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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.

BRIEF *AMICI CURIAE* OF THE AFFIRMATIVE ACTION COORDINATING CENTER THE NATIONAL CONFERENCE OF BLACK LAWYERS THE NATIONAL LAWYERS GUILD THE CENTER FOR CONSTITUTIONAL RIGHTS THE CENTER FOR URBAN LAW HON. PARREN J. MITCHELL, MEMBER OF CONGRESS

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THE URBAN LEAGUE OF GREATER NEW HAVEN

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CONSENT OF PARTIES

Amici Curiae file this brief with the consent of both parties in support of the position advanced by the Respondent. Letters of consent have been filed with the Clerk of this Court.

INTEREST OF *AMICI CURIAE*

The fifty organizations joining in this brief as *amici curiae* (see appendix) represent many sections of American society and have many diverse interests. They share a mutual hope that the Court will use the instant case to advance and not to set back the struggle to rid our nation of the haunting spectres of racial discrimination, racial hatred.

The groups share a common concern about the continuing exclusion of minorities from the economic mainstream which is the legacy of slavery and discrimination. They are aware that affirmative action set-asides such as the "minority business entreprise" provision contained in the Public Works Employment Act of 1977 are important vehicles by which to begin the long process of remedying this historic exclusion.

INTRODUCTION AND SUMMARY OF ARGUMENT

The instant case is the third in as many terms to present this Court with an opportunity to pass upon the validity of race-conscious policies adopted to alleviate a portion of the burden imposed by this country's sad history of racial oppression. In *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978), the Court was presented with a state university admissions policy which reserved a number of seats for qualified minority applicants. In *Weber* v. *Kaiser Aluminum*, —— U.S. L.W. ——, the contest involved an employee who objected to an agreement between a private employer and union to reserve for minority employees one-half of the positions in a newly-established training program.

In this case, Petitioners would have the Court do what it has not done in almost one hundred years—strike down as unconstitutional a congressional enactment designed to address the very evils to which the Civil War Amendments to the Constitution were directed. Not since the *Civil Rights Cases of 1883* has the Court sought to narrowly constrain the power of Congress to eradicate the remnents of American slavery.

By asking the Court to step back a full century, the Petitioners invite the Court to ignore the lessons of history and to deny the importance and intractability of America's continuing problems in race relations.

In the courts below and in the briefs submitted to this Court, Petitioners advance a narrow Fourteenth Amendment argument assuming erroneously that the sole justification for race-consciousness must be the remediation of past discrimination. At its core, Petitioners' arguments reveal a fundamental misunderstanding about the role of the Court when presented with a challenge to the constitutionality of a congressional enactment. The Court does not pass on the appropriateness of the congressional action. Rather, the Court quite properly defers to Congress and affords the legislation a presumption of constitutionality and effect if a permissible basis can be found.

The Thirteenth Amendment to the Constitution provides the requisite basis to support the legislative enactment being challenged.

Amici will argue that the Minority Business Enterprise (hereinafter cited as MBE) provision challenged by Petitioners is an appropriate exercise of congressional power pursuant to the Thirteenth Amendment mandate abolishing slavery, its relics, badges and incidents. We will establish that the exclusion of Blacks and other minorities from the economic mainstream is a direct result of slavery and as such can be cured by direct congressional action pursuant to the Thirteenth Amendment.

Although this brief will focus primarily on the historical treatment of Black Americans, *amici* contend that the victimization by the dominant White society of people of color in this nation triggers the protection of the Thirteenth Amendment in much the same manner as the historical relationship emanating from the slave system. To legitimize the brutal slave system, the doctrine of white supremacy developed to rationalize the total subjugation and dehumanization of the Black race by the white race.

Thus, the doctrine of white supremacy is a relic of slavery. Since other minorities have been victimized by the relic of slavery—white supremacy—it is appropriate that Congress develop remedies which include these groups even though they were not the original, intended beneficiaries of the Civil War Amendments.

ARGUMENT

THE MBE PROVISION OF THE PUBLIC WORKS EMPLOYMENT ACT OF 1977 IS AN APPROPRIATE EXERCISE OF CONGRESSIONAL POWER PURSUANT TO THE THIRTEENTH AMENDMENT MANDATE TO ERADICATE THE BADGES AND INCIDENTS OF SLAVERY.

The Thirteenth Amendment can be activated to ameliorate existing disparities when a nexus to the institution of slavery can be found. In the instant case, that nexus is clear. "The severe shortage of potential minority entrepreneurs with general business skills is a result of . . . historical exclusion from the mainstream economy." *Fullilove* v. *Kreps*, 584 F.2d 600, 606 (2d Cir. 1978) (quoting Office of Minority Business Enterprise, U.S. Dept. of Commerce, Minority Business Opportunity Hand-Book [August 1976]). Any but the most cursory and insensitive appraisal of American history would establish that the existing exclusion of Blacks and other minorities from the economic mainstream, and from the construction industry in particular, is due to the continuation and institutionalization of a pervasive pattern of officially-sanctioned policies, procedures and practices. These acts were an integral part of the institution of slavery which survived and even continued in different form despite the abolition of slavery.

A. Exclusion From The Economic Mainstream Was An Integral Aspect Of The Institution Of Slavery.

Any system of human bondage must impose substantial burdens upon and severely constrain the opportunities of the enslaved individual or group to participate effectively in a competitive economy. Even so, slavery American-style contrived to compound these inherent constraints through a complex pattern of legal strictures which collectively mandated the economic isolation of people of color. The positive law of the several states denied Blacks the opportunities to own, rent or otherwise acquire property, to acquire marketable skills through gainful employment, or to engage in trade and commerce.

It is important to understand at the outset that exclusion from the economic mainstream was more than merely incidental to the institution of slavery. This exclusion was an integral part of and critical to the very survival of slavery. A. Leon Higginbotham noted that "the control the court sought was the total submission of Blacks." A. L. HIGGINBOTHAM, IN THE MATTER OF COLOR at 9 (1st ed. 1978). Complete subjugation was considered *sine qua non* to the maintenance of slavery. Higginbotham recounts how Frederick Douglass described the underlying motivation.

> Beat and cuff the slave, keep him hungry and spiritless, and he will follow the chain of his master like a dog, but feed and clothe him well, work him moderately and surround him with physical comfort, and dreams of freedom will intrude . . . You may hurl a man so low beneath the level of his kind, that he loses all just ideas of his natural position, but elevate him a little, and the clear conception of rights rises to life and power, and leads him onward. *Id.*

William Goodell explained the need for total subjugation in yet another way.

> If the slave could possess property, he could dispose of it, he could make contracts; he might contract marriage; he might become a man, and, in becoming such, cease to be a slave. *The safety of the entire fabric required that not one stone in the edifice should be missing.* (emphasis added) W. GOODELL, THE AMERICAN SLAVE CODE at 96 (1st ed. 1968).

The right to contract, which is the right preservative of all other economic rights, was denied by law to all slaves except in one instance.

> The only case in which slaves can contract on their account, is for their emancipation. Act of 1825, Louisiana Civil Code, Art. 1783 (1925).

Ironically, this competence to contract for emancipation provided an equally compelling and far more immediate concern about allowing slaves to participate in meaningful economic activity. Consistent with the conception of slaves as property,[1] some jurisdictions allowed slaves to contract to purchase their freedom by paying their master a sum of money.[2] Without laws making it virtually

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[1] The slave codes of several states expressly conferred upon slaves the status of property. In Louisiana, slaves were considered to be real estate and as such subject to being mortgaged. Act of 1806 (Black Code) Laws of Louisiana, at 101-102 (1806). Alabama and South Carolina, however, recognized slaves to be chattel property. Act of 1852, Code of Alabama, at 390 (1852); Act of 1740, Statutes at Large for South Carolina, Vol. 7, at 397 (1825). The slave as property had no legal rights to possess anything, real or personal. The master had full rights to sell him, dispose of his person, his industry and his labor. The slave could not possess nor acquire anything that did not belong to his master. The laws were clearly enacted to insure that the slave would never reach a state of independence so to threaten the economic well being of the slaveowners.

[2] *See* BERLIN, SLAVES WITHOUT MASTERS, (1st ed. 1974); Petition from Southampton County, 9 December 1811, Virginia Legislative Papers, Virginia State Library, Richmond, Virginia; Matison, *Manumission by Purchase*, XXXIII JOURNAL OF NEGRO HISTORY, 157-158 (1958).

impossible for slaves to earn and accumulate the agreed upon sum, the number of slaves purchasing their freedom might have undermined completely the institution of slavery and the entire economic system of the region.[3]

It was this twin realization of the fundamental threat posed by a slave population even marginally participating in the economy that led inevitably to the determination to assure complete exclusion.

Slaves, themselves considered property,[4] could own neither personalty or realty. On this point, the statutes were clear and unequivocal.

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[3] Slaves needed iron determination as well as cold cash to buy their way out of bondage. Slaveholders frequently thought their slaves too good to free. "No sum of Money would induce me to part with Sarah, for she is Sober, industrious & Honest so much so that my wife always finds her things in proper order without much trouble," a Tennessee slave master wrote to a free Negro anxious to buy his wife. Besides, he added, "the Price of Black people is so enormously High in this Country that I could not Replace Such a one as her I Expect for Less than Between Six & Seven Hundred dollars and such a trusty one as She is, is hard to find. . . ." BERLIN at 154.

[4] The master's right to free his slaves shrank as slavery expanded. Manumission had been the primary source of free Negro increase during the post-Revolutionary decades, and Southern legislators worked to curb or abolish the practice. During the nineteenth century, lawmakers dismantled the last remnants of the liberal manumission policies of the earlier era. The older seaboard states added restrictions to their manumission statutes, and the newer states of the Southwest enacted almost prohibitory regulations so that even the few masters who desired to liberate their slaves found it increasingly difficult. By the mid-1830's, most Southern states required slaveowners to get judicial or legislative permission to free their slaves and demanded that newly liberated bondsmen leave the state upon receiving their freedom. Those few states which still allowed slaveowners to emancipate their slaves also stipulated that manumitted Blacks migrate or risk being forcibly deported or re-enslaved. Legislators further discouraged emancipation by requiring masters to remove freed Negroes and by making those manumitted liable to seizure for unpaid debts even after emancipation. BERLIN at 138.

