In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1007

H. EARL FULLILOVE, et al.,
PETITIONERS,

v.

JUANITA KREPS, SECRETARY OF COMMERCE OF THE UNITED STATES OF AMERICA, ET AL.,
RESPONDENTS.

On Writ of Certiorari to the United States Court of Appeals For the Second Circuit

BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE*

JOHN B. JONES, JR.
NORMAN REDLICH
Co-Chairmen
WILLIAM L. ROBINSON
RICHARD T. SEYMOUR
NORMAN J. CHACHKIN
Staff Attorneys

Lawyers' Committee for
Civil Rights Under Law
733-15th Street, N.W.
Washington, D.C. 20005

LAURENCE S. FORDHAM
HENRY P. MONAGHAN
RICHARD W. BENKA
ROBERT D. GOLDSTEIN
Foley, Hoag & Eliot
10 Post Office Square
Boston, Massachusetts 02109
Attorneys for *Amicus Curiae*

MARK AARONSON
San Francisco
Lawyers' Committee
for Urban Affairs

Of Counsel

Blanchard Press, Inc., Boston, Mass. — Law Printers

INDEX

TABLE OF AUTHORITIES

Cases

Constitution and Statutes

Executive Orders and Regulations

Legislative Materials

Executive Branch Publications

Books and Articles

Miscellaneous

INTEREST OF AMICUS CURIAE*

The Lawyers' Committee for Civil Rights Under Law was organized in 1963 at the request of President John F. Kennedy to involve private attorneys throughout the country in the national effort to assure civil rights to all Americans. The Committee's membership today includes former Attorneys General, past Presidents of the American Bar Association, a number of law school deans, and many of the nation's leading lawyers. Through its national office in Washington, D.C., and its offices in Jackson, Mississippi, and eight other cities, the Lawyers' Committee over the past sixteen years has enlisted the services of over a thousand members of the private bar in addressing the legal problems of minorities and the poor in education, employment, voting, housing, municipal services, access to government services, the administration of justice, and law enforcement.

---

* The parties' letters of consent to the filing of this brief are being filed with the clerk pursuant to Sup. Ct. Rule 42(2).

The Lawyers' Committee and its local committees, affiliates, including the San Francisco Lawyers' Committee for Urban Affairs, and volunteer lawyers have been actively engaged in providing legal representation to those seeking relief from private and public discrimination. In this case, Congress itself has come to grips with the effects of such discrimination, manifested by insignificant minority business enterprise (hereinafter at times "MBE") participation in federally funded construction work, by setting aside for MBE's ten percent of the funds allocated to one short-term federal program. The Lawyers' Committee, over the years, has strongly endorsed vigorous action by the executive and legislative branches to remedy discrimination and its effects. We believe that the MBE set-aside at issue in this case was a reasonable congressional response to the historic exclusion of MBE's from federally funded construction contracts, and we believe it important for this Court to affirm the power of Congress to respond as it did to this discrimination.

The Lawyers' Committee has previously addressed the issue of race-conscious affirmative action programs in its amicus briefs in Defunis v. Odegaard, 416 U.S. 312 (1974), University of California Regents v. Bakke, 438 U.S. 265 (1978), and United Steelworkers v. Weber, 99 S.Ct. 2721 (1979). Because the issues presented by this case are vitally important to the realization of the goal of equal opportunity for minorities, and to the power of Congress to deal with discrimination against minorities, the Committee files this brief amicus curiae for the assistance of the Court.

STATEMENT OF THE CASE

Section 42 U.S.C. §6705(f)(2)[1/] established a 10 percent set-aside for minority businesses in funds allocated pursuant to the Public Works Employment Act of 1977, Pub. L. No. 95-28, title I, May 13, 1977, 91 Stat. 116 (hereinafter "1977 PWEA"), amending Public Works Employment Act of 1976, Pub. L. No. 94-369, title I, July 22, 1976, 90 Stat. 999 (hereinafter "1976 PWEA"). These anti-recessionary Acts funded the construction of public buildings and other

---

1/ The 1977 MBE provision reads:

> Except to the extent that the Secretary determines otherwise, no grant shall be made under this chapter for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises. For purposes of this paragraph, the term "minority business enterprise" means a business at least 50 per centum of which is owned by minority group members or, in case of a publicly owned business, at least 51 per centum of the stock of which is owned by minority group members. For the purposes of the preceding sentence, minority group members are citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts. 42 U.S.C. §6705(f)(2) (1976 & Supp. I 1977).

public works on the basis of grant applications submitted by state and local governments, in order to stimulate the economy through public spending and alleviate unemployment, particularly in the hard-pressed construction industry, H.R. Rep. No. 94-1077, 94th Cong., 2d Sess. 1-2 (1976), reprinted in [1976] U.S. Code Cong. & Ad. News 1746, 1746-47.

The challenged provision (hereinafter at times "1977 MBE provision") mandated the Secretary of Commerce, unless she determined otherwise, to require from government recipients of these funds satisfactory assurance that 10 percent of each public works grant would be spent for minority business enterprises. MBE's were defined as businesses at least 50 percent of which were owned (or publicly owned businesses the stock of which was at least 51 percent owned) by United States citizens who were Negroes, Spanish-speaking, Orientals, Indians, Eskimos or Aleuts.

This provision was one of several refinements in the funding requirements

which Congress made when, in the 1977 PWEA, it extended the 1976 PWEA public works program for another year and added an additional 4 billion dollars in program funding to the 2 billion dollars originally authorized.

Versions of the 1977 MBE provision were introduced as floor amendments to the 1977 PWEA by Congressman Parren Mitchell of Maryland in the House of Representatives, 123 Cong. Rec. H1436 (daily ed. Feb. 24, 1977), and by Senator Edward Brooke of Massachusetts, and others, in the Senate, 123 Cong. Rec. S3909-10 (daily ed. March 10, 1977). After debate, versions of the MBE provision were accepted by both Houses.

The House version included a clarifying amendment offered by Representative Roe, 123 Cong. Rec. H1438 (daily ed. Feb. 24, 1977), which established that the 10 percent requirement was to be waived where the unavailability of MBE's made the 10 percent requirement infeasible. The Conference Report adopted the House version, emphasizing that "[t]his provision shall be dependent on the availability of minority business enterprises located

in the project area." H.R. Rep. No. 95-230, 95th Cong., 1st Sess. 11, reprinted in [1977] U.S. Code Cong. & Ad. News 168, 170. The 1977 PWEA, as amended, was enacted into law on May 13, 1977.

Petitioners brought suit for declaratory and injunctive relief in the United States District Court for the Southern District of New York on November 30, 1977, on the grounds that the 1977 MBE provision employed a racial classification in violation of the fifth and fourteenth amendments of the United States Constitution and of various statutes, including Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§2000d et seq. (1976). The district court consolidated for hearing petitioners' motion for a preliminary injunction and the trial on the merits, and held that hearing on December 2, 1977. The court found the 1977 MBE provision constitutional and therefore dismissed the complaint. 443 F. Supp. 253 (S.D.N.Y. Dec. 19, 1977). The court of appeals affirmed on the merits. 584 F.2d 600 (2d Cir. 1978). This Court granted certiorari on May 21, 1979. 47 U.S.L.W. 3760.

SUMMARY OF ARGUMENT

In enacting the 1977 MBE provision, Congress built on foundations it had laid over a period of decades, and the provision cannot be fairly considered in isolation from those foundations. In the course of its oversight of various government programs, including the Small Business Act, federal revenue-sharing, federal assistance to construction projects, and the Railroad Revitalization and Regulatory Reform Act, Congress had been fully informed of conditions which justified the 1977 MBE provision. For Congress had learned of the existence of discrimination against minorities in the construction industry and in state and local government procurement programs. It had learned that minority businesses had, as a result, been excluded in dramatic fashion from participation in government contracts. Congress was, furthermore, aware of the particularly severe effects of the recession in 1977 on minority individuals and minority businesses, and was aware that these problems had to be addressed quickly and decisively.

Congress' accumulated experience with the problems of minority businesses

also made it aware that methods other than a minority set-aside would be ineffective in responding to this historic discrimination and to the plight of minorities during the 1977 recessionary period.

Because the 1977 MBE provision was limited to federally assisted state and local construction projects, it would be disingenuous to argue that the reasons for the provision are obscure. The historic discrimination against minorities in the construction industry, which is so notorious that it is an appropriate subject for judicial notice, and the exclusion of minorities from government contract work provided substantial foundation for the program. Congress has broad constitutional authority to respond to such conditions in the exercise of its spending power, and by virtue of the enforcement clauses of the thirteenth and fourteenth amendments. Congress' response was temperate and rational: the 1977 MBE provision was limited to a small portion of government contract work, could be waived where infeasible, and lasted for only a limited period of time. Congress did not abuse its authority.

ARGUMENT

I. ONLY THE POWER OF CONGRESS TO REMEDY PAST AND PRESENT DISCRIMINATION BY MEANS OF A CIRCUMSCRIBED MINORITY SET-ASIDE PROVISION IS AT ISSUE.

It is essential to state clearly what this case involves. It does not involve the authority of a federal or state administrative agency, or of a state legislative body, to promulgate a minority set-aside provision. It calls into question only the authority of Congress, the body explicitly charged with enforcement of the thirteenth and fourteenth amendments. This case also does not involve a set-aside provision relating to an area of economic activity as to which evidence of discrimination and exclusion of minorities was lacking. To the contrary, Congress was fully informed of the specific problems addressed by the 1977 MBE provision. This case also does not involve a federal program depriving white contractors of existing federal benefits. Although some public works funds were set aside for MBE's, as part and parcel of the same program, 3.6 billion additional dollars were made

fully available to all contractors. Finally, this case does not involve a permanent minority set-aside, or even one which would continue in the absence of further congressional action. This particular set aside was limited to the term of the 1977 PWEA.[2/]

Since racial classifications preferring minorities are not per se unconstitutional, University of California Regents v. Bakke, 438 U.S. 265, 272, 320 (1978) (Powell, J.); id. at 324-25 (Brennan, J.), the question posed by this case is narrower and significantly less difficult than any questions future cases may pose.

2/ Because the 1977 MBE provision was limited in this fashion, because petitioners chose not to seek damages, and because Congress in 1978 enacted a different set-aside provision, see pp. 49 to 56 infra, so that there is no "reasonable expectation" to believe that petitioners will again be subject to terms like those contained in the 1977 MBE provision, cf. First National Bank of Boston v. Bellotti, 435 U.S. 765, 774-75 (1978), there is a substantial question of mootness. This brief does not address that issue, which we believe will be discussed at length in Respondent Secretary of Commerce's brief.

II. CONGRESS EXERCISED ITS POWER ONLY AFTER LONG AND DETAILED INVESTIGATION, DEBATE AND REMEDIAL EXPERIMENTATION, DURING WHICH IT HAD FOUND THAT WIDESPREAD DISCRIMINATION AGAINST MINORITIES EXISTED IN THE CONSTRUCTION INDUSTRY AND IN THE LETTING OF GOVERNMENT CONTRACTS, AND THAT THE SET-ASIDE PROVISION WOULD ENHANCE THE WELL-BEING OF THE ECONOMY.

A. The Floor Debates On The 1977 MBE Provision Capsulized The Facts Which Justified Its Passage.

Petitioners' description of the 1977 MBE provision ignores many of the statements made in the congressional debate on the provision, as well as other very substantial evidence supporting the need for such a provision. Petitioners argue that the "legislative history of the PWEA is completely devoid of any legislative findings or any other material sufficient" to sustain the MBE provision. They characterize the MBE provision as nothing more than an unreasoned "after-thought" to give MBE's a "'share of the action'" without justification. Brief for Petitioners at 15; see Brief for Petitioner, General Building Contractors of New York State, Inc., The New York State Building Chapter, Associated

General Contractors of America, Inc. ("Building Contractors' Brief") at 13.

