parties demonstrated that the law was "limited to accomplishing the remedial objectives contemplated by Congress. . . ." *Id.* at 489.

49. *Id.* at 480 (opinion of Burger, C.J., joined by White and Powell, J.J.). "Congress may employ racial or ethnic classifications in exercising its . . . legislative powers only if those classifications do not violate the equal protection component of the fifth amendment Due Process Clause." Justice Powell concurred, asserting that "racial classifications are valid only when they are a necessary means of advancing a compelling governmental interest." *Id.* at 496. Justice Marshall also concluded that racial classifications are acceptable when they benefit minorities previously experiencing discrimination. *Id.* at 518 (Marshall, J., joined by Brennan, and Blackmun, J.J., concurring in the judgment). Justice Stevens, dissenting, rejected a constitutional "prohibition against any classification based on race." *Id.* at 548 (Stevens, J., dissenting). *See Bakke*, 438 U.S. 265. There, Justice Powell argued that the "[s]tate has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race." *Id.* at 320. The Brennan quartet similarly concluded in *Bakke* that remedial programs could consider racial criteria. *Id.* at 362-63. Justice Marshall also interpreted the fourteenth amendment to permit classification by race. *Id.* at 396-98. *See supra* notes 24-35 and accompanying text.

50. *See Fullilove*, 448 U.S. at 495-517.

51. *Id.* at 498.

conscious remedy must have the prescribed authority to do so.[52] Justice Powell characterized Congress' authority as "unique"; it clearly had the power to enact the legislation. Second, the government must find that past racial discrimination exists in the challenged matter.[53] Last, Justice Powell reiterated Chief Justice Burger's position that Congress must choose means that are narrowly tailored to accomplish its objective.[54] Justice Powell expanded on the Chief Justice's "narrowly tailored" standard and presented the following five factors to consider when reviewing race-conscious remedies:[55] the efficacy of alternative remedies;[56] the planned duration of the remedy;[57] the relationship between the percentage of minority workers employed by the program and the percentage of minorities in the relevant work force;[58] whether a waiver provision is available in the event the hiring quotas are out of reach;[59] and the effect of the set-aside on innocent third parties.[60] Justice Powell applied these criteria to the set-aside provision and found the program in *Fullilove* survived the fourteenth amendment challenge.[61]

Justice Marshall articulated the third approach to the equal protection challenge presented in *Fullilove*.[62] Justice Marshall applied an in-

52. *Id. Cf.* Hampton v. Mow Sun Wong, 426 U.S. 88 (1976) (Civil Service Commission lacked the authority to bar resident aliens from working in the civil service).

53. 448 U.S. at 498. Justice Powell noted that in *Bakke* the University failed to meet either requirement. Because the University's Board of Regents did not prove past discrimination, they lacked the compelling interest necessary to justify the race conscious admissions program. *See* 438 U.S. at 309-10.

54. 448 U.S. at 498.

55. *Id.* at 510-11.

56. *Id.* at 510. Congress enacted the Public Works Employment Act of 1977 because previous remedial measures failed to rectify discrimination in the construction industry. *Id.* at 511.

57. *Id.* at 510. The set-aside program terminates when the Act expires. Thus, "[t]he temporary nature of this remedy ensures that a race-conscious program will not last longer than the discriminatory effects it is designed to eliminate." *Id.* at 513.

58. *Id.* at 510-14. Congress establishes the percentage of minorities participating in a set-aside program. This percentage is reasonably related to the percentage of minorities in the relevant population. *Id.* at 513.

59. *Id.* at 510, 514.

60. *Id.* A set-aside provision that unjustly burdens nonminority contractors conflicts with the fourteenth amendment equal protection clause. *Id.*

61. *Id.* at 515.

62. *Id.* at 517-22 (opinion of Marshall, J., joined by Brennan and Blackmun, J.J.).

termediate level of scrutiny[63] and upheld the MBE set-aside provision.[64]

Although *Fullilove* furnished several criteria to aid in the evaluation of affirmative action programs,[65] the decision left many issues unresolved.[66] Because the Court focused on the scope of congressional power,[67] it failed to address whether states may inquire into past discrimination and whether states may enact affirmative action programs.[68] The importance of *Fullilove*, then, lies in implying that the opinions authorize the federal government to implement race-conscious remedial programs. Read together, *Bakke* and *Fullilove* stand for the proposition that the Constitution empowers both states[69] and the federal government[70] to consider race when legislating to redress the effects of prior racial discrimination.