> No slave can own property, and any property purchased or held by a slave, not claimed by the master or owner, must be sold by order of any justice of the peace; one half the proceeds of the sale, after the payment of cost and necessary expenses to be paid to the informer, and the residue to the county treasury. Act of 1852, Code of Alabama, Sec. 1018 (1852).

> [N]o person . . . shall suffer or allow any of his or their slaves to plant for themselves any corn, peas or rice, or to keep for themselves any stock of hogs, cattle or horses, under the penalty of twenty pounds current money . . . for every slave so suffered . . . the said penalty to be recovered . . . half to be paid to him or them who will inform and sue for same . . . Act of 1714, Statutes at Large of South Carolina, Vol. 7, at 368 (1840).

The alienation between slaves and property was made complete by prohibiting slaves to acquire or dispose of property through inheritance.

> All free persons, even minors, lunatics, persons of insane mind and the like may transmit their estates and *ab intestato* inherit from others. Slaves alone are incapable of either. Act of 1825, Louisiana Civil Code, Art. 945 (1825).

> Every devise or bequest, to a slave or slaves, or to any person, upon a trust or confidence, secret or expressed, for the benefit of any slave or slaves, shall be null and void. Act of 1841, Statutes at Large of South Carolina, Vol. 11, at 169 (1873).

The ban on owning or otherwise acquiring property, combined with the miscegenation statutes,[5] would guar-

[5] State laws imposing criminal sanctions for interracial marriage were not ruled unconstitutional until *McLaughlin* v. *Florida*, 379 U.S. 184 (1964) and *Loving* v. *Virginia*, 388 U.S. 1 (1967). *See* J. JOHNSTON, RACE RELATIONS IN VIRGINIA AND MISCEGENATION IN THE SOUTH 1776-1860 at 165 *et seq.*, (1st ed. 1970); W. JORDAN,

antee a long term disadvantage in any private property economy.

This disadvantage was further compounded by statutes which denied slaves the opportunity to use what little personal time they had to engage in gainful employment. Slaves, masters and potential employers alike were subject to penalty.

> Section 13. No owner of slaves shall hire his slaves to themselves, under the penalty of a fine of five and twenty dollars for every offense. Act of 1806 (Black Code) Lislet's Digest to Laws of Louisiana, Sec. 13 (1828).

> [I]t shall be altogether unlawful for any person or persons to hire any male slave or slaves, his or their time; and in cases any male slave or slaves be so permitted by their owners, to hire out their own time, labor or service, the said slave or slaves shall be liable to seizure and forfeiture . . . Act of 1822, Statutes at Large of South Carolina, Vol. 7, at 462 (1840).

Nor could slaves engage in trade or commerce without the consent of their master.

> [I]f any shop keeper, trader, or other person, shall . . . buy or purchase from any slave, . . . any other article whatsoever, or shall otherwise deal, trade or traffic with any slave not having a permit so to deal, trade or traffic, or to sell any such article, from or under the hand of his master or owner, or such other person as may have the care and management of such slave, such shop keeper, trader, or other person, shall, for every such offence, forfeit a sum not exceeding one thousand dollars, and imprison-

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WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550-1812, at 136-178 (1st ed. 1968); P. WOOD, BLACK MAJORITY: NEGROES IN COLONIAL SOUTH CAROLINA FROM 1670 THROUGH THE STONO REBELLION, at 98-100, 233-6 (1st ed. 1974).

> ment not exceeding a term of twelve months, nor less than one month. Act of 1817, Statutes at Large of South Carolina, Vol. 7, at 454 (1840).

Even with the consent of their masters, slaves were excluded completely from some occupations.

> And to prevent, . . . slaves from attaining the knowledge of any mineral or vegetable poison. *Be it further enacted* by the authority aforesaid, That it shall not be lawful for any physician, apothecary or druggist, at any time hereafter, to employ any slave or slaves in the shops or places where they keep their medicines or drugs, under pain of forfeiting the sum of twenty pounds, proclamation money, for every such offence . . . Act of 1751, Statutes at Large of South Carolina, Vol. 7, at 423 (1840).

Thus, deprived of any opportunity for economic self-sufficiency, slaves were made completely dependent upon and subject to the absolute control of their masters.

B. Exclusion From The Economic Mainstream Has Survived Slavery And Continued To Be Used To Deny The Promise Of Freedom.

The mosaic of restrictions which excluded slaves (and in some instances, all people of color) from the economic mainstream did not wither away upon the abolition of slavery. It is clear that the framers of the Thirteenth Amendment and the initial Civil Rights Acts earnestly intended to assure the economic viability of the former slave population.[6] It is equally clear that there were

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[6] Slavery, at its root, was an economic phenomenon. Hence, it is not surprising that a prime concern of the framers of the Thirteenth Amendment was the economic well-being of newly freed Blacks. Congress was concerned that Blacks be accorded civil and political rights in order that they could protect and advance themselves economically. The Black Codes—i.e. the legislation passed in Southern states designed to return Blacks to a state of semi-slavery—was never far from the mind of Congress in exacting the anti-slavery amendment. Representative Godlove Orth of Indi-

those who were determined that the Black population would be forever second class—no more than "hewers

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ana acknowledged that something more than merely the right not to be held as property was involved in abolition and added that the right of "personal freedom without distinction" was involved. Ebon C. Ingersoll of Illinois stressed that the amendment would bring Blacks the right to enjoy the rewards of their labor. James Harlan of Iowa emphasized that the amendment would give Blacks the right to own property—and, strikingly, the right to protect and advance their property rights by the right to bring suit, testify in court and to speak and write freely. Cong. Globe, 38th Congress, 2d Sess., 143 (January 6, 1865); *See e.g.* 38th Congress, 1st Sess. 1463 (April 7, 1864); 38th Congress, 2d Sess., 487 (January 28, 1865). Though there was not unanimity in Congress regarding the plan of some legislators (Sumner, Thaddeus Stevens, George Julian, Benjamin Wade, *et al.*) to allocate land to the freedmen, there was recognition that "special measures" had to be taken if Blacks were not to fall back into a second-class economic status. Congressional reports and documents of that era are replete with this concern. House Executive Documents, Report of the Secretary of the Treasury on the State of the Finances for the Year 1864: General Regulations Concerning Commercial Intercourse, Abandoned Property and the Employment and General Welfare of Freedmen; [No. 3, 38th Congress, 1st Sess.] Senate Executive Documents, Preliminary Report T8ouching the Condition and Management of Emancipated Refugees, Made to the Secretary of War by the American Freedman's Inquiry Commission; [No. 53, 38th Congress, 1st Sess. (1864)]. Senate Executive Documents, "Final Report of the American Freedmen's Inquiry Commission to the Secretary of War [No. 53, 38th Congress, 1st Sess. (1864)]. The Freedmen's Bureau was both the clearest expression of congressional concern about the economic plight of the freedmen and the clearest expression of the reach of the Thirteenth Amendment. Though some have argued otherwise, it is certain that the Freedmen's Bureau was seen as a concrete realization of the anti-slavery amendment and was based upon it; *See* G. BENTLEY A HISTORY OF THE FREEDMEN'S BUREAU, at 117, (1st ed. 1955). This was the view of conservative, moderate and so-called "radical" Congressmen alike. This is also the view of the two leading authorities on the Freedmen's Bureau and post-bellum land reform. *Compare*, W. ROSE, REHEARSAL FOR RECONSTRUCTION: THE PORT ROYAL EXPERIMENT, (1st ed. 1965); W. MCFEELY, YANKEE STEPFATHER: GENERAL O. O. HOWARD AND THE FREEDMEN, at 199, 267 (1968); *See also*, MCFEELY, UNFINISHED BUSINESS: THE FREEDMEN'S BUREAU AND FEDERAL ACTION IN RACE RELATIONS, KEY ISSUES IN THE AFRO-AMERICAN EXPERIENCE, Vol. II, at 5 (Huggins, Kilson & Fox ed. 1971). Congress recognized and

of wood and drawers of water."[7] Clearer still is the realization that in the period following, the brief respite known as the Reconstruction Era, it was the latter who prevailed.[8]

> During 1865 and 1866 [Southern lawmakers] enacted the Black Codes as a system of social control that would be a substitute for slavery, fix [Blacks] in a subordinate place in the social order, and provide a manageable and inexpensive labor force. A.

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the Bureau proceeded to implement the incontrovertible fact that the peculiar status of Blacks as a result of slavery, necessarily meant that peculiar legislation had to be designed to fit their needs. In that sense, the Freedmen's Bureau can be seen reasonably as an early form of what is known today as "affirmative action." Further, the fact that the architects of the Thirteenth Amendment also authored the Freedmen's Bureau, is recognition of the sound *constitutional* basis for "affirmative action."

[7] It is undoubtedly certain that in approving the Thirteenth Amendment and its concomitant, the Freedmen's Bureau, Congress was attempting to affect directly the inferior economic status of Blacks, that the Black Codes were designed to promote. Congress was aware of the South Carolina legislation that forbade Blacks on farms to sell farm products without written authorization; the Mississippi law forbidding Blacks to rent or lease lands outside towns or cities; the special taxes that hit Blacks and Blacks alone; the provisions in virtually every Southern state's code containing detailed provisions on labor contracts, apprenticeship and vagrancy, all tailored to perpetuate a second-class economic status for Blacks. Not incidentally, after the Black Codes were passed, the migration of Blacks from rural areas—where the Codes were developed to maintain them as a form of cheap labor—to the cities was halted. T. B. WILSON, THE BLACK CODES OF THE SOUTH, at 66-80, 96-116 (1st ed. 1952).