Representative Mitchell in fact directed Congress' attention to the dismal history of federal programs designed to create and support minority businesses, and to the historical denial of government contracts to minority businesses. He did not, as petitioners suggest, blatantly urge without justification that minority businesses should receive a "share of the action". Mitchell argued that the woeful record of all of these existing federal programs, of which Congress was well aware, see pp. 27 to 56 infra, would continue unless Congress mandated the disbursement of federal monies to minority enterprises. Unless that were done, MBE's would be unable to enter the economic mainstream, and "support survival" programs would continue to be a way of life for many segments of our economy:

> Let me tell the Members how ridiculous it is not to target for minority enterprises. We spend a great deal of Federal money under the SBA program creating, strengthening and supporting minority businesses and yet when it comes down to giving those minority businesses a

piece of the action, the Federal Government is absolutely remiss. All it does is say that, "We will create you on the one hand and, on the other hand, we will deny you." That denial is made absolutely clear when one looks at the amount of contracts let in any given fiscal year and then one looks at the percentage of minority contracts. The average percentage of minority contracts, of all Government contracts, in any given fiscal year, is 1 percent--1 percent. That is all we give them. On the other hand we approve a budget for OMBE, we approve a budget for the SBA and we approve other budgets, to run those minority enterprises, to make them become viable entities in our system but then on the other hand we say no, they are cut off from contracts.

In the present legislation before us it seems to me that we have an excellent opportunity to begin to remedy this situation.

. . .

...[S]etting aside contracts for minorities...is the only way we are going to get the minority enterprises into our system.

. . .

...This is the only sensible way for us to begin to develop a viable economic system for minorities in this country, with the ultimate result being that we are going to eventually be able to pull down deficits in spending; we are going to be able to end certain programs which are merely support survival programs for people which do not

> contribute to the economy. I support those programs because at present we have nothing else to offer. 123 Cong. Rec. H1436-37 (daily ed. Feb. 24, 1977).

Representative Mitchell ascribed the problems of minority businesses not only to their relative newness and small size, attributable to prior discrimination, see, e.g., pp. 32 to 64 infra, but also to the resistance of government contracting agencies which made it necessary to mandate a minority enterprise set-aside:

> [MBE's] are so new on the scene, we are so relatively small that every time we go out for a competitive bid, the larger, older, more established companies are always going to be successful in underbidding us. Id. at H1437.
>
> ...[E]very agency of the Government has tried to figure out a way to avoid doing this very thing [of letting contracts to MBE's]. Believe me, these bureaucracies can come up with 10,000 ways to avoid doing it. That is why I am insisting it be mandated. Id. at H1438.
>
> ...I think we must look at other States and cities around this country that have not really addressed the problem at all and do not have any lever on which to hang an operation designed to begin to redress this grievance [of not

> letting contracts to MBE's] that has been extant for so long.
>
> ...By setting the tone at the Federal level,...what we do in terms of these local political subdivisions is to give them the added impetus to do those things which are right and fair. Id. at H1440.

Other congressmen recognized the fundamental fairness of the amendment, stating that it would mitigate the latent inequities of the 1977 PWEA for minority businesses and workers. Minorities had suffered disproportionately in the recessionary period which continued into 1977. They had gotten "the 'works' almost every time" by being denied participation in public works projects. One reason was the governmental bidding process, which was structured in a manner effectively excluding minorities. This was true in the experience of two congressmen:

> This Nation's record with respect to providing opportunities for minority businesses is a sorry one. Unemployment among minority groups is running as high as 35 percent. Approximately 20 percent of minority businesses have been dissolved in a period of economic recession. The consequences have been felt in millions of minority homes across the Nation.
>
> . . .

> ...Yet without adoption of this amendment, this legislation may be potentially inequitable to minority businesses and workers. It is time that the thousands of minority businessmen enjoyed a sense of economic parity. Id. (remarks of Rep. Biaggi).
>
> ...[M]inority contractors and businessmen who are trying to enter in on the bidding process...get the "works" almost every time. The bidding process is one whose intricacies defy the imaginations of most of us here. The sad fact of the matter is that minority enterprises usually lose out... Id. (remarks of Rep. Conyers).

In the end, the House, by passing the MBE amendment, attempted to change this past history of minority exclusion from public works contracts, by assuring nothing more than an "equitable relationship for minority contractors and suppliers to be able to participate, which...is right and is proper." Id. at H1437 (remarks of Rep. Roe).

Like the House debate, the Senate debate stressed the historical fact that other federal efforts had failed to overcome gross inequalities in the letting of government contracts. In

debate, Senator Brooke also emphasized the special anti-recessionary impact of the MBE provision in reducing chronic minority unemployment:

> [I]t is important that we focus on the unemployment experiences of different ethnic and racial groups in designing a sensitive and responsive jobs program. For example, among minority citizens, the average rate of unemployment runs double that among white citizens.
>
> Our most recent experience with...[administering the 1976 PWEA] was marred by projects which were inappropriate in light of the strong congressional intent that the public works funds be spent where they are most needed.
>
> . . .
>
> ...It is necessary because minority businesses have received only 1 percent of the Federal contract dollar, despite repeated legislation, Executive orders and regulations mandating affirmative efforts to include minority contractors....
>
> ...[T]he Federal Government, for the last 10 years in programs like SBA's 8(a) set-asides, and the Railroad Revitalization Act's minority resources centers, to name a few, has accepted the set-aside concept as a legitimate tool to insure participation by hitherto excluded or unrepresented groups.
>
> It is an appropriate concept, because minority businesses' work forces are principally drawn from

> residents of communities with severe and chronic unemployment. With more business, these firms can hire even more minority citizens.
>
> ...This amendment provides a rule-of-thumb which requires much more than the vague "good-faith efforts" language which currently hampers our efforts to insure minority participation. Id. at S3910.

Thus, contrary to petitioners' suggestion that the 1977 MBE provision was an unreasoned effort to spread the "action" of federal contracts, the congressmen who spoke in favor of the provision articulated the historical exclusion of minorities from government contract work, and the inadequacy of alternative efforts to establish minority businesses as viable participants in the governmental contract process.

B. It Is Appropriate To Look To Prior Legislative Inquiries And Acts Of Congress, And To Consider All The Evidence Available To Congress, In Reviewing The 1977 MBE Provision.

Although petitioners attempt to narrow this Court's attention to the specific floor debates on the 1977 MBE provision, these debates need not and

should not be the limit of inquiry, for the "constitutional propriety...[of a statute] must be judged with reference to the historical experience which it reflects." South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966). The ready acceptance of the MBE provision by both houses of Congress[3/] demonstrates that Representative Mitchell's proposal did not arise in a factual vacuum; it was, in fact, considered "right and proper" in view of two decades of legislative and executive experience which had preceeded it.[4/] Congress need not

---

3/ Debate focused almost exclusively on the feasibility of the ten percent figure in areas with few minority individuals, with most legislators otherwise accepting the appropriateness and fairness of the 1977 MBE provision. See 123 Cong. Rec. H1436-40 (daily ed. Feb. 24, 1977); 123 Cong. Rec. S3910 (daily ed. March 10, 1977).

4/ Petitioners, for example, claim that Representative Mitchell's remarks "concerning the rate of underutilization of MBE's were merely naked assertions on his part." Brief for Petitioners at 16. Mitchell stated that minorities received one percent of government contracts in an average fiscal year. 123 Cong. Rec. H1436-37 (daily ed. Feb. 24, 1977). Petitioners ignore the fact that the Subcommittee on SBA Oversight and Minority Enterprise of the House Committee on Small Business had before it in 1975 a report of the U.S. Commission on Civil Rights, Minorities and Woman as Government Contractors (May 1975), which found that in 1972 minorities and women received less than one percent of federal contracts. See p. 41 n.14 infra.

re-invent the wheel by restating evidence on the record whenever it passes yet another bill in an evolutionary legislative program.[5/] Indeed, the

> fundamental basis for legislative action is the knowledge, experience, and judgment of the people's representatives only a small part, or even none, of which may come from the hearings and reports of committees or debates upon the floor. Cox, The Supreme Court, 1965 Term -- Foreword: Constitutional Adjudication and the Promotion of Human Rights, 80 Harv. L. Rev. 91, 105 (1966) (footnote omitted).

Congress, in short, must be able to rely on its accumulated knowledge and experience.

In addition to looking myopically only at the debates immediately preceding enactment of the 1977 MBE provision, and thereby conveniently avoiding the evidentiary weight of years of congressional

---

5/ See, e.g., Katzenbach v. Morgan, 384 U.S. 641, 654 & n.14, 646 n.5 (1966) (relying on hearings before prior Congress and on "understanding of the cultural milieu" existing in past); South Carolina v. Katzenbach, 383 U.S. 301, 330 (1966) ("In identifying past evils, Congress obviously may avail itself of information from any probative source."); Oregon v. Mitchell, 400 U.S. 112, 235 & n.10 (1970) (Brennan, J.) (reliance on census data).

experience, see pp. 27 to 75 infra, petitioners assert that Congress did not make adequate formal "findings" of discrimination in the construction industry. Building Contractors' Brief at 11-15; Brief for Petitioners at 14-17. Petitioners make much of the fact that the MBE provision arose as a floor amendment, and appear to suggest that legislative action such as the MBE provision should be found defective unless it is supported by an independent congressional "study", perhaps in the form of committee consideration, and unless it is specifically addressed by "findings" in House and Senate reports generated at the time of legislative action. See Brief for Petitioners at 16 n.7; Building Contractors' Brief at 11-12.

Of course, congressional committees had previously made findings relevant to the 1977 MBE provision. See, e.g., pp. 37 to 69 infra. Moreover, it is unsound to demand that Congress proceed in so formalized a fashion. Petitioners' argument fails to recognize the signi-

ficance of the fact that this case involves action by Congress, and therefore fails to consider any distinction between Congress and other bodies with respect to the need for formal "findings" as a prerequisite to decision-making. See C. Black, Structure and Relationship in Constitutional Law 67-98 (1969).6/

This Court has explicitly stated that Congress is not required to make formal "findings" in order to justify the constitutionality of legislation. Katzenbach v. McLung, 379 U.S. 294, 299 (1964). See also Oregon v. Mitchell, 400 U.S. 112, 147 (1970) (Douglas, J.). In conformity with the presumption of constitutionality given Congress' actions, this Court has recognized that legislation should be found constitutional if there is a basis on which Congress could

---

6/ Congress, of course, is not required by custom, statute or rule to make findings before it can act, unlike administrative agencies. See 5 U.S.C. §§ 553(c); 557(c)(3)(A) (1976); Securities and Exchange Comm'n v. Chenery Corp., 318 U.S. 80, 94 (1943). See generally K. Davis, Administrative Law Treatise, §§16.01 et seq. (1958 and 1970 Supp.)

rationally have acted. See Cox, supra, 80 Harv. L. Rev. at 104-05 & cases cited in nn. 82-83.

Petitioners' argument could have disastrous practical ramifications for Congress. Legislation is frequently accomplished through floor amendments, see B. Gross, The Legislative Struggle 218 (1953), where "findings" are not and need not be made. See Katzenbach v. Morgan, 384 U.S. 641, 653, 654 (1966) (reviewing amendment introduced on floor of Congress without committee hearings or reports); Cox, The Role of Congress in Constitutional Determinations, 40 U. Cin. L. Rev. 199 (1971). To impose the formal requirement that "findings" be made by the Congress would be unreasonable:

> ...[D]ifferences from accustomed legal patterns merely reflect faithfully the different logic and discipline of the legislative process, within which the legislative counselor or representative must work.
>
> ...[T]he business of a legislator is not to adjudicate, but to legislate.... [H]is policy choices, whether statesmanlike or deplorable, are not limited to any pleadings or points raised in argument. If it

> were otherwise, the legislative process in our particular form of representative government would choke in a hopeless tangle of formal procedures within a few weeks. During the Eighty-fourth Congress 19,039 bills and resolutions were introduced in the two houses, 5,753 were reported out by the committees, and 1,028 public bills were enacted into law. Linde, Book Review, 66 Yale L.J. 973, 975 (1957) (footnote omitted).

See also J. Chamberlain, Legislative Processes, National and State 7 (1936).

In addition to these practical considerations, "findings" are not the source of Congress' legitimacy. Unlike a university faculty, or the commissioners of an administrative agency, the members of Congress are directly answerable to their constituents, a majority of whom are white, when they establish a remedial program such as the 1977 MBE provision. The political accountability inherent in our representative form of government, and not formalized procedures and fact-finding, is the mainspring of Congress' legitimacy and an effective check on its authority in a case where

racial minorities are favored. Cf. The Federalist Nos. 52, 57; H. Linde & G. Bunn, Legislative and Administrative Processes 736 (1976). This political accountability also permits greater judicial deference to Congress. "[A]s the most broadly representative, politically responsible institution of government," Congress is most likely to reach "a focused judgment about the appropriate balance to be struck between competing values." Sandalow, Racial Preferences in Higher Education: Political Responsibility and the Judicial Role, 42 U. Chi. L. Rev. 653, 701 (1975) (footnote omitted).