In *Ohio Contractors Association v. Keip*,[71] the Sixth Circuit[72] reviewed a state-authorized MBE set-aside program, and upheld the

63. *See id.* at 579 (racial classification must be substantially related to an important legislative goal).

64. *Id. See also supra* notes 28-30 and accompanying text.

65. *See Fullilove*, 448 U.S. 448.

66. The fragmented *Fullilove* opinion left lower courts without guidance regarding the proper level of judicial scrutiny to apply in affirmative action cases. *But see* Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (the holding of a fragmented Court "may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds").

67. *See* Note, *supra* note 6, at 1164 n.147.

68. *Id.* at 1165.

69. *See supra* notes 31-35 and accompanying text.

70. *See supra* notes 36-55 and accompanying text.

71. 713 F.2d 167 (6th Cir. 1983).

72. Courts in several other circuits recently reviewed state authorized affirmative action programs. *See, e.g.*, Valentine v. Smith, 654 F.2d 503, 507 (8th Cir. 1981) ("The constitutional guarantee of equal protection does not prohibit states from taking appropriate measures to remedy the effects of past discrimination."); Detroit Police Officers Ass'n, v. Young, 608 F.2d 671, 691 (6th Cir. 1979) ("The Constitution imposes on states the duty to take affirmative steps to eliminate the continuing effects of past unconstitutional discrimination.") (citing Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 at 15 (1971)); Michigan Road Builders v. Milliken, 571 F. Supp. 173, 178 (E.D. Mich. 1983) (state representatives, like their congressional counterparts, owe a duty to their constituents to eliminate the present effects of past discrimination); Central Ala. Paving, Inc. v. James, 499 F. supp. 629, 638 (M.D. Ala. 1980) (states may inquire into past discrimination and then may tailor a race-conscious program to remedy the effects of that discrimination); Southwest Washington Chapter, Nat'l Elec. Contractors Ass'n. v. Pierce County, 667 P.2d 1092, 1100-02, 100 Wash. 2d 109, 123-28 (1983) (county affirmative action plan met the requirements of the equal protection clause).

Ohio MBE Act[73] against a fourteenth amendment challenge. The court of appeals interpreted Justice Powell's reference in *Fullilove* to the power of Congress as "unique"[74] as meaning "unequalled," rather than "exclusive."[75] Supreme Court decisions approving the enforcement of fourteenth amendment provisions by public entities other than Congress support the Sixth Circuit's interpretation.[76]

Applying a means-ends analysis, the Sixth Circuit found the state legislature competent to determine the means necessary to remedy discriminatory practices.[77] The court concluded that the Ohio MBE set-aside program sufficiently safeguarded against restrictive administration of the Act.[78] *Ohio Contractors* applied *Fullilove's* rationale upholding federal set-asides[79] to a state authorized affirmative action program, thus rejecting the fourteenth amendment challenge.

In *South Florida Chapter of the Associated General Contractors of America, Inc. v. Metropolitan Dade County, Florida*,[80] the Eleventh Circuit reviewed the *Bakke* and *Fullilove* opinions and determined that the Court's concerns in those cases[81] applied to the issues in *South Florida*. First, the court held that the legislative body involved[82] was authorized to find past discrimination.[83] Second, the court noted that the findings of discrimination supported the need for remedial legislation.[84] Last, the court required that the means adopted to remedy the effects of discrimination contain sufficient administrative safeguards to prevent abuse of the program.[85]

The *South Florida* court adopted the Sixth Circuit's interpretation of Justice Powell's language in *Fullilove* concerning the "unique" role ac-

73. OHIO REV. CODE §§ 122.71, 123.151, 125.081 (1984).

74. *See Fullilove*, 448 U.S. at 500.

75. 713 F.2d at 172.

76. *See id.*

77. *Id.* at 173.

78. *Id.* at 174.

79. *See supra* notes 36-65 and accompanying text.

80. 723 F.2d 846 (11th Cir. 1984), *cert. denied*, 105 S. Ct. 220 (1984).

81. *See supra* notes 24-71 and accompanying text.

82. The Dade County Commission enacted the program at issue in *South Florida*, 723 F.2d at 848.

83. *Id.* at 851.

84. *Id.* at 851-52.