[8] In his eloquent opinion in the *Bakke* case, Justice Marshall succinctly described the failure of the Reconstruction Era. "The Southern States took the first steps to re-enslave the Negroes. . . . Congress responded to the legal disabilities being imposed in the Southern States by passing the Reconstruction Acts and the Civil Rights Act . . . Thus, for a time it seemed as if the Negro might be protected from the continual denial of his civil rights . . . That time, however, was shortlived. Reconstruction came to a close, and, with the assistance of this Court, the Negro was rapidly stripped of his new civil rights." *Bakke*, 438 U.S. at 390-391.

MEIER and E. RUDWICK, FROM PLANTATION TO GHETTO: AN INTERPRETIVE HISTORY OF AMERICAN NEGROES at 138 (1st ed. 1966).

The right to contract, although now not completely denied, was continually burdened:

> All contracts between any persons whatever, *whereof one or more of them shall be a person of color* . . . shall be void as to all persons whatever unless the same be put in writing and signed by the vendors or debtors and witnessed by a *white* person who can read and write. (emphasis added) MCPHERSON, *infra.*

The ability of people of color to seek out gainful employment and to diversify their economic base was constrained severely by vagrancy and apprenticeship laws which combined to make a mockery of the very notion of abolition.[9] Property still could not be bought and sold

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[9] The Virginia Vagrant Act of 1866 provided that "in case any vagrant shall, during his term of service, run away from his employer without sufficient cause, he shall be apprehended on the warrant of a justice of the peace and returned to the custody of his employer, who shall then have him, free from any other hire. Among those declared to be vagrants are all persons who, not having the wherewith to support their families, live idly and without employment, and refuse to work for the usual and common wages given to other laborers in the like work in the place where they are."

In ordering the non-enforcement of the Virginia Vagrant Act, General Terry stated, "In many counties of this State meetings of employers have been held, and unjust and wrongful combinations have been entered into for the purpose of depressing the wages of the freedmen below the real value of their labor, far below the prices formerly paid to masters for labor performed by their slaves . . . The effect of the statute in question will be, therefore, to compel the freedmen, under penalty of punishment as criminals, to accept and labor for the wages established by these combinations of employers. It places them wholly in the power of their employers and it is easy to foresee that, even where no such combination now exists, the temptation to form them offered by the statute will be too strong to be resisted, and that such inadequate wages will become the common and usual wages throughout the State. The ultimate effect of the statute will be to reduce the freedmen to a condition of servitude worse than that from which they have been

by people of color on the same terms and conditions as their White counterparts.[10]

These legal sanctions encouraged, sustained and required widespread private discrimination. Already disadvantaged by restraints on their right to contract, Blacks were further affected by the actions of "landowners and employer's who entered into gentlemen's agreements to refuse to rent land to Negroes."[11] The "gentlemen's agreements" matured into restrictive covenants which were enforceable at law until this Court's decision in *Shelley* v. *Kraemer*, 334 U.S. 1 (1947).

Even so, private action in restricting the ability of Blacks to purchase property was not deemed outlawed until this Court acted in *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968)[12] and the Congress passed the Civil

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emancipated—a condition which will be slavery in all but its name." E. McPherson, The Political History of the United States of America During the Period of Reconstruction (1st ed. 1880).

[10] *See* R. Higgs, Competition and Coercion; Blacks in the American Economy, 1865-1914, at 11-13, 91-92 (1st ed. 1977); Senate Executive Document, No. 6, 39th Cong., 2nd Sess. (1866), Laws of South Carolina, 1865, at 275-276, 292-299; *In re Turner*, 14 Fed. Case 247 (1867).

[11] V. Wharton, The Negro in Mississippi, 1865-1890, at 79 (1947); Bentley, at 104-106

[12] In *Jones*, the Court upheld an effort by Black citizens to invoke federal equity power to restrain racial discrimination by private individuals in the sale of real estate. The Court found statutory authority for this exercise of federal judicial power in one of the original Reconstruction Statutes, the Civil Rights Act of 1866. Section One of the Act provided that "citizens of every race and color . . . shall have the same right . . . to inherit, purchase, lease, sell, hold . . . and convey real and personal property . . . as is enjoyed by white citizens . . . ." In resting judicial action upon this statutory basis, the Court was forced to face the ultimate question of the source for congressional legislation in the area of Negro rights in the power created by the Thirteenth Amendment "to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States." Kinoy, The Constitutional

Rights Act of 1968.[13]

As a matter of law, specific forms of economic activity were completely closed to people of color.

> [I]t shall not be lawful for a person of color to be the owner, in whole or in part, of any distillery where spirituous liquors of any kind are made, or of any establishment where spirituous liquors of any kind are sold by retail; nor for a person of color to be engaged in distilling any spirituous liquors, or in retailing the same in a shop or elsewhere. A person of color who shall do anything contrary to prohibitions herein contained shall be guilty of a misdemeanor, and, upon conviction, may be punished by fine or corporeal punishment and hard labor, as to the district judge or magistrate before whom he may be tried shall seem meet.

Other fields of employment were open only upon conditions quite different from those imposed on Whites. South Carolina offers this example.

> No person of color shall pursue or practice the art, trade, or business of an artisan, mechanic, or shopkeeper, or any other trade, employment, or business, (besides that of husbandry, or that of a servant under a contract for service or labor,) on his own account and for his own benefit, or in partnership with a white person, or as agent or servant of any person, until he shall have obtained a license therefor from the judge of the district court, which

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RIGHTS OF NEGRO FREEDOM REVISITED: SOME FIRST THOUGHTS ON *Jones* v. *Alfred H. Mayer Company*. 22 RUTGERS L. REV. 537, 538-539 (1968) (footnotes omitted).

[13] Civil Rights Act of 1968, Pub. L. No. 90-284, 801, 82 Stat. 73 (1968). Title VIII forbids discrimination in the sale, rental or financing of housing and the provision of brokerage services. Aggrieved parties are expressly authorized to enfc 'e their rights under the statute in federal district court without regard to the amount in controversy. The statute is not limited to state action or federal grantees.

license the judge may grant upon petition of the applicant, and upon being satisfied of his skill and fitness, and of his good moral character, and upon payment by the applicant to the clerk of the district court of one hundred dollars if a shopkeeper or peddlar, to be paid annually, and ten dollars if a mechanic, artisan, or to engage in any other trade, also to be paid annually: Provided, however, that upon complaint being made and proved to the district judge of an abuse of such license, he shall revoke the same: And provided, also, that no person of color shall practice any mechanical art or trade unless he shows that he has served an apprenticeship in such trade or art, or is now practicing such trade or art. MCPHERSON at 29-44.

It is important that the statutes and ordinances referred to and excerpted above be seen in their proper context. They are merely illustrative and could not reflect adequately the pervasiveness of the discrimination which permeated every aspect and institution of American society.[14]

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[14] Even when the more odious of "Black Codes" were overturned, patterns and practices carried over from slavery and its immediate aftermath continued to persist. When ex-slaves banded together to form the Freedmen's Savings Bank (which had deposits at one time of $57 million), they encountered staunch opposition from Southern state governments and White banks. ". . . the white planter regarded the Freedmen's Saving Bank as part of the Freedmen's Bureau and did everything possible to embarrass it and curtail its growth." W.E.B. DUBOIS, BLACK RECONSTRUCTION IN AMERICA at 600 (1st ed. 1935); W. FLEMING, THE FREEDMAN'S SAVING BANK at 1, 26 (1st ed. 1919). Eventually Jay Cooke and Company and the First National Bank of Washington controlled, traduced and looted the bank. Added to the usual problems faced by small businesses (e.g. securing credit, competition from larger, more efficient enterprises, etc.), Blacks had to contend with racial discrimination by big bankers, suppliers and customers. Blacks could expect less police protection of their property and greater insecurity of their property rights in cases brought before the courts. As a successful Black businessman in Atlanta emphasized, "if we can have justice in the courts and fair protection we can learn to compete with white stores and get along alright." HIGGS, at 91-

In the wake of *Brown* v. *Board of Education*, 347 U.S. 483 (1954) and the equal protection assault upon state-

92. This Court has long been cognizant of the impact of the system of justice on economic enterprise. *See generally Goesart* v. *Cleary*, 335 U.S. 464 (1948); *Morey* v. *Doud*, 354 U.S. 457 (1957); *Hadacheck* v. *Los Angeles*, 239 U.S. 394 (1915); *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1922). Hence, it should not be surprising that it has been noted that the aforementioned practices significantly aided in the exclusion of Blacks from the marketplace. HIGGS, at 11.

> Blacks did accumulate property, but the actions of white police and law courts attenuated their property rights by refusing to provide them with the equal protection of the laws . . . The Black man could expect a higher risk to surround his investments because the agencies charged with enforcing property rights, the police and the law courts, did not offer him equal protection. For the Black man the future was always more uncertain than for the white man. Hence, to adjust for this greater risk he discounted future returns more heavily. Moreover, if he could expect to encounter effective discrimination in the marketplace, the stream of projected returns would be reduced, or the projected costs increased, or the rate of interest higher, as compared with the levels applicable to a white investor. All these differences worked to reduce the present value of investment by blacks and therefore to discourage them from investing as much as whites other things being the same.