Knowing that Congress does not act in isolation from its past experience, the congressional proponents of the 1977 MBE provision explicitly recognized its relationship to several ongoing federal legislative programs with which Congress was familiar, and against which the provision must be judged. These include: (1) The Small Business Act, adopted in 1953 and repeatedly amended, in response to additional evidence, with increasing

focus on minority business enterprises; (2) legislation designed to use the federal government's spending power to remedy discrimination and to prevent the federal government from being implicated in discrimination practiced by recipients of federal aid; and (3) the anti-recessionary Public Works Employment Act of 1976, and its 1977 amendments, which required the swift spreading of money throughout the country to those most likely to spend, so as to maximize the anti-recessionary effect of each federal dollar. It is to these legislative programs that analysis of the 1977 MBE provision must turn.

1. In amending and enforcing the Small Business Act, Congress and the Executive have made studies of minority businesses, the discrimination they have suffered, and the effectiveness of various remedial strategies.

Both Congressman Mitchell and Senator Brooke recognized that the 1977 MBE provision at issue in this case was the next step in an evolving series of Small Business Administration (hereinafter "SBA") programs designed to aid minority

businesses. This recognition reflects the fact that Congress had focused on the problems of minority business enterprises on numerous occasions during its oversight of the Small Business Act.[7/] Congress' overall knowledge of, and concern with, the problems of minority-owned businesses is fully understood best by reference to that Act.

Congress and the Executive have repeatedly found a history of discrimination against minorities which has resulted in their exclusion from the mainstream of the American economy and, in particular, from government contracts, which represent a sizeable amount of contracting dollars. This exclusion has been found to result not only from the debilitating effects of discrimination which impair the inherent ability of MBE's to compete

---

7/ Minority persons own few businesses, and the businesses they own are small. See, e.g., U.S. Commission on Civil Rights, Report, Minorities and Women as Government Contractors 11 (May 1975) (Respondent Kreps' Ex. No. 1, App. 124a); Bureau of Census, Special Report, Minority-Owned Businesses, 1972 Survey of Minority-Owned Business Enterprises, MB72-4, Table 1 at 16 (May 1975).

successfully, but also from the attitudes of government procurement officers who have resisted giving contracts to minority enterprises. In response to this discrimination, a variety of remedial programs have been tried, including contract set-aside provisions. The MBE provision involved in this case is an evolutionary step, necessitated in Congress' judgment by the failure of existing programs.

For at least 26 years Congress has sought to foster small businesses and assure them their fair share of government contracts, and specifically subcontracts for construction. In the Small Business Act of 1953, Pub. L. No. 163, title II, 67 Stat. 232, amended by Act of July 18, 1958, Pub. L. No. 85-536, 72 Stat. 384 (codified at 15 U.S.C. §§631 et seq.), Congress declared that the entry of individuals and small business enterprises into the market and the fair distribution of government contracts to them was essential to a strong economy, an efficient government procurement program, and fairness to the individual small

business person. Id. §2(a) (codified at 15 U.S.C. §631(a)).

In addition to providing for direct loans and technical advice, the Small Business Act from the beginning created a government contract set-aside program for small businesses. Id. §8(a) (codified at 15 U.S.C. §637(a)). This program, known as "the 8(a) program", was discussed by Senator Brooke during debate on the 1977 MBE provision. It originally authorized the SBA to enter into contracts with federal procurement officers for the acquisition of government supplies and equipment, and to subcontract, in turn, to small businesses for the performance of such contracts. From the start, also, the SBA was expressly charged with taking government-wide "action to encourage the letting of subcontracts by [private] prime contractors [on federal projects] to small-business concerns," not on strictly competitive terms,[8/] but "at prices and on conditions

---

8/ The Small Business Act, as amended, provides for a variety of non-racial special preferences to small businesses, and thus deviates repeatedly from the principle of strict market competition. See, e.g., 15 U.S.C.A. §§636(b), (i), (j)(3) (1979).

and terms which are fair and equitable." Id. §8(b)(5) (codified at 15 U.S.C. §637(b)(5)).[9/]

By 1967, Congress perceived the need to go one step further and to emphasize the needs of a specific portion of small businesses; it required the SBA to assure that federal funds would benefit low-income persons and the areas in which they lived. The Economic Opportunity Amendments of 1967, Pub. L. No. 90-222, title II, 81 Stat. 710 (codified at 42 U.S.C. §§2901 et seq.), provided that the SBA should give "special attention to small business concerns (1) located in...areas with high proportions of unemployed or low-income individuals, or (2) owned by low-income individuals." Id. §406(a). It authorized the

---

9/ In 1961, another small business subcontracting program was added to the SBA to further assure that small businesses would be "considered fairly as subcontractors" for government contracts. Small Business Act Amendments of 1961, Pub. L. No. 87-305, §7, 75 Stat. 667 (codified at 15 U.S.C. §637(d)). This amendment provided that "the extensive use of subcontractors by a proposed contractor" would be a "favorable factor" in "evaluating bids or selecting contractors for negotiated contracts...."

SBA to assure "that contracts, [and] subcontracts...[made] in connection with programs aided with Federal funds are placed in such a way as to further the purposes of this title." Id. §407(a).

Following widespread urban unrest in 1967, President Johnson appointed the National Advisory Commission on Civil Disorders (the Kerner Commission) to investigate the civil disorders in black ghettos throughout the nation. Its report found discrimination rampant in American life. One of its "Recommendations for National Action" was "[e]ncouraging business ownership in the ghetto" by minority individuals. Report of The National Advisory Commission on Civil Disorders 236 (March 1, 1968). Despite the decade-old mandate of the SBA to encourage small business, the Commission found that the benefits of SBA programs had not adequately reached minority enterprises:

> We believe it is important to give special encouragement to Negro ownership of business in ghetto areas. The disadvantaged need help in obtaining managerial experience and in creating for themselves a

stake in the economic community. The advantages of Negro entrepreneurship also include self-employment and jobs for others.

Existing Small Business Administration equity and operating loan programs, under which almost 3,500 loans were made during fiscal year 1967, should be substantially expanded in amount, extended to higher risk ventures, and promoted widely through offices in the ghetto. Loans under Small Business Administration guarantees, which are now authorized, should be actively encouraged among local lending institutions. Id.

A response to the Kerner Commission's recommendation (and the discrimination which it described) required focusing long-standing SBA programs still more narrowly on minority business enterprises, the segment of small business most beset with difficulties.

Three presidential orders[10/] followed in the ensuing three years, premised on

---

10/ Executive Order 11458, Prescribing Arrangements for Developing and Coordinating a National Program for Minority Business Enterprise, 3 CFR, 1966-1970 Comp., p. 779 (March 1969) (ordering Secretary of Commerce to develop "comprehensive plans of Federal action" to promote the "growth of minority business enterprises"); Executive Order 11518, Providing for

(footnote continued)

(footnote continued)

the Increased Representation of the Interests of Small Business Concerns Before Departments and Agencies of the United States Government, 3 CFR, 1966-1970 Comp., p. 907 (March 1970) (ordering that the SBA "shall particularly consider the needs and interests of minority-owned small business concerns and of members of minority groups seeking entry into the business community"); Executive Order 11625, Prescribing Additional Arrangements for Developing and Coordinating a National Program for Minority Business Enterprise, 3 CFR, 1971-1975 Comp., p. 616 (October 1971) (noting that "social and economic justice" required the "opportunity for full participation in our free enterprise system by socially and economically disadvantaged persons," who include without limitation "Negroes, Puerto Ricans, Spanish-speaking Americans, American Indians, Eskimos, and Aleuts"; and requiring the Secretary of Commerce to coordinate "an increased minority enterprise effort," to develop "specific program goals for the minority enterprise program...[and] establish regular performance monitoring and reporting systems to assure that goals are being achieved.").

In response to the first Order, the Office of Minority Business Enterprise ("OMBE"), mentioned by Representative Mitchell during debate on the 1977 MBE provision, was established at the Department of Commerce. It funds organizations to "provide assistance to minority firms in obtaining procurements from...State and local governments, and the Federal Government.... A construction firm for example may be assisted in bidding and securing bonding for public or private sector contracts...." Minority Enterprise and Allied Problems of Small Business, H.R. Rep. No. 94-468, 94th Cong., 1st Sess. 8 (Sept. 1975).

the finding that "members of certain minority groups through no fault of their own have been denied the full opportunity" to "own their own businesses and thereby to participate in our free enterprise system". Executive Order 11518, 3 CFR, 1966-1970 Comp., p. 907. The Secretary of Commerce was required to establish a coordinated federal program with specific goals and monitoring systems and to encourage state, local and private programs to strengthen minority business enterprises.

As a result of the Kerner Commission Report and the three Executive Orders,[11/] a regulation was promulgated further narrowing the 8(a) program by specifically limiting eligibility for that program to

---

11/ See S. Rep. No. 95-1070, 95th Cong., 2d Sess. 14, reprinted in [1978] U.S. Code Cong. & Ad. News 3835, 3849 ("The 8(a) program simply evolved as a result of Executive orders issued by Presidents Johnson and Nixon in response to the 1967 Report of the Commission on Civil Disorders...[based on its] finding that...disadvantaged individuals did not play an integral role in America's free enterprise system, in that they enjoyed no appreciable ownership of small businesses....").

"disadvantaged persons. This category often includes, but is not restricted to, Black Americans, American Indians, Spanish Americans, Oriental Americans, Eskimos and Aleuts." 35 Fed. Reg. 17833 (Nov. 20, 1970) (codified at 13 CFR §124.8-1). General government procurement regulations were also promulgated, requiring that "the maximum practicable opportunity to participate in the performance of government contracts be provided to minority business enterprises as subcontractors." 36 Fed. Reg. 17509 (Sept. 1, 1971) (codified at 41 CFR §1-1.1310-1).[12/] They required clauses in government procurement contracts committing private contractors to use their "best efforts" to maximize the partici-

---

12/ "For the purposes of this definition, minority group members are Negroes, Spanish-speaking American persons, American-Orientals, American-Indians, American-Eskimos, and American-Aleuts." 36 Fed. Reg. 17509 (Sept. 1, 1971) (codified at 41 CFR §§1-1.1303, 1-1.1310-2).

pation of minority businesses as subcontractors.[13/]

Examination of MBE's by Congress and administrative agencies became exhaustive in 1975, only two years before the passage of the MBE provision

---

13/ In addition to these Executive actions, the Ninety-second Congress authorized the SBA to create minority enterprise small business investment companies (MESBIC's). Act of October 27, 1972, Pub. L. No. 92-595, §2(b), 86 Stat. 1314 (codified at 15 U.S.C. §681(d)). Their task was to contribute to a "well-balanced national economy by facilitating ownership in such concerns by persons whose participation in the free enterprise system is hampered because of social or economic disadvantages...." Id. An amendment, Act of October 24, 1978, Pub. L. No. 95-507, title I, §104, 92 Stat. 1758, increased the level of funding in order to reinvigorate these MESBIC's, so as to compensate for the "[h]istorically...acute shortage of equity capital and long-term debt" for small concerns owned and operated by socially and economically disadvantaged individuals. S. Rep. No. 95-1070, 95th Cong., 2d Sess. 3, reprinted in [1978] U.S. Code Cong. & Ad. News 3835, 3838.

The Ninety-third Congress recognized and confirmed the new emphasis in SBA policy by creating the position of Associate Administrator for Minority Small Business. Small Business Amendments of 1974, Pub. L. No. 93-386, §6, 88 Stat. 748 (codified at 15 U.S.C. §633).

at issue in this case. In that year, the Subcommittee on SBA Oversight and Minority Enterprise of the House Committee on Small Business held hearings to review the foregoing existing "efforts designed to assist the development of minority business." Minority Enterprise and Allied Problems of Small Business, H.R. Rep. No. 94-468, 94th Cong., 1st Sess. 1 (Sept. 1975) (summarized in Summary of Activities of the Committee on Small Business, H.R. Rep. No. 94-1791, 94th Cong., 2d Sess. 183 (Nov. 1976) (Respondent Kreps' Ex. No. 4, App. 123a)). Subcommittee Chairman Addabbo noted the need for

> effective remedial action...to guarantee opportunities for full economic participation to those members of our society who have traditionally encountered impediments or obstacles to entering the mainstream of business resulting from discrimination or similar circumstances. Id. (emphasis supplied).