85. *Id.* at 852.

corded Congress,[86] and concluded that state governments may also enact race-conscious remedial legislation[87] to ensure equal protection.[88] Next, the Eleventh Circuit evaluated the Dade County Commission's findings of past racial discrimination.[89] The court approved the depth and accuracy of the Commission's investigation,[90] and concluded that there was a compelling governmental interest justifying the affirmative action program.[91]

Following these preliminary findings, the Eleventh Circuit turned to the constitutionality of the program as implemented. First, the court examined the ordinance's administrative review process and concluded that the review provisions[92] assure that the county's program will last only as long as necessary to achieve its goals.[93] Based on its observations, the court held the ordinance constitutional on its face.[94] Second, the Eleventh Circuit considered whether the set-aside program was constitutional as applied to a particular government construction project for which minority contracts were set aside.[95] Applying Powell's *Fullilove* analysis,[96] the court found that the set-aside and subcontractor goals were proportionate to the percentage of blacks living in the county, and were appropriate measures for the project.[97] The Eleventh

86. *See supra* notes 75-76 and accompanying text.

87. 723 F.2d at 852. *See also Michigan Road Builders*, 571 F. Supp. at 178 (the policymaking authority of state legislatures is analagous to that of Congress; state legislatures may, therefore, rely on evidence of past discrimination to enact race-conscious remedial programs).

88. 723 F.2d at 852 (citing *Ohio Contractors*, 713 F.2d at 172).

89. 723 F.2d at 852.

90. *Id.* at 853 (citing *Dade County*, 552 F. Supp. at 925-26).

91. 723 F.2d at 853. The compelling governmental interest lies in reversing the detrimental effects racism has on opportunities for minority-owned businesses.

92. *See supra* note 15.

93. 723 F.2d at 853.

94. *Id.* at 854.

95. *Id.* at 854-56.

96. *Id.* at 855 n.11. *See also supra* notes 51-62 and accompanying text. Justice Powell required that the race-conscious remedy be narrowly tailored to achieve the legislature's stated objectives, thereby preventing arbitrary implementation of affirmative action programs. Justice Powell articulated several factors for courts to consider in evaluating the constitutionality of affirmative action programs. *See supra* notes 56-61 and accompanying text.

97. 723 F.2d at 855. The court stressed that the Earlington Heights Station project accounted for less than 1% of the county's annual contract appropriations, while blacks make up 17% of the county's population and only 1% of Dade County contractors. *See supra* note 12.

Circuit, therefore, rejected the plaintiffs' claims that the minority set-aside plan unfairly burdened them.[98]

South Florida acknowledges the vital nature of a state's interest in counteracting racial discrimination. Relying on what it perceived as the concerns expressed in *Bakke* and *Fullilove*,[99] the Eleventh Circuit applied Chief Justice Burger's *Fullilove* opinion[100] to a state authorized affirmative action program. The *Bakke*[101] and *Fullilove*[102] opinions support the proposition that the Dade County Commission, a non-Congressional governmental authority, had the power to enact an affirmative action program. The court's approval of a state power akin to the federal power to enact affirmative action programs makes *South Florida* important.

South Florida is notable also for its social implications. Increasing the participation of minority-owned businesses and eradicating present discrimination through remedial affirmative action programs justifies the harm suffered by nonminorities.[103] The government's good faith efforts to rectify the present effects of past racial discrimination are therefore consistent with equal protection guarantees. This conclusion survives even if the government enacts race-conscious programs to enhance minority participation or to transcend the effects of hidden racism.[104]

The practical impact of *South Florida's* correct application of *Bakke* and *Fullilove* will provide other states with established procedures for implementing similar programs. Despite *Bakke* and *Fullilove's* ambiguities, *South Florida* provides the source of authority for other states to increase participation of minority-owned businesses. This guidance should enhance the states' ability to defeat fourteenth amendment attacks on well-intentioned affirmative action programs.

Michael Rosen

98. 723 F.2d at 856.

99. *See id.* at 851.

100. *See supra* notes 41-49 and accompanying text.

101. *See supra* notes 31-35 and accompanying text.

102. *See supra* notes 41-49 and accompanying text.

103. *See* L. TRIBE, *supra* note 19, at 1049, (quoting United Jewish Organizations v. Carey, 430 U.S. 144, 172 n.2 (1977) (opinion of Brennan, J., concurring) (the equitable use of racial criteria legitimizes consideration of race in remedial programs).

104. *See* L. TRIBE, *supra* note 19, at 1052. *See also Bakke*, 438 U.S. at 387-402 (opinion of Marshall, J., dissenting) (discusses the plight of minorities in the United States since the colonial period).