The ability of Blacks to become entrepreneurs was hampered as well by legislation and actions that were designed to maintain them as a permanent underclass of low-paid labor for White employers. White employers who refused to pay their Black workers, White employers who agreed not to hire freed slaves without permission of former masters, and general hostility of White employers directed against Black labor was a frequent source of comment and investigation in Congress and was the back-drop for congressional efforts to bring Blacks into the mainstream. CONG. GLOBE, 39th Congress, 1st Sess. 95, 1160 (1833); Report of Carl Schurz, SENATE EXECUTIVE DOCUMENT No. 2, 39th Cong., 1st Sess. 2, 17-25. In Mississippi, newspapers frequently called for discrimination against Black artisans and laborers. Railroad shops and a foundry established in Water Valley in 1866 abjectly barred Black labor. In 1874, the Vicksburg & Meridian Railroad replaced all its Black mail agents with Whites. V. WHARTON, THE NEGRO IN MISSISSIPPI, 1865-1890, at 127 (1947). Such incidents were not isolated but a piece of a larger pattern and practice affecting the entire Black community. Blacks could not "pull themselves up by their bootstraps" because there were neither straps nor boots.

imposed segregation, many of the statutes and ordinances which facially restricted the opportunities of people of color disappeared. But as with the abolition of slavery, those customs and institutional practices which were fostered by and critical to nearly a century of state-imposed segregation did not come immediately to an end. To the contrary, they persist to this day.

In a report prepared by the House Sub-Committee on Small Business Administration's Oversight and Minority Business Enterprise, the following statement appears:

> The very basic problem . . . is that, over the years, there has developed a business system which has traditionally excluded measurable minority participation. In the past more than the present, this system of conducting business transactions overtly precluded minority input. Currently, we more often encounter a business system which is racially neutral on its face, but because of past overt social and economic discrimination is presently operating, in effect, to perpetuate these past inequities. Minorities, until recently have not participated to any measurable extent, in our total business system generally, *or in the construction industry, in particular.* H.R. Rep. No. 1791, 94th Cong., 2nd Sess. 182-83 (1976).

The construction industry to which the MBE provision is addressed typifies the problem.[15]

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[15] Although discrimination against minority construction firms is difficult to document statistically, a number of studies have confirmed the existence of such discrimination. *See*, e.g. R. Glover, Fostering Minority Enterprise in Construction (April 1975) (Report for the Center for the Study of Human Resources, University of Texas, at Austin, on file at the *Harvard Civil Rights-Civil Liberties Law Review*); S. Taylor, Catching up: A study of Behavior and Experience of Minority Construction Contractors in Nine American Cities (May 1973) (Report for the Charles F. Kettering Foundation, on file at the *Harvard Civil Rights-Civil Liberties Law Review*).

> Historical patterns of racial and economic discrimination, have prevented minority construction contractors from entering the construction industry and from attaining long-run success. Minority firms have difficulty entering the industry because of inadequate financing, insufficient bidding opportunities and lack of access to the business relationships necessary to develop competitive bidding skills. Firms that survive the initial entry period often find that they are unable to obtain the surety bonding necessary to compete for large and profitable construction contracts. . . .
>
> Most large public and private construction projects require all of their contractors and subcontractors to obtain surety bonding. Minority firms, because they are often inexperienced and undercapitalized, have difficulty convincing sureties that their business risks are sufficiently low to make bonding worthwhile for the surety. Bonding is also denied because of racial discrimination. . . .
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> All of these factors operate to prevent minority construction firms from participating effectively in public and private construction projects. Comment, *Minority Construction Contractors*, 12 Harv. C.R.-C.L. L. Rev. 693 (1977).

C. It Would Be Proper For Congress To Conclude That The Historical Exclusion From The Economic Mainstream Constitutes A Badge And Incident Of Slavery.

In the *Civil Rights Cases of 1883*, Justice Bradley spoke for the entire Court when he declared that, "By its own unaided force and effect [the Thirteenth Amendment] abolished slavery and established universal freedom." 109 U.S. 3, 20 (1883). That propostion, recently reaffirmed by this Court twice in just over a decade, remains a clear and unambiguous expression of the state of the law.[16]

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[16] *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Runyon* v. *McClary*, 427 U.S. 160 (1976).

Equally clear, and just as viable today as ever, is Justice Bradley's recognition that the Thirteenth Amendment did more than merely prohibit discriminatory action. Rather,

> . . . [T]he power vested in Congress to enforce the Article by appropriate legislation, clothes Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States. . . . 109 U.S. at 3, 20 (1883)

This reading of the meaning of Article 2 of the Thirteenth Amendment has yet to be challenged in the scholarly literature or in the cases presented to this Court.

Assuming that the current exclusion of minorities from the economic mainstream, in general, and the construction industry in particular had its genesis in the institution of slavery, it then remains to be determined whether this continuing pattern can be described within the category "badges and incidents" of slavery and thus amenable to legislative remediation. A century of decisions by this Court provides a ready affirmative answer.

In the *Slaughter House Cases*, 83 U.S. 36 (1873), less than a decade after the passage of the Civil War Amendments, Justice Miller stated the fundamental truth.

> . . . We repeat, then, in light of this recapitulation of events, almost too recent to be called history, but which are familiar to us all; and on the most casual examination of the language of these amendments; no one can fail to be impressed with one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freedom and citizen from the oppressions of those who had formerly exercised unlimited dominion over him. It is true that only the 15th Amendment in

terms mentions the negro by speaking of his color and his slavery. But it is just as true that each of the other articles was addressed to the grievances of that race, and designed to remedy them as the fifteenth." 83 U.S. at 71-72.

Six years later, the Court reaffirmed this original understanding. In *Strauder* v. *West Virginia,* 100 U.S. 303 (1879), Justice Strong commented on the Fourteenth Amendment.

> This is one of a series of constitutional provisions having a common purpose, namely: securing to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoy. The true spirit and meaning of the Amendments, cannot be understood without keeping in view the history of the times when they were adopted, and the general objects they plainly sought to accomplish. 100 U.S. at 306.

The historic debate in the *Civil Rights Cases of 1883* (between Justices Bradley, speaking for the majority, and J. Harlan dissenting), involved the question as to which of the multitude of disabilities suffered by Blacks were to be considered the badges and incidents of slavery and thus amenable to legislation under the Thirteenth Amendment. In Justice Bradley's views, the badges and incidents of slavery were limited to those legal disabilities imposed on slaves "that interfered with their fundamental rights" of citizenship. 109 U.S. at 22. He stated,

> Congress, as we have seen, by the Civil Rights Bill of 1866, passed in view of the Thirteenth Amendment, before the Fourteenth was adopted, undertook to wipe out these burdens and disabilities, the necessary incidents of slavery, constituting its substance and visible form; and to secure to all citizens of every race and color, and without regard to previous servitude, those fundamental rights which are the

> essence of civil freedom, namely, the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens. *Id.*

By stressing the literal, legal trappings of slavery, Justice Bradley totally ignored the legislative history of the Thirteenth Amendment and the historical reality of the institution of slavery and its institutional aftermath. His narrow interpretation of what constituted a badge and incident of slavery restricted the scope of the Thirteenth Amendment and by implication rejected the Congress' determination as to what were the badges and incidents of slavery.

Justice Harlan, on the other hand, urged a more expansive reading of what were badges and incidents of slavery.

> . . . I hold that since slavery, as the court has repeatedly declared, was the moving or principal cause of the adoption of [the Thirteenth] amendment and since that institution rested wholly upon the inferiority, as a race, of those held in bondage, their freedom necessarily involved immunity from, and protection against, all discrimination against them, because of their race, in respect of such civil rights as belong to freemen of other races. Congress, therefore, under its express power to enforce that amendment, by appropriate legislation, may enact laws to protect that people against the deprivation, *because of their race*, of any civil rights granted to other freemen in the same State; and such legislation may be of a direct and primary character. . . . 109 U.S. at 36 (citations omitted)

For Justice Harlan, discrimination based on theories of racial inferiority was a substitute for slavery and as such, clearly a relic of slavery.

It is important to note that while the more expansive view of Justice Harlan has best withstood the test of

time, the facts presented in this particular case, fall well within the narrow parameters outlined by Justice Bradley and subscribed by Justice Stewart in *Jones.*[17] The current exclusion from the economic mainstream is a direct consequence of the denial of "those fundamental rights which are the essence of civil freedom, namely the right to make and enforce contracts . . . and to inherit, purchase, lease, sell and convey property." This exclusion thus becomes a part of those burdens and disabilities which even Justice Bradley would find constitute "the substance and visible form" of slavery.

To date, neither the Court nor the academic community have sought to compile an exhaustive listing of those practices which could be considered "badges and incidents" of slavery. This is a matter committed by the Constitution to the province of the Congress.

> Rights and immunities created by or dependent upon the Constitution of the United States can be protected by Congress. The form and manner of that protection may be such as long as Congress, in the legitimate exercise of its legislative discretion, shall provide, and may be varied to meet the necessities of a particular right. *United States* v. *Reese,* 92 U.S. 214, 217 (1875).

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[17] To the contrary, in *Hodges* v. *United States,* 203 U.S. 1, the Supreme Court held that "no mere personal assault or trespass or appropriation operates to reduce the individual to a condition of slavery" and asserted that only conduct which actually enslaves someone can be subjected to punishment under legislation enacted to enforce the Thirteenth Amendment. *Contra, United States* v. *Cruikshank,* 25 Fed. Cas. 707, 714 (dictum of Mr. Justice Bradley, on circuit), *Aff'd,* 92 U.S. 542 *United States* v. *Morris,* 125 F. 322, 324, 330-331. (E.D. Ark. 1903) In *Jones,* Justice Stewart clearly rejected this interpretation. In footnote 78, he stated, "The conclusion of the majority in *Hodges* rested upon a concept of congressional power under the Thirteenth Amendment irreconcilable with the position taken by every member of this Court in the Civil Rights Cases and incompatible with the history and purpose of the Amendment itself. Insofar as *Hodges* is inconsistent with our holding today, it is hereby overruled." 409 U.S. at 442-3.

Justice Stewart agrees, "surely Congress has the power under the Thirteenth Amendment *rationally* to determine what are the badges and the incidents of slavery . . . ." (emphasis added) 392 U.S. at 440 (1968).