In its report, the Subcommittee found that the dearth of minority-owned businesses was the result of racial discrimination and that the Government's

MBE programs had not cured the effects of such discrimination. It stated:

> The subcommittee is acutely aware that the economic policies of this Nation must function within and be guided by our constitutional system which guarantees "equal protection of the laws." The effects of past inequities stemming from racial prejudice have not remained in the past. The Congress has recognized the reality that past discriminatory practices have, to some degree, adversely affected our present economic system.
>
> While minority persons comprise about 16 percent of the Nation's population, of the 13 million businesses in the United States, only 382,000, or approximately 3.0 percent, are owned by minority individuals. The most recent data from the Department of Commerce also indicates that the gross receipts of all businesses in this country totals about $2,540.8 billion, and of this amount only $16.6 billion, or about 0.65 percent was realized by minority business concerns.
>
> These statistics are not the result of random chance. The presumption must be made that past discriminatory systems have resulted in present economic inequities.... Id. at 1-2 (emphasis supplied).

The report reaffirmed the need for remedial programs to assure equal oppor-

tunity, and concluded that they would be proper if tempered by an equitable balance between those minorities injured by discrimination and those white persons innocent of discriminatory acts:

> In order to right this situation, the Congress has formulated certain remedial programs designed to uplift those socially or economically disadvantaged persons to a level where they may effectively participate in the business mainstream of our economy.
>
> . . .
>
> It is, of course, hoped that some day remedial programs will be unnecessary and that all people will have the same economic opportunities. However, until that time remedial action must be considered as a necessary and proper accommodation for our Nation's socially or economically disadvantaged person....
>
> The subcommittee is mindful that remedial programs should not be used in such manner as to unjustly sacrifice the rights and privileges of the majority.... A balance must be struck and equity must be the keynote. Id.

In its report, the Subcommittee also related testimony about the inadequacy of the 8(a) program from various persons, including Representative Mitchell.

This testimony[14/] identified existing

14/ The Subcommittee also had as evidence, Minority Enterprise and Allied Problems of Small Business, H.R. Rep. No. 94-468, 94th Cong., 1st Sess. 11 (Sept. 1975), two government reports: a GAO report, Questionable Effectiveness of the 8(a) Procurement Program, GGD-75-57 (April 1975), and a U.S. Commission on Civil Rights Report, Minorities and Women as Government Contractors (May 1975). It was found that minority businesses are beset with, among other handicaps, unwarranted resistance from government contracting officers and that existing federal programs are failures; both of these considerations were expressed in the floor debate in support of the 1977 MBE provision.

On the basis of a wide-ranging survey of federal, state and local agencies and procurement officers and of minority business persons, id. at 142-175, the U.S. Commission on Civil Rights Report concluded that minority firms encounter "staggering" problems in bidding, in obtaining capital and in obtaining contracting information, id. at i. Moreover they are subjected to a great deal of unwarranted "skepticism" about their competency by government contracting officers. Id. Federal MBE programs have achieved only "limited success", and there is only "limited" compliance by state and local governments with federal efforts to increase minority subcontracting. Id. at ii. As a result, in 1972 minorities and women received only 0.7 percent of federal contracts, despite the fact that they represented 4 percent of all American business. Id. at 6, 111.

The U.S. Commission on Civil Rights also found that the MBE 8(a) program represents only 0.25 percent of all federal procurement spending, and that the program is only a limited success.
(footnote continued)

(footnote continued)

Id. at 41-42. In particular, the Report noted its slowness and lack of staff. Id. at 37-40, 46-47, 114. Finally, it found that the program suffers from the unsupported belief of some federal contracting officials, mostly white males, that MBE firms are less competent than others. Id. at 48-49, 112.

The Report found that the government-wide minority subcontracting program has had little impact; that federal contracting officers seldom monitor or enforce subcontracting requirements, id. at 78, 81-82, 84, 120-121; and that "from all indications,...[the subcontracting program] has failed to substantially increase either the number or dollar amounts of subcontracts...," id. at 79.

The Report made similar findings with respect to local and state government contracting programs. Because state and local governments spend more money on goods and services than the federal government, and spend more on smaller contracts for which small businesses are especially suitable, and spend significantly more of their dollars on construction contracts than the federal government, the Report found that "the volume and nature of State and local contracting is sufficent to provide extensive contracting opportunities to" minority and female firms. Id. at 87. Nonetheless in the Commission's survey, minority and female firms also were found to receive only 0.7 percent of state and local contracting dollars. Id. at 86, 122. Federal regulatory efforts do not appear to have resulted in a significant increase in local and state MBE programs. Id. at 89-93. The Commission's survey data reported only ten jurisdictions, of which New York was not one, which had established compliance programs under these regulations. Id. at 87. Federal and state enforcement or

(footnote continued)

resistance of public and private parties to minority contractors:

> [T]here is a great deal of resistance, particularly by the middle management level of Federal procuring agencies, to implement this [8(a)] program. Private industry is likewise hesitant to accept minority concerns...because of an established mode of business which has traditionally excluded minority-owned businesses. This is one reason...for the apparent inability of 8(a) firms to secure more commercial contracts. Id. at 11.

As a result of its study, the Subcommittee recommended an increase in the number of 8(a) contracts and the adoption of specific criteria defining which contracts were to be set aside for minority businesses. Id. at 34.

(footnote continued)

monitoring of "minority affirmative action subcontracting programs is virtually nonexistent." Id. at 91. In addition, the Report found that "[n]egative attitudes among State and local procurement officers also present a barrier to the participation of minorities . . . as contractors"; in general, these white male officials believe that such minority firms could not be relied upon to perform. Id. at 106-107. It noted that other contracting officials who were interviewed believed that a contract set-aside program was the most effective method for MBE aid. Id. at 107.

With respect to government-wide subcontracting regulations for minority businesses, the Subcommittee found that the "best efforts" regulations in 41 CFR Subpart 1-1.13 were "totally inadequate" because of "a glaring lack of specific objectives which each prime contractor should be required to achieve," a "lack of enforcement" and a lack of "meaningful monitoring." Id. at 32. The Subcommittee recommended that bidders on government contracts be required to include a "plan specifically designed to recruit minority subcontractors" and that sanctions be imposed for non-compliance. Id. at 36.15/

15/ The Subcommittee on SBA Oversight and Minority Enterprise considered other relevant matters during the two years immediately preceding passage of the 1977 MBE provision. It held hearings on the effect of New York City's fiscal crisis on small business, especially on MBE's. Effects of New York City's Fiscal Crisis on Small Business, H.R. Rep. No. 94-659, 94th Cong., 1st Sess. (Nov. 1975), summarized in Summary of Activities, A Report by the House Committee on Small Business, H.R. Rep. No. 94-1791, 94th Cong., 2d Sess. 150-63 (Jan. 3, 1977). The Subcommittee heard testimony that any change in the lending policies of New York banks would have a very detrimental impact on MBE's because economically and socially disadvantaged firms are especially affected by tight

(footnote continued)

(footnote continued)

credit conditions. Id. at 162. Testimony also focused on the detrimental impact of the City's diminished spending for construction. Id. at 153. The Subcommittee heard repeated testimony that in case of a default, MBE's would be the worst hit of all, id. at 152-55, because "[t]raditionally, such businesses have been the first to be affected by the lack of credit, the shortened cash flow, and the lack of access to capital funding.... 'For these people, default could be a death knell.'" Id. at 152.

In addition, the Subcommittee, on March 25, 1976, requested the Comptroller General to conduct a study of the Department of Defense's Minority Business Enterprise Subcontracting Program. Comptroller General of the United States, Report, Department of Defense Program To Help Minority-run Businesses Get Subcontracts Not Working Well (Feb. 28, 1977) (Respondent Kreps' Ex. No. 3, App. 122a-123a). The Report found in general that the program was inadequate, id. at 5, 19-20; and specifically that the DOD lacked standards for the appropriate utilization of an MBE subcontracting clause, resulting in its wrongful omission from some contracts, that the subcontracting plans failed to establish specific contracting goals, and that the DOD did not monitor compliance, id. at 6-8. As a result the MBE subcontracting plans adopted by prime contractors were often inadequate. Id. at 12-14. Prime contractors usually relied on their previous suppliers or subcontractors and would not risk alienating these companies in order to use an MBE, id. at 16; as a result MBE's had a difficult time breaking-into established markets.

The next year, the Subcommittee provided detailed conclusions of discrimination against minority business, including a specific reference to construction.

> The very basic problem disclosed by the testimony is that, over the years, there has developed a business system which has traditionally excluded measurable minority participation. In the past more than the present, this system of conducting business transactions overtly precluded minority input. Currently, we more often encounter a business system which is racially neutral on its face, but because of past overt social and economic discrimination is presently operating, in effect, to perpetuate these past inequities. Minorities, until recently, have not participated to any measurable extent, in our total business system generally, or in the construction industry, in particular. However, inroads are now being made and minority contractors are attempting to "break-into" a mode of doing things, a system, with which they are empirically unfamiliar and which is historically unfamiliar with them. Summary of Activities of the House Comm. on Small Business, 94th Cong., 2d Sess. 182-83 (Comm. Print Nov. 1976) (emphasis supplied.)

During this same period, a Senate committee was also holding hearings on the SBA's MBE program. Hearings on Small Business Administration 8(a) Contract Procurement Program Before the Senate Select Comm. on Small Business, 94th Cong., 2nd Sess. (Jan. 21, 1976). Senator Javits opened these hearings with the following remarks:

> This policy of promoting and advocating the integration of the disadvantaged into the U.S. free enterprise system and economic mainstream has been continuously restated in legislation enacted by the Congress and in Executive orders....
>
> In 1971, this committee recognized that businesses owned and controlled by disadvantaged persons receive less than one-twentieth of 1 percent of the total Federal procurement market. This committee is concerned that 4 years later, a 1975 survey by the Commission on Civil Rights indicates that firms owned by minorities and women still receive less than 1 percent of the total Government contracts.
>
> . . .
>
> Our focus is particularly timely today in view of the extremely detrimental effects of the current economic recession on the minority business community.... Id. at 1.

The Committee then heard testimony that minority enterprises have difficulty obtaining contracts in part because government procurement policies are so complex, id. at 169, and because private subcontracting is based as much on kinship and friendship as on low bids, id. at 57.[16/] In addition, one witness indicated that procurement officers in the 8(a) program deliberately let contracts involving non-technical and lower status jobs to minorities, and that this may arise out of resentment against MBE's. Id. at 151.

The Senate Committee's report, issued one week before Parren Mitchell introduced the MBE provision here at issue, also noted testimony that the long standing exclusion of MBE's from participation in the economy has its roots in slavery. Senate Select Committee on Small Business, 95th Cong., 1st Sess., Report on Small Business Administration 8(a) Contract Procurement Program 3 (Comm. Print Feb. 16, 1977). The

---

16/ Limiting the availability of subcontracts in this fashion can effectively discriminate against minorities. See p. 89 n.39 infra.

report also noted testimony recommending that Congress establish a set-aside program in all major pieces of spending legislation, so as to overcome the unresponsiveness and hostility to existing MBE programs of government officials and private contractors. Id. at 7-8.17/

Within weeks, Congress adopted the short-term MBE provision at issue in this litigation.

In its second session in 1978, the same Congress turned to the task of greatly strengthening the long-term MBE provisions of the Small Business Act. Act of October 24, 1978, Pub. L. No. 95-507, title II, 92 Stat. 1760. The accompanying Senate Report established that legislative and executive investigations had found that the SBA "had fallen far short of its goal to develop

---

17/ The appendix to the Senate Select Committee report included an investigative report, prepared for the Committee, concerning the New York and San Francisco offices of the SBA's 8(a) program. The investigation found that the offices were not serving "the management and technical assistance needs of 8(a) contractors," id. at 36, and were unable regularly and reliably to deliver contracts to 8(a) recipients, id. at 13, 37.

strong and growing disadvantaged small businesses," and that further changes were needed to rectify "the pattern of social and economic discrimination that continues to deprive racial and ethnic minorities, and others, of the opportunity to participate fully in the free enterprise system." S. Rep. No. 95-1070, 95th Cong., 2d. Sess. 14, reprinted in [1978] U.S. Code Cong. & Ad. News 3835, 3848-49.