No recent court has even suggested that Justice Stewart's impression as to the scope of congressional power is inaccurate. Just as Justice Stewart could not conclude that "the determination Congress has made [was] an irrational one" *Id.* at 440-41 with reference to legislation outlawing private discrimination in the sale of real property, so is it implausible to conclude that Congress acted irrationally by determining that the documented historical exclusion of minorities from the economic mainstream in general, and the construction industry in particular, is a "badge and incident" of slavery amenable to legislative amelioration.

D. The MBE Provision Is Appropriate For Thirteenth Amendment Purposes And Thus Unassailable On Fourteenth Amendment Grounds.

Assuming that Congress rationally determined that the historic exclusion of minorities from the economic mainstream is a "badge and incident" of slavery amendable to legislative remediations, the only remaining question is whether the Congress was empowered to adopt the specific race-conscious provision challenged in the instant case.

This issue is presented to the Court only obliquely since Petitioners proffer a narrow Fourteenth Amendment argument as the basis for their objection to the MBE provision.[18] Petitioners contend that the provision

[18] Petitioners also contend that the "minority business enterprise" provision of the Public Works Employment Act of 1977 fails because it conflicts with Title VI of the Civil Rights Act of 1964. Petitioners virtually ignore the rule of construction which requires the Court to harmonize statutes. Petitioners, like the court in *Associated General Contractors of California* v. *Secretary of Com-*

can be sustained only if Respondent can establish that a compelling government interest is achieved by the least onerous means. This argument is without either force or effect in the face of the Thirteenth Amendment.

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merce, 441 F. Supp. 955, 967-68 (C.D. Cal. 1977), merely assume that Title VI and §-103(f)(2) are in conflict.

Contrary to Petitioners' assertion, *Amici* contend that the provisions of these two federal statutes reasonably can and certainly should be read in harmony.

Amici contend that harmony is achieved by examining the intended scope and purposes of these statutes. *Bailey* v. *United States,* 511 F. 2d 540, 546 (1975). Upon such examination, the inescapable conclusion is that Title VI and § 103(f)(2) were *both primarily* designed to remedy various aspects of discrimination against Blacks and other minorities. These common goals, which both enactments foster, provide the bases for their reconciliation and harmony, and do not invalidate the explicit remedial use of race in § 103(f)(2). Furthermore, the effect of both Acts is to help fulfill the unfulfilled promise of the Thirteenth Amendment to eliminate certain badges and incidents of slavery. Thus, implementing the mandates of the Thirteenth Amendment provides a harmonizing principle based squarely in the Constitution.

A majority of the justices in the *Bakke* case found Title VI was primarily designed to end discrimination against minorities. Four justices in the *Bakke* case explicitly found Title VI and § 103(f)(2) in harmony as promoting the same ends.

Speaking in *Bakke,* Mr. Justice Powell opined that

> [Title VI] must be read against the background of both the problem that Congress was addressing and the broader view of the statute that emerges from a full examination of the legislative debates.
>
> The problem confronting Congress was discrimination against Negro citizens at the hands of recipients of federal moneys. . . . Over and over again, proponents of the bill detailed the plight of Negroes seeking equal treatment in such programs. *Bakke,* 438 U.S. at 285.

The Opinion of Justices Brennan, White, Marshall, and Blackmun reached a similar conclusion as to the purpose of Title VI.

> The debates reveal that the legislation was motivated primarily by a desire to eradicate a very specific evil: federal financial support of programs which disadvantaged Negroes by excluding them from participation or providing them with separate facilities. Again and again supporters of Title VI

It cannot be denied that cases of this genre present a facially troublesome dilemma. Nonetheless, the incisive comments of Justice Blackmun provide a perspective from which to view this "dilemma."

> . . . the Fourteenth Amendment has expanded beyond its original 1868 concept and now is recognized to have reached a point where it embraces a broader principle. This enlargement does not mean that the Fourteenth Amendment has broken away from its moorings and its original intended purposes. Those original aims persist. And that, in a distinct sense, is what "affirmative action" in the face of proper

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emphasized that the purpose of the statute was to end segregation in federally funded activities and to end other discriminatory uses of race disadvantaging Negroes. 438 U.S. at 334.

The opinion of Justices Brennan, White, Marshall, and Blackmun explicitly discusses the relationship between Title VI and § 103 (f)(2). In that Opinion, these four Justices find support for their view that race-conscious remedies for societal discrimination are not prohibited by Title VI, in the passage of § 103(f)(2).

As to the purpose of the "set-aside" law, these Justices explicitly found that § 103(f)(2) was

> a deliberate attempt to deal with the excessive rate of unemployment among minority citizens and to encourage the development of viable minority controlled enterprises. It was believed that such a "set-aside" was required in order to enable minorities, still "new on the scene" and "relatively small," to compete with larger and more established companies which would always be successful in underbidding minority enterprices. 123 CONG. REC. 1437 (Rep. Mitchell). 438 U.S. at 348-49.

These Justices found that Congress must have found Title VI and § 103(f)(2) in harmony, since it found it

> inconceivable that . . . a purported conflict would have escaped congressional attention through an inadvertent failure to recognize the relevance of Title VI. Indeed, the Act of which this affirmative action provision is a part also contains a provision barring discrimination on the basis of sex which states that this prohibition "will be enforced through agency provisions and rules similar to those already established, with respect to racial and other discrimination under Title VI of the Civil Rights Act of 1964." 438 U.S. at 349.

> facts, is all about. If this conflicts with idealistic equality, *that tension is original Fourteenth Amendment tension, constitutionally conceived and constitutionally imposed,* and it is part of the Amendment's very nature until complete equality is achieved in the area. (emphasis added) 438 U.S. at 405.

Thus impregnated in the Civil War Amendment from the outset, the tension to which Justice Blackmun avers can be resolved only by resort to the original understanding of the meaning of those amendments—that they sought to establish and to secure a constitutional right to universal freedom.[19] This right to freedom becomes the reconciling principle for the "constitutionally perceived and imposed" tensions. As such it commends that the Amendments adopted to secure universal freedom, the Fourteenth and Fifteenth, be construed in a manner consistent with and supplementary to the Amendment which established the principle of universal freedom by abolishing the institution of slavery. Construed in this manner, the Fourteenth Amendment cannot operate to invalidate any measure undertaken upon the authority of the Thirteenth.

Even assuming that the Court deems it appropriate to consider the nature of the governmental interest, it must be presumed that the mandate of the Thirteenth Amendment is *ipso facto* an expression of governmental interest of sufficient import as to be deemed "compelling" by any standard in any Court at any time.

The exclusion of minorities from the economic mainstream is a matter of public record and has been the subject of such repetitive findings and overwhelming proof as to be a proper subject both for judicial and

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[19] Kinoy, *The Constitutional Rights of Negro Freedom*, 21 RUTGERS L. REV. 387 (1967).

legislative notice.[20] Nonetheless, Petitioners contend that the question . . . is whether or not Congress has made the requisite detailed findings of constitutional or statutory violations sufficient to constitute the extraordinary

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[20] The following is a selected listing of official findings since 1970 concerning the exclusion of minorities from the economic mainstream: H.R. REP. No. 1615, 92d Cong., 1st Sess. (1972); H.R. REP. No. 1626, 92d Cong., 1st Sess. (1972); H.R. REP. No. 468, 94th Cong., 1st Sess. (1975); H.R. REP. No. 1791, 94th Cong., 2d Sess. (1977); H.R. REP. No. 604, 95th Cong., 1st Sess. (1977); H.R. REP. No. 949, 95th Cong., 2d Sess. (1978); H.R. REP. No. 1070, 95th Cong., 2d Sess. (1978); H.R. REP. No. 1714, 95th Cong., 1st Sess. (1978); H.R. REP. No. 1830, 95th Cong., 2d Sess. (1979); S. REP. No. 31, 96th Cong., 2d Sess. (1979); H.R. DOC. No. 69, 92d Cong., 1st Sess. (1971); H.R. DOC. No. 194, 92d Cong., 2d Sess. (1972); Amendments to Small Business Act and Small Business Investment Act of 1958, PUB. L. No. 95-507, 92 Stat. 1757 (1978); Exec. Order No. 11518, 3 C.F.R. 1966 (1970); Exec. Order No. 11625, 3 C.F.R. 1971 (1971); DEPARTMENT OF COMMERCE, OFFICE OF MINORITY BUSINESS ENTERPRISE, BUILDING MINORITY BUSINESS ENTERPRISE (1970); PRESIDENT'S ADVISORY COUNCIL ON MINORITY BUSINESS ENTERPRISE, MINORITY ENTERPRISE AND EXPANDED OWNERSHIP: BLUEPRINT FOR THE 1970's (1971); DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, MINORITY OWNERSHIP OF SMALL BUSINESS: INSTRUCTIONAL HANDBOOK (1972); DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, MINORITY OWNERSHIP OF SMALL BUSINESS: THIRTY CASE STUDIES (1972); DEPARTMENT OF COMMERCE, OFFICE OF MINORITY BUSINESS ENTERPRISE, PROGRESS REPORT: THE MINORITY BUSINESS ENTERPRISE PROGRAM 1972 (1972); COMPTROLLER GENERAL OF THE UNITED STATES, GENERAL ACCOUNTING OFFICE, LIMITED SUCCESS OF FEDERALLY FINANCED MINORITY BUSINESSES IN THREE CITIES (1973); DEPARTMENT OF COMMERCE, OFFICE OF MINORITY BUSINESS ENTERPRISE, REPORT OF THE TASK FORCE ON EDUCATION AND TRAINING FOR MINORITY BUSINESS ENTERPRISE (1974); U.S. COMMISSION ON CIVIL RIGHTS, DISTRICT OF COLUMBIA ADVISORY COMMITTEE, OBSTACLES TO FINANCING MINORITY ENTERPRISES (1974); DEPARTMENT OF COMMERCE, OFFICE OF MINORITY BUSINESS ENTERPRISE, FEDERAL PROCUREMENT AND CONTRACTING TRAINING MANUAL FOR MINORITY ENTREPRENEURS (1975); DEPARTMENT OF COMMERCE, OFFICE OF MINORITY BUSINESS ENTERPRISE, MINORITY ENTERPRISE PROGRESS REPORT (1976); DEPARTMENT OF COMMERCE, OFFICE OF MINORITY BUSINESS ENTERPRISE, LAND AND MINORITY ENTERPRISE: THE CRISIS AND THE OPPORTUNITY (1976); PRESIDENT'S INTERAGENCY TASK FORCE ON MINORITY BUSINESS OWNERS, REPORT ON WOMEN BUSINESS OWNERS (1978).

justification required to sustain the racial classification in question. This standard no doubt derives from the language in the opinion of Justice Powell in *Bakke*. 438 U.S. at 307-9. Rather than track Justice Powell's formulation, Petitioners misconstrue, misstate, misapply and attempt to transmogrify the Powell standard into a mandate for the Court to become the arbiter and parliamentarian of the legislative process.

The admittedly scant legislative history on this particular provision in this specific piece of legislation is directly attributable to the fact that the provision being challenged was introduced as an amendment to a bill on the floor of both the House and Senate. The absence of detailed legislative findings is thus a phenomenon inherent in the floor amendment process.

The import of Petitioners' standard would be to have the Court, on its own initiative, deny members of Congress the right to propose, or to consider amendments to bills on the floor of Congress, on the pain that if subsequently passed, the amended legislation may be subjected to greater scrutiny and accorded less weight than legislation which is not amended on the floor. The Court would thus take the anomalous position that an amendment proposed on the floor of Congress, debated by the members there assembled, and voted upon on its own merits separate and apart from the rest of a proposed bill, is somehow less legitimate an outcome of the democratic process and the will of Congress than a similar provision buried in a committee report and passed in a larger bill.

This is a position inconsistent with common sense, constitutional democracy and the historic role of this Court.

Consistent with their narrow Fourteenth Amendment analysis, Petitioners urge the Court to adopt the restrictive "least onerous means test" generally applied as the

second-tier of the "strict scrutiny" regime. That test has never been applied in a Thirteenth Amendment context and is inappropriate to the instant case.

The proponent of the race-conscious measure being challenged in this case is not a state university or private employer. The proponent is the Congress of the United States—an equal and coordinate branch of government. Moreover, in passing this measure, Congress was acting in an area expressly committed to it by the Constitution and pursuant to an explicit grant of constitutional power.

Not one of the cases construing the Thirteenth Amendment even hint that the Court intends to so constrain congressional power in the manner demanded by Petitioners.

Moreover, there is some support for a general proposition that this Court will not apply the "least onerous means" test to legislation when Congress acts pursuant to express constitutional authority. A clear example of this can be seen in the treatment afforded one of the groups included within the MBE provision which is challenged in the instant case—Native Americans. The Constitution gives Congress exclusive authority to regulate commerce with Indian tribes. U.S. CONST. art. I, § 8. Consequently, the Court has held consistently that the rational basis test is appropriate even where special or preferential treatment is accorded to Indians.

> As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed. *Morton* v. *Mancari*, 417 U.S. 535, 555 (1974); *Moe* v. *Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 480 (1976); *Delaware Tribal Business Committee* v. *Weeks*, 430 U.S. 73, 85 (1977).

Justice Stewart's treatment of this issue in *Jones* is instructive. He recounted how Representative Wilson of

Iowa, the floor manager for the Civil Rights Act of 1866, urged that Congress had ample authority to pass the then pending bill, by recalling the admonition of Chief Justice Marshall in *McCulloch* v. *Maryland*,

> Let the end be legitimate, let it be within the scope of the [C]onstitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the [C]onstitution are constitutional. 17 U.S. 316, 421 (1819).

Justice Stewart continued

> "The end is legitimate," the Congressman said, "because it is defined by the Constitution itself. The end is the maintenance of freedom. . . . A man who enjoys the civil rights mentioned in this bill cannot be reduced to slavery. . . . This settles the appropriateness of this measure, and that settles its constitutionality." We agree. 392 U.S. 409, 443-44 (1968).

No clearer statement is possible and none is needed.

CONCLUSION

At the outset of his dissent in *Weber*, Chief Justice Burger made this statement.

> The Court reaches a result I would be inclined to vote for were I a member of Congress considering a proposed amendment to Title VII. 99 Sup. Ct. at 2734.

Even more explicit was the observation by the Chief Justice.

> Until today, I had thought the Court was of the unanimous view that "discriminating preference for any group . . . is precisely and only what Congress has proscribed." *Had Congress intended otherwise, it very easily could have drafted language allowing what the Court permits today.* (emphasis added) *Id.* at 2735.

The Chief Justice therefore would admit no constitutional infirmity to congressional action which would expressly authorize an employer to set-aside a specified number of positions for minority employees even if that process entailed passing over white employees with more seniority. The Chief Justice dissented in *Weber* because he objected to the majority's "rewriting of a crucial part of Title VII to reach a desirable result." *Id.*

Unlike *Weber*, the instant case calls upon the Court to give effect to a clear expression of congressional intent—not to discern it. It is the letter not the spirit of the law, which is at issue here. The Congress has acted and it remains to be seen whether this Court is willing to be accused justly of once again having ". . . strangled Congress' effort to use its power to promote racial equality."

Not to uphold the judgment of the Court of Appeals would mean that this Court chose to accept an invitation to step back into the nineteenth century. In that event,

Justice Marshall's poignant lament would be transmogrified into prophecy.

"I fear we have come full circle." 438 U.S. at 402.

Respectfully submitted,

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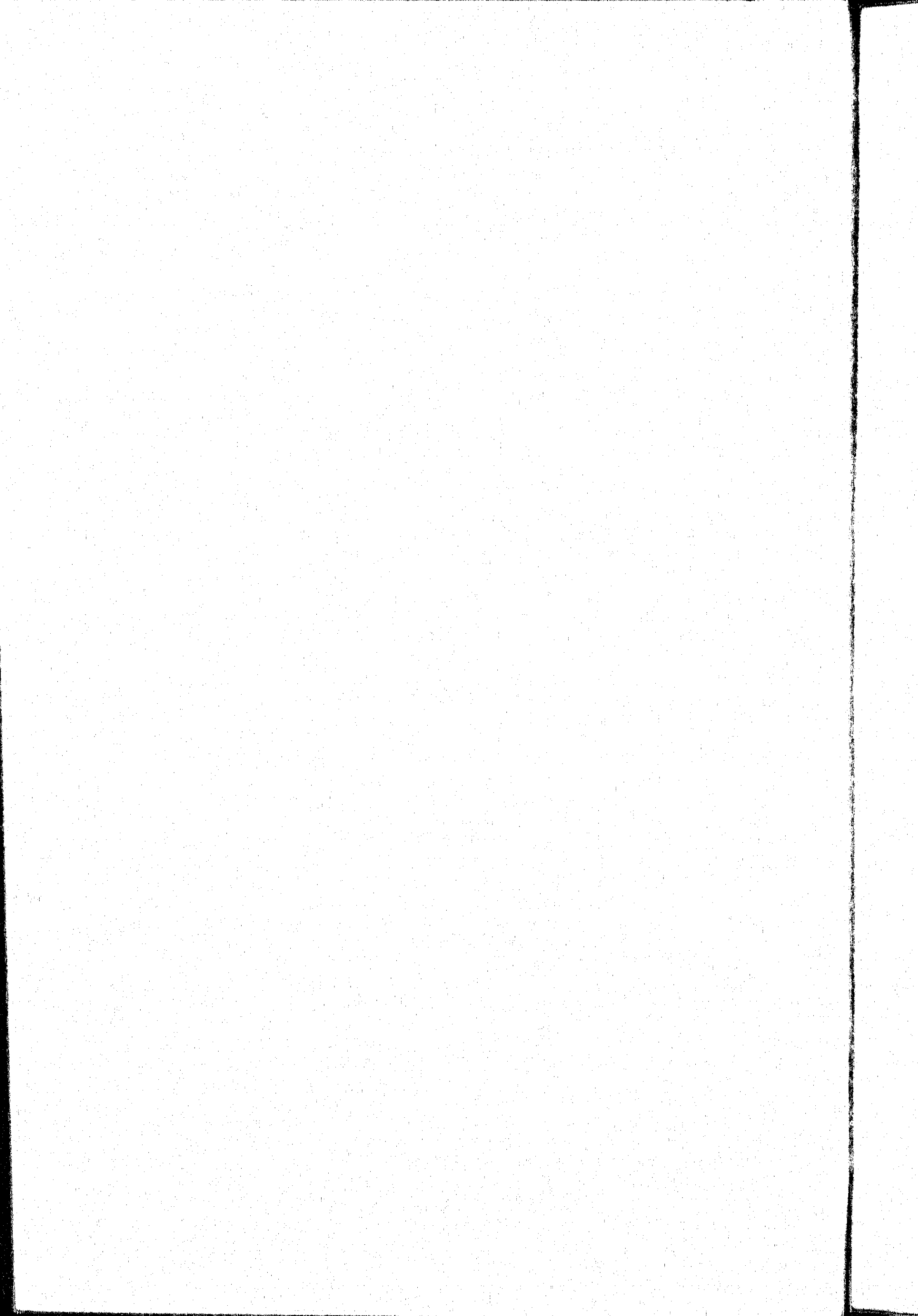