Based on its knowledge of a decade of prior MBE programs, as confirmed by House and Senate hearings and administrative reports, Congress made several express findings of fact, including the finding that Black Americans, Hispanic Americans, Native Americans and other minorities have suffered from discriminatory practices with the result that such persons have been deprived of their right to full participation in the economy. Congress found:

> (A) that the opportunity for full participation in our free enterprise system by socially and economically disadvantaged persons is essential if we are to obtain social and economic equality for such persons and improve the functioning of our national economy;

(B) that many such persons are socially disadvantaged because of their identification as members of certain groups that have suffered the effects of discriminatory practices or similar invidious circumstances over which they have no control;
(C) that such groups include, but are not limited to, Black Americans, Hispanic Americans, Native Americans, and other minorities;
(D) that it is in the national interest to expeditiously ameliorate the conditions of socially and economically disadvantaged groups;
(E) that such conditions can be improved by providing the maximum practicable opportunity for the development of small business concerns owned by members of socially and economically disadvantaged groups;
(F) that such development can be materially advanced through the procurement by the United States of articles, equipment, supplies, services, materials, and construction work from such concerns; and
(G) that such procurements also benefit the United States by encouraging the expansion of suppliers for such procurements, thereby encouraging competition among such suppliers and promoting economy in such procurements. 15 U.S.C.A. §631(e)(1) (1979) (emphasis supplied).

On the basis of these findings, Congress strengthened prior practice by giving the

SBA statutory authorization to arrange for the performance of 8(a) set-aside contracts through "negotiating or otherwise letting subcontracts to socially and economically disadvantaged small business concerns for construction work [et cetera].... " Id. §637(a)(1)(C).18/

18/ "Socially disadvantaged persons are those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities." 15 U.S.C.A. §637(a)(5) (1979). This includes the group of "Black Americans, Hispanic Americans, Native Americans, and other minorities." Id. §631(e)(1)(C). The House Conference Report noted that "in many, but not all, cases status as a minority can be directly and unequivocally correlated with social disadvantagement." H. Conf. Rep. No. 95-1714, 95th Cong., 2d Sess. 21, reprinted in [1978] U.S. Code Cong. & Ad. News 3879, 3882.

"Economically disadvantaged individuals are those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged." 15 U.S.C.A. §637(a)(6) (1979). With regard to economic disadvantage, the House Conference Report mandated that regulations "recognize the historic past discrimination of minorities in their efforts to participate in the free enterprise system." H. Conf. Rep. No.

(footnote continued)

Although it did not require a particular percentage of set-aside contracts, Congress authorized the SBA to appeal a procurement officer's refusal to set aside a contract for SBA subcontracting.[19] Id. §637(a)(1)(A).

(footnote continued)

95-1714, supra, at 22, reprinted in [1978] U.S. Code Cong. & Ad. News at 3883. The Report in summary stated that the "Conferees intend that the primary beneficiaries of this program will be minorities," but that economic disadvantage is imposed (with regard to the 8(a) set-aside requirements) as a further limitation in order to focus on the 8(a) goal of furthering economic and business development only of those MBE's which require aid. Id.

A socially and economically disadvantaged small business concern is defined as one which is 51 percent owned by socially and economically disadvantaged individuals and the management and daily business operations of which are controlled by at least one such individual. 15 U.S.C.A. §637(a)(4) (1979).

19/ The Senate Report noted that the 8(a) program should use "Federal contracts as a means for the development of minority businesses in the more sophisticated kinds of industries such as...construction," rather than for janitorial services which now predominate. S. Rep. No. 95-1070, 95th Cong., 2d Sess. 11, reprinted in [1978] U.S. Code Cong. & Ad. News 3835, 3845.

With respect to general government-wide subcontracting, the accompanying committee report found that the SBA has "generally ignored" the authority it has to encourage private sector subcontracting to minority businesses, although "this authority is potentially among the most important in the Small Business Act for developing strong disadvantaged firms." S. Rep. No. 95-1070, supra, at 13, reprinted in [1978] U.S. Code Cong. & Ad. News at 3847. In response to this failure of the SBA, Congress established that

> It is the policy of the United States that small business concerns, and small business concerns owned and controlled by socially and economically disadvantaged individuals, shall have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency. 15 U.S.C.A. §637(d)(1) (1979).

It therefore required that in large procurement contracts each contractor adopt a strictly enforced MBE subcontracting plan, establishing "percentage goals for the utilization as subcontractors of...small business concerns owned and controlled by socially and economically

disadvantaged individuals,"[20/] id. §637(d)(6)(A), whom the contractor "shall presume... include Black Americans, Hispanic Americans,

---

20/ In large negotiated procurement contracts, Congress required that an apparently successful offeror would have to negotiate "a subcontracting plan", 15 U.S.C.A. §§637(d)(4)(A), (B)(1979), providing for the use of small businesses and small businesses owned by socially and economically disadvantaged persons. Each such plan would be required to include "percentage goals for the utilization as subcontractors" of such businesses. Id. §637(d)(6)(A). The SBA was authorized to consider, in granting or denying a contract, the offeror's "prior compliance" with subcontracting plans, id. §637(d)(4)(C), and the likelihood that the current plan would result in "the maximum practicable" use of such small businesses, id. §637(d)(4)(D). Breach of the plan would constitute a material breach of the contract. Id. §637(d)(8). Congress required similar provisions in contracts let by formal competitive bidding. Id. §637(d)(5).

In addition, Congress required that all federal agencies, in consultation with the SBA, "establish goals for the participation...by small business concerns owned and controlled by socially and economically disadvantaged individuals..." in the agency's procurement contracts worth over $10,000. Id. §644(g). To further these goals, an Office of Small and Disadvantaged Business Utilization was established in each agency with procurement powers. Id. §644(k).

Native Americans, and other minorities," id. §637(d)(3)(C).[21/]

2. In enforcing fifth and fourteenth amendment prohibitions, Congress has found widespread discrimination in the distribution of federal funds by state and local governments and widespread discrimination by construction industry recipients of federal funds, and it has reviewed and accepted the use of race-sensitive goals as a remedy for that discrimination.

(a) Discrimination in state and local use of federal revenue-sharing funds.

During Congress' debates on the 1977 MBE provision, its proponents could draw not only on Congress' experience with the Small Business Act, but also on Congress' exposure to evidence of state and local discrimination obtained in its oversight of general revenue-sharing. In its review of this program, Congress considered ample evidence of discrimination prevalent among state and local governments

---

21/ With respect to the general subcontracting program, socially and economically disadvantaged individuals could also include "any other individual found to be disadvantaged by the [SBA] pursuant to section 8(a) of the Small Business Act." Id. §637(d)(3)(C).

in disbursing benefits, including federal funds.

Congress recognized the constitutional problem inherent in discrimination by state and local recipients of federal funds when it adopted Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§2000d et seq. (1976). Based upon evidence of widespread discrimination, Title VI was enacted, in the words of one congressman, to "enable the Federal Government itself to live up to the mandate of the Constitution and to require States and local government entities to live up to the Constitution...." Quoted in University of California Regents v. Bakke, 438 U.S. at 331-32 (Brennan, J.). See generally id. at 284-87 (Powell, J.); id. at 328-340 (Brennan, J.).

The problems which Title VI addresses were exacerbated in 1972 by the passage of general revenue-sharing. 31 U.S.C. §§1221 et seq. (1976). Despite its general policy that revenue-sharing monies were to be disbursed "without strings", Congress deemed it necessary to adopt a provision to assure the equal protection of the laws by barring the

discriminatory use of these funds and establishing enforcement procedures beyond those of Title VI.[22/] Id. §1242.

The evidence of governmental discrimination which Congress had from its study of the SBA programs, see, e.g., pp. 15, 41-43 n.14, p. 48 supra, received additional support from a 1975 congressional hearing. That hearing provided clear evidence of continuing local and state discriminatory practices in the use of revenue-sharing funds. Hearings on Civil Rights Aspects of General Revenue Sharing Before the Subcomm. on Civil and Constitutional Rights of the House Comm.

22/ Also during this period, Congress found state and local governments guilty of widespread intentional discriminatory employment practices, as well as ostensibly neutral institutional practices having a discriminatory impact. Finding these practices even more widespread than in the private sector, Congress concluded that it was necessary to strip state and local governments of their prior exemption from Title VII coverage. H.R. Rep. No. 92-238, 92d Cong., 1st Sess. 17-19 (1971), and S. Rep. No. 92-415, 92d Cong., 1st Sess. 9-11 (1971), reprinted in 2 Subcomm. on Labor of Senate Comm. on Labor and Public Welfare, 92d Cong., 2d Sess., Legislative History of the Equal Employment Opportunity Act of 1972 at 77-79, 418-20 (Comm. Print 1972). It is proper to presume that discriminatory attitudes which find expression in employment decisions could also find expression in other areas, such as the letting of contracts. Cf. Keyes v. School District No. 1, 413 U.S. 189 (1973).

on the Judiciary, 94th Cong., 1st Sess., ser. 21 (1975). The Chairman of the U.S. Commission on Civil Rights, Arthur S. Flemming, testified, for example, that the Commission had found "[a]bundant evidence...that discrimination in the employment practices and in the delivery of benefits of State and local government programs is far-reaching, often extending to activities funded by general revenue sharing."[23/] Id. at 154. Before the Subcommittee, also, was a report of the U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort - 1974, Vol. IV, To Provide Fiscal Assistance (Feb. 1975), which described the enforcement efforts of the Office of Revenue Sharing as highly inadequate, see, e.g., id. at 63-64, in the face of this prevailing discrimination, see, e.g., id. at 31-34,

---

23/ Flemming also noted that other studies, including one by the Comptroller General, confirmed this finding. Hearings on Civil Rights Aspects of General Revenue Sharing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 94th Cong., 1st Sess., ser. 21, at pp. 155-56 (1975). See also id. at 109-10 (exchange between Undersecretary of the Treasury and Representative Drinan).

64 n.162.[24/] Testimony before the Subcommittee supported this judgment.[25/]

24/ Another report, U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort - 1974, Vol. VI, To Extend Federal Financial Assistance (Nov. 1975), reviewed Title VI enforcement efforts of several federal agencies and concluded that "Federal Title VI responsibilities have not been effectively discharged," id. at 756, because government-wide leadership is lacking, federal agencies engage in too little monitoring, and findings of violations rarely lead to enforcement proceedings, id. at 756-58. For example: the Federal Highway Administration has apparently never "required a State to set goals and timetables for increasing the number of minority or female contractors although in several cases the number of minority contractors used by States appeared inadequate," id. at 512-13; the Department of Transportation's adoption of a percentage goal for minority contractors apparently focused primarily on federal agency contracts and not on contracts awarded by state recipients of federal funds, id. at 514; and the wastewater treatment plant construction program of the Environmental Protection Agency was often of little benefit to minority contractors because the EPA's civil rights staff usually learned of contracts only after they had been awarded, id. at 621 n.1647.

25/ With five full time enforcement officers to police 39,000 recipient jurisdictions, the Office of Revenue Sharing could resolve few complaints. Hearings on Civil Rights Aspects of General Revenue Sharing, supra, at 97, 106-07, 125. Testimony showed the Office's inability to monitor and its hesitation to assure compliance with the law when violations were suspected. Id. at 157-64.

Accordingly, the Subcommittee's report expressly found discrimination in state and local governments' use of revenue-sharing funds coupled with inadequate federal enforcement efforts.[26/]

(b) Discrimination in the construction industry.

As a result of the Executive's efforts to prevent the discriminatory use of federal funds in federally assisted construction contracts, both the Executive and Congress had occasion to review evidence of the discriminatory practices of the construction industry and to sanction the use of affirmative goals as a remedy to that discrimination. The focus of executive efforts has been regulations promulgated pursuant to

---

26/ See Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 94th Cong., 1st Sess. 5-8 (Comm. Print Nov. 1975) (finding widespread discrimination in local and state government activities, including in distribution of benefits and in employment); id. at 8-26 (finding federal efforts to monitor and enforce anti-discrimination provisions "grossly inadequate"); id. at 30 (suggesting that fifth and fourteenth amendments require more vigorous anti-discrimination enforcement than had previously existed).

Executive Order 11246, parts II, III, 3 CFR, 1964-1965 Comp., pp. 339, 340-47, which, in part, forbids the denial of equal employment opportunities in federal and federally assisted construction contracts. As a result of administrative findings of discriminatory employment practices, the regulations have established, as part of such government contracts, affirmative racial hiring plans. See, e.g., Contractors Association of Eastern Pa. v. Secretary of Labor, 442 F.2d 159, 163 (3d Cir.), cert. denied, 404 U.S. 854 (1971). Although superimposed on the prohibition of discrimination found in Title VII of the Civil Rights Act of 1964, these affirmative goals were deemed necessary by the Executive to assure non-discriminatory employment practices in the construction industry.

Congress has extensively and vigorously reviewed these affirmative goals and its repeated rejection of bills forbidding such goals, in 1969, and in 1971 and 1972, as well as in 1978, has constituted

ratification of them.[27]

Congress' awareness of this evidence of discrimination[28] has special signifi-

---

27/ The history of this congressional debate and action has been repeatedly set before this Court and need not be recited once again. See University of California Regents v. Bakke, 438 U.S. at 341-47 (Brennan, J.); Supplemental Brief for the United States as Amicus Curiae 19-23, University of California Regents v. Bakke, supra; Brief for the American Civil Liberties Union and the Society of American Law Teachers Board of Governors, Amici Curiae 74-95, United Steelworkers v. Weber, 99 S.Ct. 2721 (1979); Brief for the Lawyers' Committee for Civil Rights Under Law as Amicus Curiae 7-15, United Steelworkers v. Weber, supra; Comment, The Philadelphia Plan: A Study in the Dynamics of Executive Power, 39 U. Chi. L. Rev. 723 (1972). See also Hearings on the Philadelphia Plan and S931 Before the Subcomm. on Separation of Powers of the Senate Judiciary Comm., 91st Cong., 1st Sess. (1969).

28/ The existence of widespread discriminatory practices among the construction trade unions are well known; indeed they are so notorious that they may be the subject of judicial notice. United Steelworkers v. Weber, 99 S.Ct. at 2725 n.1; see id. at 2735 (Burger, C.J. dissenting). Cf. Fullilove v. Kreps, 443 F.Supp 253, 260 n.17 (S.D.N.Y. 1977) (citing New York cases on discrimination in the building trades). If this discrimination is a subject of which the judiciary may take notice, it is certainly a subject of which the Congress may take notice.

cance to the 1977 MBE provision. The open and notorious discrimination in the building trades has a direct impact on the number and the capacity and skill of minority contractors. It is established that the route to becoming a contractor is usually through the building trades where important experience is acquired. For example, the ability to bid rationally and correctly and to manage the performance of a contract effectively can be hampered by exclusion from actual performance of similar work as a tradesman. Thus, even past job discrimination continues to undermine the capacity of minority enterprises to compete successfully for construction contracts.29/

29/ See Department of Housing and Urban Development, A Survey of Minority Construction Contractors 29 ("with virtually no exceptions, the route to entrepreneurship as a general or specialty contractor begins with entry into a skilled occupation. Examples of persons who become contractors without ever having worked in a skilled construction trade are extremely rare."); Rhode Island Chapter, Associated General Contractors v. Kreps, 450 F.Supp. 338, 356 (D.R.I 1978). The well-documented difficulties which MBE's have because of a lack of skills may be traced directly to this discrimination in the building trades. Cf. Office of Minority Business Enterprise, Minority Business Opportunity Committee

(footnote continued)

c) Discrimination in letting railroad construction contracts.

A congressional committee has also directly reviewed the specific need for quotas to prevent the discriminatory use of federal funds in the letting of railroad construction contracts, a fact which Senator Brooke called to Congress' attention in the 1977 MBE provision debate, see p. 18 supra. Because the revitalization of the railroads with federal funds provided a particularly significant source of contracts, and because it wished to further "an established national policy...to encourage and assist in the development of minority business enterprise," the Ninety-fourth Congress legislated to assure that MBE's would have an equal opportunity to

---

(footnote continued)

Handbook I-2 (Aug. 1976) (minority entrepreneurs deprived of skills by their historic exclusion from the mainstream economy); Executive Office of the President and Office of Management and Budget, Interagency Report on the Federal Minority Business Development Programs 29 (March 1976) (lack of management skills is a leading cause of minority business failure).

compete for such railroad contracts. See S. Rep. No. 94-499, 94th Cong., 2d Sess. 44-45 (1976), reprinted in [1976] U.S. Code Cong. & Ad. News 14, 58-59. The Railroad Revitalization and Regulatory Reform Act of 1976 required a non-discrimination clause in certain federally funded railroad construction contracts, and a mandatory fund cut-off procedure for violations thereof, 45 U.S.C. §803 (1976), and also special affirmative assistance to minority businesses in the form of a Minority Resource Center, 49 U.S.C. §1657a (1976).

Pursuant to the non-discrimination provision, the Secretary of Transportation promulgated regulations, 42 Fed. Reg. 4286 (Jan. 24, 1977) (codified at 49 CFR Part 265), which require, as a condition for receiving contracts worth $50,000 or more, that contractors "[w]here appropriate because of prior underutilization of minority businesses, establish specific goals and timetables to utilize minority businesses...." 49 CFR §265.13(c)(3)(vi). The regulations provide that compliance will be evaluated partially

in terms of "[s]pecific efforts to...award contracts to" MBE's. Id. §265.19(a)(2).

In subsequent hearings on railroad revitalization, congressmen have repeatedly scrutinized the success of this MBE effort. In one hearing, Congressman Mitchell expressed his grave concern that Amtrak's record on MBE contracting was so dismal that providing information and technical assistance through the Minority Resource Center would be useless if Congress did not regulate, in some mandatory fashion, Amtrak's letting of construction contracts. Special Joint Session Hearings on Purchase and Revitalization of Northeast Corridor Properties (Amtrak) Before the Senate Comms. on Appropriations, Budget and Commerce, 94th Cong., 2d Sess. 2-6 (1976).30/

30/ Mitchell stated "how absolutely frustrating it is" for him as a black congressman to vote for billions of dollars in appropriations, "knowing that minority businesses will not even get an infinitessimal share of the money that's spent." Special Joint Session Hearings, supra, at 2.

In further hearings on April 26, 1977, during which Amtrak's record on MBE subcontracting

(footnote continued)

Senator Bayh concurred in this concern. Id. at 11. In response, the Secretary of Transportation indicated that he had taken steps to assure that there would be ample MBE subcontracting, id. at 13, and the Chairman of the Board of Amtrak assured the Committees that a 10 percent small business and MBE set-aside on Amtrak construction contracts would protect MBE's, id. at 45-47.

Thus, before the passage of the 1977 MBE provision, Congress, in fulfilling its constitutional duty to assure that federal funds would be spent in a non-discriminatory way, had investigated and debated the widespread discrimination in the letting of public contracts

---

(footnote continued)

was reviewed, Mitchell expressed further doubts about the effectiveness of the Minority Resource Center and noted that, as of October 30, 1976, Amtrak, Conrail and the U.S.R.A. had let only 0.6 percent of their contracts to MBE's. Hearings on H.R. 7557, Department of Transportation and Related Agencies Appropriations for Fiscal Year 1978, Part IV, Before the Subcomm. of the Senate Comm. on Appropriations, 95th Cong., 1st Sess. 1285 (1977). See also id. at 1282-95, 1956-65, 1971-77, 2006-09.

generally and in the construction industry specifically and the necessity of affirmative goals to prevent discrimination in publicly funded construction.

C. Congress Recognized That, Because Of Racial Discrimination In The Construction Industry, The 1977 MBE Provision Significantly Advanced The Racially Neutral Anti-recessionary Purposes Of The Public Works Employment Acts of 1976 and 1977.

The Public Works Employment Act of 1976 was designed to fight the "worst recession" since the Great Depression by increased spending for state and local public works projects and services. H.R. Rep. No. 94-1077, 94th Cong., 2d Sess. 1 (1976), reprinted in [1976] U.S. Code Cong. & Ad. News 1746. This anti-recessionary statute manifested two qualities traditionally thought to be essential to effective counter-cyclical spending: money was provided quickly to those with the least propensity to save it.

Because time is of the essence in an anti-recessionary spending program,[31] the Act was "carefully and expressly designed," id. at 3, [1976] U.S. Code Cong. & Ad. News at 1748, to provide that a grant application would be deemed approved if the Secretary failed to act on it within 60 days, 42 U.S.C. §6706 (1976), and that projects would be required to commence work within 90 days after approval, id. §6705(d).

Furthermore, because spreading funds to those most likely to use the money for consumption purposes, that is

---

31/ Time is of the essence, in part, because increased spending must be counter-cyclical: it must not continue once the economy is in an upswing, lest inflation be fueled. H.R. Rep. No. 95-20, 95th Cong., 1st Sess. 2 (1977), reprinted in [1977] U.S. Code Cong. & Ad. News 151; id. at 23, [1977] U.S. Code Cong. & Ad. News at 168 (supplemental views of Mr. Myers).

to poor persons,[32] is of the essence, the Act directed the Secretary of Commerce, in allocating funds among projects and geographic areas, to take into account the severity and duration of each area's unemployment and under-employment, the income level of the area, and the effect of a proposed project on employment. Id. §§6706, 6707(c), 6707(d).

When Congress amended this Act in 1977, it left untouched the earlier provisions requiring speedy dispersal of funds, but amended other provisions to assure that each federal dollar spent would have the maximum multiplier effect on the economy by directing funds to poor persons who are likely to spend.

32/ Poorer persons spend a significantly greater percentage of their income on consumption, as the following table shows. U.S. Department of Labor, Bureau of Labor Statistics, Report 455-4, Consumer Expenditure Survey Series, Interview Survey, Table I (1977) (n of families = 71,220).

Before Tax Income	$0-2,999	$4,000-$4,999	$6,000-$6,999
Total Current Consumption Expenditures	$3,039	$4,531	$5,725
	$8,000-$9,999	$12,000-$14,999	$20,000-$24,999
	$6,921	$8,890	$12,591

One of these,[33] as Senator Brooke recognized, was the 1977 MBE provision which directed public works funds to areas "where they are most needed", "because minority businesses' work forces are principally drawn from residents of communities with severe and chronic unemployment." 123 Cong. Rec. S3910 (daily ed. March 10, 1977). Without this provision, such poor persons could be excluded from the benefits of the public works program by the discriminatory practices of the building trades. See, e.g., pp. 61 to 64 supra. By contrast with white-owned construction companies, minority businesses are much

---

33/ Three other amendments also heightened the multiplier effect of the federal funds. Two of these sought to prevent the multiplier effect from being dissipated by spending outside the United States. See 42 U.S.C. §§6705(e)(2), (f)(1)(A) (in public works contracts, forbidding the employ of illegal alien labor and minimizing use of foreign made materials). In addition, the Act required that construction projects be built in those neighborhoods of highest unemployment or lowest income, should a local government derive its unemployment statistics, for purposes of its project application, from those areas. Id. §6707(e).

more likely to hire minority employees.[34/] In addition, because most minority construction firms have few if any regular employees, U.S. Bureau of the Census, Special Report, Minority-Owned Businesses, MB72-4, 1972 Survey of Minority-Owned Business Enterprises, Table I at 16 (1972), an increase in contracts to them would undoubtedly result in new hires, see Executive Office of the President and Office of Management and Budget, Interagency Report on the Federal Minority Business Development Programs 51 (March 1976) (SBA finding that 81.4 percent of sampled MBE's increased their employment after receiving an 8(a) contract).

The proponents of the MBE provision recognized explicitly that the minority unemployment rate was double that of white citizens, and as high as 35 percent.

34/ See, e.g., A. Andreasen, Inner City Business: A Case Study of Buffalo, New York 147 (1971) (black-owned firms in Buffalo N.Y. hire much higher percentage of black employees than did white-owned firms); R. Glover, Minority Enterprise in Construction 27-28 (1977) (small minority construction firms have a significantly higher percentage of minority employees than white firms).

123 Cong. Rec. S3910 (daily ed. March 10, 1977) (remarks of Senator Brooke); 123 Cong. Rec. H1440 (daily ed. Feb. 24, 1977) (remarks of Rep. Biaggi). In 1977, the median income of minority families was approximately 61 percent that of white families, and a significantly greater percentage of minority persons than white persons were below the poverty line. See U.S. Bureau of the Census, Statistical Abstract of the United States: 1978, Tables 729, 756. There was thus good reason for Congress to believe that the MBE provision would utilize federal funds for a maximum anti-recessionary effect, since, as Senator Brooke noted, it directed those funds to minority persons, who are among the poorest members of society and who, but for the provision, would be excluded from those funds by discrimination.