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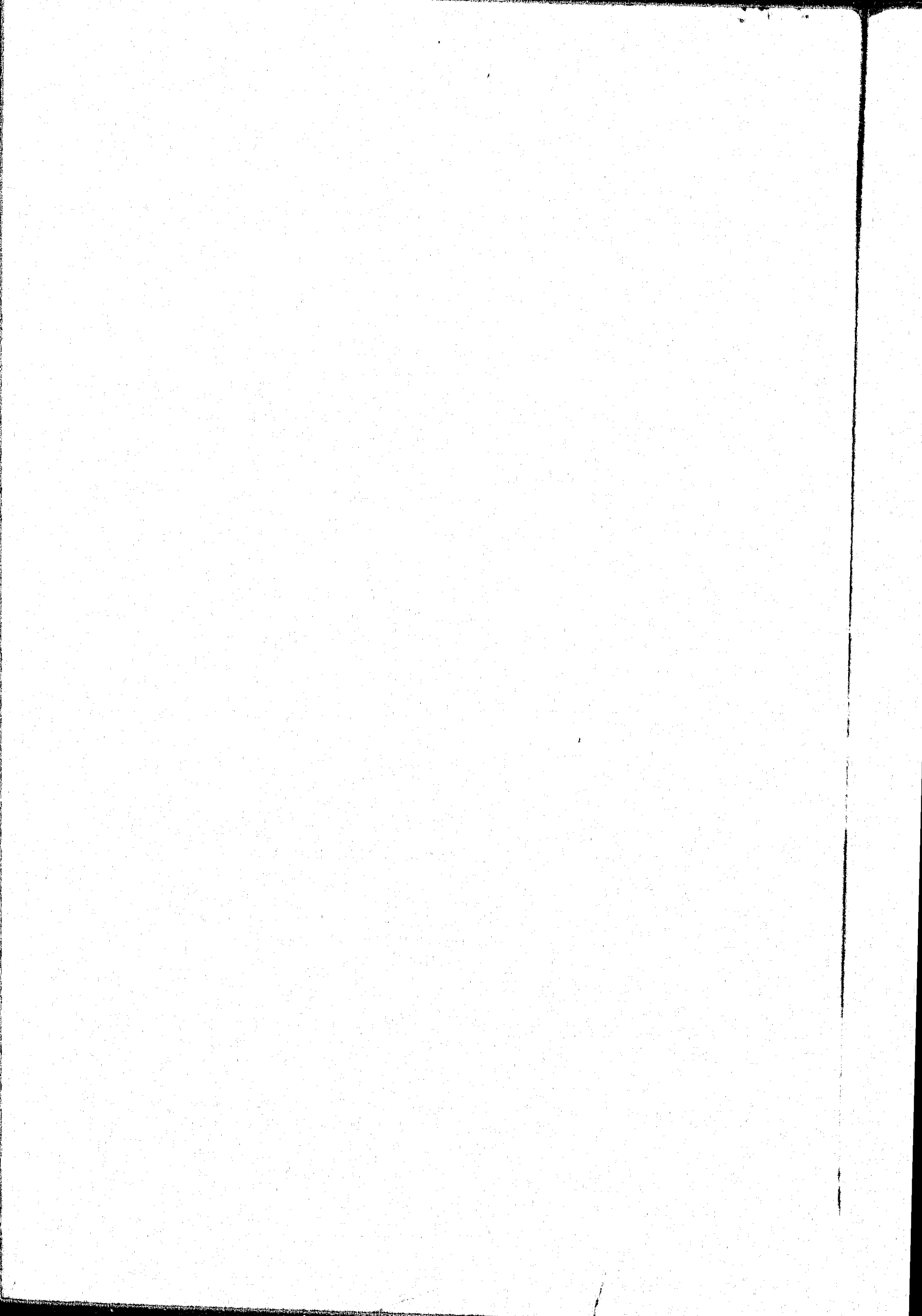

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AMICI STATEMENTS OF INTEREST

The *Affirmative Action Coordinating Center* (*AACC*) is an organization created by the National Conference of Black Lawyers (NCBL), the Center for Constitutional Rights (CCR) and the National Lawyers Guild (NLG), with the participation of a cooperating network of civil rights, civil liberties, and other organizations. Many network organizations as well as other groups have joined as *amici* in this brief.

The AACC was formed in response to the proliferation of attacks on affirmative action programs. Its purposes are to stimulate and coordinate resources and legal strategies for the defense and expansion of affirmative action programs. The AACC has convened roundtables of civil rights, labor and women's rights attorneys to discuss the *Weber* and *Bakke* cases.

AACC publishes an informational newsletter entitled *AACC News*. It has installed a national telephone "hotline" to receive and dispense information on affirmative action developments. It is preparing several educational publications on affirmative action in education and employment. The AACC has conducted and is planning other activities designed to increase communications and enhance joint efforts by all groups and individuals interested in strengthening effective affirmative action programs.

The *National Conference of Black Lawyers* (NCBL) is an activist legal organization of Black lawyers, law professors, judges and law students dedicated to serving as the legal arm of the Black community. Since its inception in 1968, NCBL has been actively involved in the continuing struggle for equal employment opportunity. Over the past five years, NCBL has been a leader in the battle against the growing concept of "reverse discrimination." NCBL strongly believes that the adoption of

the principle of reverse discrimination by the courts and the continued attacks on affirmative action plans, as in *Bakke*, *Weber* and *Fullilove*, represent a rejection of the nation's professed commitment to equality of opportunity. Without the power of Congress to enact legislation to eliminate the effects of 400 years of institutional discrimination, the goal of racial equality will continue to be a commitment with form but no substance.

The *National Lawyers Guild* was founded in 1937 as a multi-racial and progressive alternative to the racially restrictive and conservative American Bar Association. Its commitment to civil rights dates back to efforts to eliminate the poll tax and white primaries. In 1962, the Guild dedicated its full resources to the legal support of the civil rights movement. In support of affirmative action, the Guild filed briefs as *amicus curiae* throughout the course of the *Bakke* litigation and in 1977, joined with the NCBL to co-sponsor a *Bakke amici* roundtable attended by forty organizations.

The *Center for Constitutional Rights* (CCR) was born of the civil rights movement and the struggles of Black people in the United States for true equality. CCR attorneys have been active in cases involving voting rights, jury composition, community control of schools, fair housing and employment discrimination. Through litigation and public education, they have worked to protect and make meaningful the constitutional and statutory rights of women, Blacks, Puerto Ricans, Native Americans and Chicanos.

The *Affirmative Action Committee of New Haven* is composed of members of municipal and community based organizations that are concerned with affirmative action issues. The committee supports the principle of the Mitchell Amendment and is seriously concerned about the future of minority enterprise.

The *Afro-American Museum and Research Center* of Youngstown, Ohio is a national information center and clearinghouse of materials of importance to Afro-Americans. As an organization intimately involved with preservation and cultivation of Black history, we are well aware of the badges of slavery that continue to bar Blacks from the economic mainstream.

The *Asian Law Caucus* provides legal assistance in the areas of employment and housing and engages in community education and impact litigation on behalf of the Asian communities of the San Francisco Bay Area. The difficult and often tortured Asian-American historical experience convinces us that affirmative action programs must be supported and expanded.

Asian Legal Services Outreach provides legal service and education to the Sacramento area Asian communities. We recognize that underlying discrimination against minorities must be attacked via affirmative action.

Asociación Politica de Habla/Apellido Español (Spanish Speaking/Surnamed Political Association) was the first organization to file suit demanding the right to vote in Spanish and contesting discrimination against non-English speaking persons reflected in the Voting Rights Act of 1965; this led ultimately to amendment of same. Our experience in pushing for the rights of the Spanish speaking convinces us of the crucial need for affirmative action.

Associated Minority Contractors of America is a national trade association whose concern is representing the interest of minority construction contractors. We are presently constituted in forty states and the Virgin Islands. We are well aware of the discrimination suffered—past and present—by minority contractors and recognize that set-asides are a prime method for alleviating this persistent problem.

Associated Transit Guild is a fraternal organization of Black employees within the New York City Transit Authority. As workers in the most important industry in the most important city in this country, we know that minority workers are not hired unless minority contractors get contracts.

Association of Community Organizations for Reform Now (ACORN), which is constituted in thirty states, organizes low income families and neighborhoods around crucial economic and political concerns. We recognize that set-asides for minority contractors introduces a significant element of competition into an otherwise monopoly-dominated industry, thus lowering prices for the ultimate consumers.

Barristers Association of Philadelphia consists of over 400 Black attorneys. Our interest in this case stems from our belief that the effect of cases such as *Fullilove* is to undermine the legitimacy of affirmative action programs; this affects us adversely and, as well, the constituency we are pledged to serve.

Black American Law Students Association (BALSA) is the representative organization of Black law students in this country. We recognize that the severe dearth of the Black law student and law faculty could possibly plummet even more if affirmative action receives a set back in *Fullilove*.

The Black Panther Party was founded in 1966. Despite numerous obstacles thrown in its path, it has worked consistently for concrete political, social and economic change. The BPP sees the advancement of affirmative action as essential for said change.

Black Methodists for Church Renewal, Inc. is the official Black Caucus within the United Methodist Church. We are a national organization with a chapter in each of the five geographic jurisdictions and sub-caucus groups in

several states and municipalities. We see affirmative action as simply a reflection of Christian concern for equality of all peoples.

The *Civil Rights—Civil Liberties Research Committee of Harvard Law School* is a student organization which provides civil rights lawyers with research, briefs and memoranda. We have contributed to major litigation efforts e.g. the *Spock* conspiracy trial and appeal, *Gideon v. Wainwright, etc.* Our massive research in the area of affirmative action has convinced us that it is not only legal and constitutional but absolutely mandatory if equality is to ever become a reality.

The *Champaign-Urbana Tenant Union* has supported the affirmative action ordinances of the cities of Champaign and Urbana, Illinois. Our experience here has shown that these ordinances, which apply to vendors, contractors, etc. doing business with the cities, benefit not only minority communities but all people. Hence, we support the upholding of the *Fullilove* ruling.

The *Cleveland Tenants Union* unequivocally supports set-asides for minority contractors. Our firm position is that affirmative action is in the best interests of the entire community.