In addition, the 1977 MBE provision served as equitable direct aid to those who suffered from the differential impact a recession has on minority groups. Just as Senator Brooke noted,

the recession had brought severe unemployment to minority persons; in fact, their unemployment rate was double that of others. 123 Cong. Rec. S3910 (daily ed. March 10, 1977). The MBE provision sought to diminish that differential in unemployment rates, a purpose which could otherwise be frustrated by the effects of discrimination in the building trades.

Moreover, the recession had a particularly destructive impact on minority businesses. See id. (remarks of Senator Brooke); p. 47 supra (remarks of Senator Javits); p. 44 n.15 supra (H.R. Rep. No. 94-659). Like minority employees who suffer the "last hired, first fired" syndrome, MBE's (in many cases only newly formed due to past discrimination) had suffered heavily during the recession, see 123 Cong. Rec. H1440 (daily ed. Feb. 24, 1977) (remarks of Rep. Biaggi). Through the MBE provision, contracts would be available to minority businesses, including those in which the SBA had already made investment, which might otherwise have failed.

III. ACTING ON THE BASIS OF THIS HISTORY, CONGRESS WAS CLOTHED WITH ABUNDANT CONSTITUTIONAL AUTHORITY, UNDER ITS SPENDING POWER, UNDER ITS THIRTEENTH AMENDMENT §2 POWER, AND UNDER ITS FOURTEENTH AMENDMENT §5 POWER, TO ENACT THE 1977 MBE PROVISION.

There are, then, a multitude of factors which provide the historical context of the 1977 MBE provision: the exclusion of minorities from government contracts, the opposition of government contracting officers to minority businesses, the recognized inadequacies of existing programs designed to aid minority businesses, the historic discrimination against minorities in the construction industry, and the particularly severe economic plight of minorities during recessionary periods. Of all the branches of government, Congress is charged with special authority and discretion to deal with such problems, under its spending power and under the enforcement clauses of the thirteenth and fourteenth amendments. With these sources of authority, Congress possesses broad discretion to eliminate racial discrimination. Its judgment is measured by the standard of the "Necessary and Proper" clause; the Court should overturn

Congress' judgment only if there is no reasonable basis on which it could be sustained.

The MBE provision did not restrict the conduct of private or public parties without concurrently providing benefits. Congress, rather, disbursed substantial federal funds in a new program, on the condition that a small portion of them be set aside for minorities, thereby implicating the spending power, U.S. Const. art. I, §8, cl. 1. Because it is Congress' duty to determine how the needs of the nation will be served Congress' discretion in the exercise of the spending power is broad:[35/]

> The discretion [in exercise of the spending power]...is not confided to the courts. The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment. This is now familiar law. Helvering v. Davis, 301 U.S. 619, 640 (1937).

Clearly the relief of unemployment, id. at 641; Charles C. Steward Machine Co. v.

35/ Its authority to set the terms of government contracts is, if anything, even broader. See Perkins v. Lukens Steel Co. 310 U.S. 113 (1940).

Davis, 301 U.S. 548, 586-87 (1937), and the remedying of economic disparities among groups, Califano v. Webster, 430 U.S. 313, 318 (1977) (per curiam), are legitimate objects of the spending power. Congress' choices in spending can be successfully challenged only if "'by no reasonable possibility can the challenged legislation fall within the wide range of discretion permitted to the Congress.'" Helvering v. Davis, 301 U.S. at 641. The question is whether Congress "had a basis for" its choice: "Whether wisdom or unwisdom resides in the scheme of benefits...it is not for us to say. The answer to such inquiries must come from Congress, not the courts." Id. at 644.

This is particularly true, in a case such as this one, where Congress could perceive the inequitable disbursement of federal monies in the past to be the result of discrimination by governmental contract officers and of discrimination in the construction industry.

> 'Simple justice requires that public funds, to which all taxpayers of all races contribute, not be

> spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination.' Lau v. Nichols, 414 U.S. 563, 569 (1974) (quoting Senator Humphrey).

Congress, of all branches of the federal government, is uniquely charged with the authority to prevent the "entrenchment" of racial discrimination by the enforcement clauses of the thirteenth and fourteenth amendments. Its exercise of the spending power is informed and directed by its responsibility under those clauses:

> Where Congress attempts to remedy racial discrimination under its enforcement powers, its authority is enhanced by the avowed intention of the framers of the Thirteenth, Fourteenth, and Fifteenth Amendments. Oregon v. Mitchell, 400 U.S. at 129 (Black, J.).

In section 5 of the fourteenth amendment, Congress is granted "by a specific provision," "the same broad powers expressed in the Necessary and Proper Clause...." Katzenbach v. Morgan, 384 U.S. at 650. Section 5

> is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation

> is needed to secure the guarantees of the Fourteenth Amendment. Id. at 651.

See also Oregon v. Mitchell, 400 U.S. at 127-28, 131 n.12 (Black, J.); id. at 145, 150 (Douglas, J.); id. at 231, 240 (Brennan, J.); id. at 284, 296 (Stewart, J.). Wide congressional latitude in exercising the authority granted by section 5 of the fourteenth amendment is recognized, lest the Court "depreciate both congressional resourcefulness and congressional responsibility for implementing the Amendment." Katzenbach v. Morgan, 384 U.S. at 648 (footnote omitted):

> It is not for us to review the congressional resolution of these factors. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did. Id. at 653.

Here, Congress had before it evidence of discrimination by state and local governments in a variety of areas including the awarding of federal monies. See, e.g., pp. 56 to 61 supra. There is also evidence that discrimination was notorious in the construction industry, so that even if local government officials

did not originally contribute to the racially exclusionary nature of the industry, they would necessarily become implicated in such discrimination by awarding contracts for the construction of public works and public buildings in a manner which openly preserved and rewarded private discrimination. Cf. Burton v. Wilmington Parking Authority, 365 U.S. 715, 724-26 (1961); Gilmore v. City of Montgomery, 417 U.S. 556, 582 (1974) (White, J., concurring); United States v. Guest, 383 U.S. 745, 755-57 (1966); United States v. Price, 383 U.S. 787, 794, 798 (1966). Because both the discriminatory practices of local and state officials and the entanglement of government with the discriminatory practices of the construction industry directly implicated the fourteenth amendment, Congress appropriately acted to forestall an unconstitutional exclusion of minority businesses from access to these federal funds. Rhode Island Chapter, Associated General Contractors v. Kreps, 450 F. Supp. 338, 349-51 (D.R.I. 1978).

Even if the fourteenth amendment were not implicated in this case by the

involvement and entanglement of state and local governments in discriminatory action, Congress' judgment in enacting the MBE provision would be supported by the enforcement clause of the thirteenth amendment. Id. at 360-66. That clause "clothed 'Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States.'" Jones v. Alfred H. Mayer Co., 392 U.S. 409, 439 (1968). That power to redress societal and historic group-based discrimination, even by private parties, continues in force to this day. See generally id.

Again, Congress' discretion is broad:

> "...Who is to decide what that appropriate legislation is to be? The Congress of the United States; and it is for Congress to adopt such appropriate legislation as it may think proper...."
>
> ...Surely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation. Id. at 440 (footnote omitted).

It cannot be deemed "irrational" to view the exclusion of minorities from participation in the construction industry and from government contracts as a badge and incident of slavery, any less than the refusal of white planters to hire freed slaves for pay after the Civil War. Id. at 427. It is clearly established that Congress can, under this amendment, enforce the right of minorities to enter into contracts, whether individual employment contracts in the building trades, or MBE subcontracts with white businesses, or MBE primary contracts with local governments. See id. at 439 (Congress "plainly" possesses "the power to eliminate all racial barriers to the acquisition of real and personal property"); Runyon v. McCrary, 427 U.S. 160, 170-72 (1976).

It is open to Congress under the enforcement clause not simply to prohibit discrimination, as it has in 42 U.S.C. §§1981, 1982 (1976), but also to employ affirmative aid where simple prohibitory statutes are inadequate, as it now does in the MBE set-aside provision,

and in other special affirmative programs, and as it did over 100 years ago in legislation aiding ex-slaves, including the Freedmen's Bureau Acts, see Brief of the NAACP Legal Defense and Educational Fund, Inc., as Amicus Curiae 10-53, University of California Regents v. Bakke, supra. "If Congress cannot say that being a free man means at least this much, then the Thirteenth Amendment made a promise the Nation cannot keep." Jones v. Alfred H. Mayer, 392 U.S. at 443.[36/]

36/ The power of Congress to include groups of Native Americans in the 1977 MBE provision, at least with regard to construction in and around their traditional lands, also derives from its plenary power to regulate the dealings of the United States with Indian tribes, and, in particular, its power to "regulate Commerce...with the Indian Tribes," U.S. Const. art. I, §8, cl. 3. On this basis, this Court has unanimously affirmed analogous legislation establishing a benign classification which prefers Indians for employment in the Bureau of Indian Affairs. Morton v. Mancari, 417 U.S. 535, 551-55 (1974).

IV. THE 1977 MBE PROVISION DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

Congress did not abuse its special authority and competence when it enacted the 1977 MBE provision.[37/] That provision was a reasonable response to

---

37/ Petitioners' argument that the 1977 MBE provision violates Title VI of the Civil Rights Act of 1964 and should therefore be struck down is absolutely frivolous. Because repeals by implication are not favored, Morton v. Mancari, 417 U.S. 535, 549-51 (1974); Universal Interpretative Shuttle Corp. v. Washington Metropolitan Area Transit Commission, 393 U.S. 186, 193 (1968); Posadas v. National City Bank, 296 U.S. 497, 503 (1936); Wood v. United States, 41 U.S.(16 Pet.) 342, 362-63 (1842); because the very idea of repeal of a later statute by an earlier statute borders on the ludicrous, see Araya v. McLelland, 525 F.2d 1194, 1196 (5th Cir. 1976); International Union of Electrical, Radio and Machine Workers v. N.L.R.B., 289 F.2d 757, 761 (D.C.Cir. 1960); and because the MBE provision is the more specific of the two statutes, regardless of the date of passage, Morton v. Mancari, 417 U.S. at 550-551; Bulova Watch Co. v. United States, 365 U.S. 753, 758 (1961), the MBE provision is not rendered inoperative by Title VI. As this Court has said, "[t]he courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." Morton v. Mancari, 417 U.S. at 551.

existing conditions, including the exclusion of minorities from government contracts and the notorious discrimination in the construction industry.

The MBE provision at issue in this case is not subject to the criticism that it is an "amorphous" response to social problems. University of California Regents v. Bakke, 438 U.S. at 307 (Powell, J.). To the contrary, the provision was "far more focused than the remedying of the effects of 'societal discrimination....'" Id.38/

38/ It is the position of the Lawyers' Committee that societal discrimination would by itself provide a sound basis for the limited preference of the 1977 MBE provision. See, e.g., University of California Regents v. Bakke, 438 U.S. at 362-73 (Brennan, J.); id. at 387-98 (Marshall, J.); id. at 402 (Blackmun, J.). This question need not be resolved in this case, however, in view of the specific past discrimination in government funded construction work which is addressed by the 1977 MBE provision.

It is, of course, not necessary for Congress to find discrimination on a case-by-case basis on the part of each private individual and government affected by the 1977 MBE provision. In utilizing the constitutional authority vested in it by the thirteenth and fourteenth amendments and the spending power, Congress, as this Court

(footnote continued)

(footnote continued)

has recognized, does not and cannot function as would a trial court or administrative agency in an adjudicatory proceeding. See, e.g., Katzenbach v. McClung, 379 U.S. 294, 302-05 (1964); South Carolina v. Katzenbach, 383 U.S. 301, 328-29 (1966); Oregon v. Mitchell, 400 U.S. 112, 133-34 (1970) (Black, J.); id. at 146-47 (Douglas, J.); id. at 216-17 (Harlan, J.); id. at 232-34 (Brennan, J.); id. at 283-84 (Stewart, J.). United Jewish Organizations v. Carey, 430 U.S. 144, 156-57, 161 (1977).

While Congress need not respond to discrimination on a state-by-state basis, it in fact had evidence concerning MBE's in New York State when it enacted the 1977 MBE provision. See p. 44 n.15 supra (effect of New York City fiscal crisis on MBE's); p. 49 n.17 supra (inadequacies of New York City SBA 8(a) office); Hearings on Small Business Administration 8(a) Contract Procurement Program Before the Senate Select Comm. on Small Business, 94th Cong., 2d Sess. 141 (Jan. 21, 1976) (testimony that New York State and City MBE contracting program was lacking); Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, Civil Rights Aspects of General Revenue Sharing 6 (Comm. Print Nov. 1975) (New York City guilty of discriminatory employment practices). Cf. U.S. Commission on Civil Rights, The Unfinished Business, Twenty Years Later...A report submitted to the U.S. Commission on Civil Rights by its Fifty-One State Advisory Committees 142 (Sept. 1977) (implementation of New York State MBE subcontracting program ineffective despite high number of minorities in state; furthermore, "New York City's contract compliance program has been left in shambles by the State courts").

The 1977 MBE provision was directed at a specific segment of society's activities where past discrimination was notorious. It dealt with the construction industry, where past discrimination has been rife. See pp. 61 to 64 supra; United Steelworkers v. Weber, 99 S.Ct. at 2725 n.1; id. at 2732 n.* (Blackmun, J., concurring); id. at 2735 (Burger, C.J., dissenting). Employment discrimination in the building trades has prevented and delayed the creation of minority construction businesses, since contractors have traditionally gained necessary familiarity with construction practices as tradesmen-employees. See p. 64 & n.29 supra. Such discriminatory inhibition of the formation of minority construction enterprises means that they are presently hampered by inexperience and small size, so that even a facially "neutral" system would operate to "perpetuate...past inequities." See p. 46 supra. These problems are exacerbated by the present unwillingness of white contractors to deal with minority

enterprises.[39] See, e.g., p. 45 n.15, p. 48 supra. Letting contracts to such white contractors would also exacerbate and perpetuate the effects of discrimination on the employment of minorities as construction workers; white firms, even years after the passage of Title VII, are far less likely than MBE's to have minority employees. See, e.g., pp. 18-19, p. 63 n.28, p. 73 n.34 supra.

39/ The reasonableness of Congress' concerns is buttressed by petitioners' evidence in this case, which indicates the existence of an "old boy" network effectively excluding minority businesses from participation in construction work. One general contractor testified that he did not even solicit MBE's to bid on subcontracts: there were four non-minority firms which he "generally contact[ed] with respect to getting a price for performance of" certain work. App. 65a-66a. An affidavit submitted by an industry official in support of petitioners' request for injunctive relief claimed that irreparable injury occurred when petitioners were required to "enter into subcontracts with subcontractors ...other than those with whom a long standing relationship of trust and confidence has been established." App. 29a.

Such thinking reflects a system operating to exclude minority enterprises, where contractors deem it irreparable harm to deal with a new enterprise and where MBE's are not even requested to submit bids. See United States v. Georgia Power Co., 474 F.2d 906, 925-26 (5th Cir. 1973) (word-of-mouth hiring violates Title VII by isolating blacks from 'web of information' in the company).

The 1977 MBE provision, moreover, was not directed at the construction industry at large, but only at a specific and limited portion of that industry's activities: the performance of public works contracts. Congress had evidence of the effective exclusion of minorities from government contracting. There was evidence of discrimination by government contracting officers, including, in particular, discrimination by state and local contracting officers in the disbursement of federal funds. See pp. 41-43 n.14, pp. 43, 48, 49, 56-61 supra. All of this evidence, and more, was before Congress when it enacted the 1977 MBE provision.40/

Congress' response to the conditions it perceived was temperate and reasonable.

40/ Because of the substantial evidence that the 1977 MBE provision was necessitated by past and present discrimination in the construction industry and in the awarding of government contracts, it cannot be said that the provision "stigmatizes" minorities. It is a response to perceived discrimination in a narrowly circumscribed arena, and not a response to any presumption that minorities are "inferior" or incapable of succeeding in a nondiscriminatory environment. See University of California Regents v. Bakke, 438 U.S. at 357-58, 360, 375-76 (Brennan, J.).

The MBE provision applied only to the 1977 PWEA amendments, not to all government projects. It was therefore temporary and self-limiting, with the result that its impact on white contractors was transitory. See United Steelworkers v. Weber, 99 S.Ct. at 2730; id. at 2734 (Blackmun, J., concurring). Moreover, the short term nature of the 1977 set-aside meant that its effects on both whites and minorities could be evaluated before similar provisions were considered. See Oregon v. Mitchell, 400 U.S. at 216-17 (Harlan, J.). The MBE provision was, moreover, reasonable in that it was limited to a maximum of ten percent of 1977 PWEA funds, less than the percentage of minority citizens in our nation.[41/]

41/ See United Steelworkers v. Weber, 99 S.Ct. at 2732 n.* (Blackmun, J., concurring) (black population alone is 11.7 percent in 1970).

The 10 percent figure is, of course, greater than the percentage of construction enterprises owned by minorities. This fact does not undercut the reasonableness of the MBE provision, because the number of minority construction firms has been impaired by discrimination. See, e.g., pp. 39, 46, 64 & n.29 supra.

Cf. University of California Regents v. Bakke, 438 U.S. at 374 n.58 (Brennan, J.). Even this ten percent figure was not cast in stone; it could be waived when the low percentage of minority contractors in a trade area made the 10 percent figure infeasible. Indeed, the ten percent of 1977 PWEA funds in fact set aside amounted to only one quarter of one percent (.25 percent) of annual construction expenditures in the United States. Fullilove v. Kreps, 584 F.2d 600, 607 (2d Cir. 1978). Thus, the impact on white contractors was minimal in view of the goals of the provision.

The 1977 MBE provision did not "unnecessarily trammel the interests of" white contractors. United Steelworkers v. Weber, 99 S.Ct. at 2730. It did not mandate the displacement of white contractors from projects previously available to them, or otherwise frustrate their existing expectations. See id. Congress did not impose a new minority business requirement on existing federal programs; it merely set aside ten percent of entirely new federal funds which would otherwise not have been available.

After passage of the 1977 PWEA amendments, white contractors found themselves not with less than they previously had but rather with more, access to 3.6 billion new federal dollars. These benefits were perhaps not as great as they could have been, absent the 1977 MBE provision, but they were still substantial,[42/] cf. Geduldig v. Aiello, 417 U.S. 484 (1974); General Electric Co. v. Gilbert, 429 U.S. 125 (1976), and Congress' allocation of funds was not unreasonable.

Petitioners' criticisms of the 1977 MBE provision are, in essence, policy arguments more properly directed

---

42/ Moreover, since the 1977 MBE provision affected only one-quarter of one percent of this Nation's construction work, for only a single year, it did not prevent white contractors from pursuing their chosen professions. White contractors had complete access to 99.75 percent of the work available during the term of the MBE provision, and to all work thereafter. In contrast to exclusion from a program leading to a medical degree, see University of California Regents v. Bakke, supra, the MBE program had no residual effect on succeeding years for white contractors.

to Congress than to this Court.[43/] Petitioners argue that Congress erred in adopting the 1977 MBE provision because it was "non-effective", Building Contractors' Brief at 19, while they simultaneously urge other "less drastic" means, including tax incentives to encourage joint ventures between minority enterprises and established contractors; technical, financial and educational assistance programs; the provision of retired or other experienced construction industry executives to MBE's in the manner of Junior Achievement; assistance to MBE's in securing bonding, and so on, id. at 24-31. See also Brief for Petitioners at 26-27 (recommending that Commerce Department ensure that business in high unemployment areas become "aware of" federal projects, and assist such businesses in "familiarizing

---

43/ The evidence on which the 1977 MBE provision was premised would enable it to survive "strict scrutiny", were the Court to analyze the provision in those terms. However, since this case involves an appropriate response to discrimination by Congress acting pursuant to its express mandate under the thirteenth and fourteenth amendments, the MBE provision need not be analyzed in such terms. See pp. 76 to 84 supra.

themselves" with general contractors who bid on federal projects).

Congress has in fact already adopted various of these proposals.[44/] But it had ample reason not to rely exclusively on these alternatives to reverse the historic exclusion of minorities from government contracts. Petitioners' recommendations, first of all, ignore

---

44/ It was also rational to conclude that the stringent time limits necessarily imposed on 1977 PWEA expenditures made impossible the broader categorization of beneficiaries used in the 1978 Small Business Act amendments, which petitioners apparently approve. Brief for Petitioners at 27-28; Building Contractors' Brief at 29-30.

The 1978 Small Business Act amendments, as petitioners point out, favor "socially and economically disadvantaged individuals", and not exclusively minorities. While this broader category of beneficiaries may be politic for an ongoing program such as the Small Business Act, it would not have been reasonable for a short-term program operating under severe time constraints. This is apparent from the SBA procedure now necessary to determine which individuals other than minorities are "socially and economically disadvantaged", 44 Fed. Reg. 30673 (May 29, 1979)(to be codified in 13 CFR Part 124), a procedure clearly impracticable in the context of the 1977 PWEA program.

the fundamental fact that rapid disbursement of federal monies was integral to the 1977 PWEA amendments. See pp. 69 to 71 supra. Congress could have readily found that none of the recommended alternatives, such as tax incentives and assistance programs, would have had any effect at all within the stringent time limits required by the Act.

Moreover, even were the 1977 MBE provision not compelled by temporal constraints, Congress could still have readily determined that it was necessary. Petitioners' recomendations are strikingly similar to the SBA programs which had been tried in the past and which had been ineffective in curing the effects of discrimination against MBE's seeking access to government contracts. The SBA and OMBE had long been charged with the obligation of providing MBE assistance, MESBIC's had been charged with the responsibility of encouraging investment in minority enterprises, private contractors had been required to use "good faith" efforts to subcontract to MBE's, and "goals" for MBE utilization had been

mandated. Yet, as was made clear during the debates on the 1977 MBE provision, see, e.g., pp. 13 to 15, 18 to 19 supra, and was amply supported by Congress' experience, see, e.g., pp. 41-43 n.14, p. 45 n.15, p. 48, p. 49 n.17, p. 53 n.19 supra, the net effect of all these programs on minority access to government contracts had been minimal. While each of petitioners' suggestions may be helpful, and while each may address a portion of the problems faced by MBE's, Congress had ample reason to conclude that none of them would have effectively remedied the effects of past discrimination against MBE's in the construction industry or the unwarranted reluctance of government contracting officers and established white contractors to deal with minority enterprises. See 123 Cong. Rec. H1436-37, 1438 (daily ed. Feb. 24, 1977) (remarks of Rep. Mitchell). It is reasonable to conclude that petitioners' recommendations could be called "less drastic" than the 1977 MBE provision for only two reasons: they would be not

only too slow but also ultimately ineffective.[45/]

45/ It is the position of the Lawyers' Committee that Congress could proceed on an industry-wide basis, that the facts before Congress amply justified its nationwide approach, and that these same facts are appropriate for judicial notice. But if, on the facts of the record, this Court were to entertain doubts about the constitutionality of the 1977 MBE provision, as it has affected the particular Petitioners before this Court, then it should remand this case to the district court with instructions to allow Respondent Secretary of Commerce an opportunity for a full trial on the merits.

For if, despite the presumption of constitutionality, Respondent is required to place on the record facts supporting the 1977 MBE provision, extant when Congress adopted it, then that opportunity was denied Respondent when the district judge consolidated the hearing on a preliminary injunction with a trial on the merits, and held both on December 2, 1977, two days after the complaint was filed. See App. 47A-49A.

A remand would permit Respondent Secretary of Commerce to put on the record the abundant evidence, some of which has been cited in this Brief, which was before Congress. Then Petitioners would be unable to make a claim that Respondent had failed to give them "a demonstration that the challenged classification is necessary to promote a substantial state interest." University of California Regents v. Bakke, 438 U.S. at 320 (Powell, J.).

CONCLUSION

For the foregoing reasons, amicus respectfully submits that the judgment below should be affirmed.

Respectfully submitted,

John B. Jones, Jr.
Norman Redlich
Co-Chairmen

William L. Robinson
Richard T. Seymour
Norman J. Chachkin
Staff Attorneys

Lawyers' Committee for
Civil Rights Under Law
733-15th Street, N.W.
Washington, D.C. 20005

Mark Aaronson
San Francisco
Lawyers' Committee
for Urban Affairs

Of Counsel

Laurence S. Fordham
Henry P. Monaghan
Richard W. Benka
Robert D. Goldstein
Foley, Hoag & Eliot
10 Post Office Square
Boston, Massachusetts 02109

Attorneys for Amicus Curiae