The *Council on Interracial Books for Children* recognizes the damaging effect that persistent inequality has, not only on the victims of such practices, but on the majority as well. Hence, we support set-asides and affirmative action generally because it is designed to root out such deleterious practices.

The *Emergency Land Fund*, is dedicated to preserving the ownership of real property by Blacks which has been diminishing steadily. We see support for minority contractors to be consistent with our effort and hence, support the Mitchell Amendment.

The *Fair Housing Council of Orange County* is a non-profit California corporation organized for the purpose of promoting fair housing laws and eliminating housing discrimination. We support set-asides for minority contractors and view such regulations as a benefit for the entire community.

The *Food Research and Action Committee* is a national, non-profit law firm and advocacy organization working to end hunger and malnutrition in the United States. We join this brief because we see hunger as an outgrowth of poverty and poverty as an outgrowth of lack of access to employment, training and the economic mainstream. We see set-asides as a means of improving the economic well-being of minorities—who are disproportionately affected by hunger and poverty—and thus, wholeheartedly support affirmative action.

The *Grand Jury Project*, is organized to end abuse of the grand jury system. We are cognizant of the fact that the grand jury often focuses disproportionately on third world communities and we see attacks on affirmative action as consistent with that effort. Hence, we join *amici* in this brief.

The *Greater New Haven Business and Professional Association* consists of affiliate firms and professionals. We have assisted over 2000 minority construction contractors, architects and engineers. Consequently, we are well aware of the past and present discriminatory practices visited upon minority contractors by white contractors, suppliers and financiers. We have intimate knowledge of the quota system which resulted in 100% of contracts going to whites and 0% to Blacks. We are also aware of business quotas set by Congress that have gone unchallenged in the steel, oil, cattle and automotive industries, among others. We, therefore, join enthusiastically with *amici*.

Hartford Neighborhood Legal Services views the setting aside of a fixed percentage of governmental construction contracts for minorities as an effective way to begin to eliminate the effects of institutional discrimination. We also believe that the court should defer to Congress in its implementation of the 13th and 14th Amendments in light of such cases as *Katzenbach* v. *Morgan* and *Jones* v. *Mayer*.

The *Institute of the Black World* conducts major research on the political social and economic situation of Blacks in this country. As a result, we are convinced that affirmative action programs are not only necessary but mandatory, if the stain of inequality is to be removed from this nation's escutcheon.

The *Interracial Council for Business Opportunity* is the largest national minority business development organization in the country. Co-chaired by noted Black economist Arthur Brimmer, ICBO maintains councils across the country in eight geographic areas and has served as a contract agency for the Office of Minority Business Enterprise (OMBE). ICBO urges the Court to uphold the Mitchell Amendment as a major step toward equity for minority business.

The *Interreligious Foundation For Community Organization, Inc.* (IFCO) is a non-profit foundation established to strengthen empowerment efforts of grass roots organizations. Our 37 member board represents a broad cross-section of religious, educational and community organizations. We urge the court to uphold the Mitchell Amendment and view continued expansion of affirmative action as essential for the future of this country.

Impact Associates of Philadelphia is a multi-racial organization of men and women whose goal is to develop in the minority community an independent political power base. We see economic advancement as crucial for the

attainment of this goal and, thus, urge this Court to uphold the Mitchell Amendment.

The Law Students Civil Rights Research Council since its inception in 1968 has assisted the efforts of every major civil rights, civil liberties and public interest organization. Our work and research has convinced us that support and expansion of affirmative action must continue.

Liberation News Service provides weekly packets of news and graphic materials to newspapers, radio stations, libraries, etc. Our daily and extensive coverage of third world communities convinces us that affirmative action should be expanded not stopped. Hence, we join in co-signing this brief.

The Metropolitan New York Council of Minority Builders, Inc., is a voluntary, non-profit association incorporated under New York laws. This organization was created to address the special concerns of minority contractors by shaping public opinion on critical issues and drafting or supporting legislation to cure the problems which have drastically curtailed minority participation in the construction industry. The Council's membership consists of minority contractor associations representing six counties including Westchester, the Bronx, Queens, Kings (Brooklyn), Nassau and Suffolk. The Council contends that the economic viability of minority contractors is closely linked, through the construction industry, to the economic stability of minority communities. Therefore, the Council's principal goal is to build viable construction businesses which the organization believes can eventually aid in bringing economic parity to minority communities.

As an association comprised of minority contractors, the Council's membership represents a pool of potential beneficiaries under the Public Works Employment Act

and particularly that section of the law which mandates at least ten percent of each grant awarded be reserved for minority business enterprises.

The Minority People's Council of the Tennessee-Tombigbee Waterway is a coalition of over 4,000 individuals and organizations in the Southwest and Northeast Mississippi area of this major federal public works project. Our first-hand knowledge of the workings of the Public Works Act convinces us that set-asides for minority contractors has a decidedly beneficial impact for the entire community. Of the $400 milllion contracted to construction firms for this major project (one of the largest in U.S. history) in our area, minority firms have received less than $2 million. Thus, enactments like the Mitchell Amendment are absolutely necessary and we urge the Court to uphold this legislation.

The National Alliance Against Racist and Political Repression is a broad coalition of church, labor, student and civic groups formed in 1973 to fight repression. The NAARPR appears here because of its deep and demonstrated concern for the future necessity and expansion of affirmative action.

The National Black United Fund is a non-profit, tax-exempt organization founded to increase the amount of charitable contributions for groups serving the Black community. Our day to day experience has shown us conclusively that affirmative action must be supported and expanded.

The National Child Labor Committee was chartered by Congress 75 years ago to promote child labor legislation. Presently, we are involved in numerous projects including studies of people in the workplace. Our thorough and meticulous investigation has revealed that minority children—for obvious economic reasons—are disproportionately represented in the ranks of child

laborers. Thus, we have a special interest in urging the Court to uphold affirmative action as a path to equality.

The *National Employment Law Project* is a legal services organization which provides assistance in all areas of employment law. We have been involved in the creation of numerous affirmative action programs adopted voluntarily and involuntarily by public and private agencies that use racial classifications to remedy racial discrimination. If the Mitchell Amendment is not upheld, severe detriment to many of our minority clients would result.

The National Indian Youth Council (NIYC) was formed in 1961 to protect and enrich the Indian tribal community. Our large membership has strong ties to many different Indian communities on and off the reservation. Our fight for Indian preference in hiring in the Bureau of Indian Affairs has convinced us of the need for continued affirmative action.

Opportunities Industrialization Centers of America, Inc. (OIC) is a national orgaization based in over 140 communities. Founded by Rev. Leon Sullivan, OIC has long been concerned with the economic well-being of the unskilled and disadvantaged. Our extensive contacts in the mountains of Appalacia, in the inner cities, in the barrios, in the rural South, and in depressed communities throughout the United States convinces us of the dire need for extensive affirmative action.

Panamerican Panafrican Association is a ten year old foundation devoted to Intra/Inter-African American education, cultural and economic exchange. We support the Mitchell Amendment in light of the virtually insurmountable systemic barriers to minority business in the private sector and acknowledge that Congress has the right to legislate a remedy to the socio-economic aspects of this dilemma.

Prisoners Rights Organized Defense (*PROD*) is affiliated with the American Civil Liberties Union (ACLU) and is concerned with prison rights and conditions of confinement for inmates in New Jersey. The over-representation of minorities in prisons has a direct correlation with their under-representation in the mainstream of economic life. Hence, we join with *Amici* in beseeching the Court to uphold the Mitchell Amendment.

Schenectady Community Action Program is an official anti-poverty agency. We are aware of the disproportionate number of Black and other minority families living in poverty. We believe that increasing business opportunities for minority firms will result in more job opportunities for minority persons; hence, we join with *Amici* in this brief.

Southern Christian Leadership Conference (SCLC) was founded by Nobel Laureate Dr. Martin Luther King, Jr. in 1957. It has 200 chapters and affiliates across the country and, historically, has had a strong base in the Black church—the most durable and important institution in the Black community. Our knowledge and experience convinces us that advancement of affirmative action is essential for both the economic and moral well-being of this nation. If minority workers are to receive jobs, minority contractors must receive contracts.

The Southern Organizing Committee for Economic and Social Justice believes that affirmative action is the only way that minorities and women in this country can begin to achieve social justice—and also because it is in the best interests of white working people as well. This is because, *inter alia*, only as there are strong united movements of Blacks and Whites, will working people advance. Such unity depends on fair and honest relationships which affirmative action brings.

The Southern Poverty Law Center is a private non-profit foundation dedicated to securing and enforcing the

rights of the poor. Our experience in this area has demonstrated to us the dire necessity for affirmative action.

The Southern Regional Council is an organization designed to promote equal opportunity among all peoples of the South. Our research studies, which have received wide publicity, detail the need for affirmative action in all sectors of U.S. life, e.g. the judiciary itself. We urge the Supreme Court to give equality a boost by upholding the Mitchell Amendment.

The Suburban Action Institute is a non-profit institute for research and action in the suburbs. Our experience with the frequently exclusionary practices of suburban America has convinced us of its detrimental impact and the need for affirmative action as an antidote.

Try US: National Minority Business Campaign is a national nonprofit organization committed to increasing the sales of minority-owned companies by encouraging purchasing agents of major corporations to buy from minority controlled companies. Working daily in this area has brought home to us the conviction that contracting with minority owned companies has positive economic and social results for the entire community. We urge upholding of the Mitchell Amendment.

The Urban League of Greater New Haven is an affiliate of the National Urban League (NUL). We are intimately involved in promoting Black economic development and affirmative action. We join *Amici* in their effort to uphold the Mitchell Amendment.

The Center for Urban Law, Wayne County Neighborhood Legal Services represents persons in the Detroit metropolitan area. Its clientele is composed primarily of an ethnic population victimized by societal discrimination and institutional racism.