

# THE RIGHT TO ECONOMIC PARITY: CONSTRUCTORS ASSOCIATION OF WESTERN PENNSYLVANIA V. KREPS

*The right to work and profit is a right to be shared by all Americans. It is the right that leads to power. For in our society, economics play a central role in social and political decisionmaking. Indeed it seems to me that the old adage "economics is power" ought to be changed to "economic parity is power." And minorities will continue to be disadvantaged until some semblance of economic parity is attained, and greater participation in the nation's economy is insured.*

Edward W. Brooke\*

## I. INTRODUCTION

Among recent legislation designed to remedy the historic exclusion of minorities from the construction industry is the minority business enterprise ten percent set-aside [MBE] requirement of the Public Works Employment Act of 1977 [PWE].<sup>1</sup> Designed to increase the level of participation by minority builders in public works construction projects,<sup>2</sup> the MBE has generated aggressive and organized opposition,<sup>3</sup> including numerous legal challenges.

More than a dozen federal district court cases have been filed involving the MBE set-aside.<sup>4</sup> In *Associated General Contractors of California v. Secretary of Commerce*,<sup>5</sup> district court Judge Hauk held the provision unconstitutional. However, during its 1977-78 term, the Supreme Court vacated the

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\* 122 Cong. Rec. S 7144 (May 13, 1976) (Sen. Brooke).

1. Pub. L. No. 95-28, § 103(f)(2), 91 Stat. 117 (amending 42 U.S.C. § 6705 (1977)).

2. For a fuller discussion of the history and purpose of the PWE and the MBE, see text, accompanying notes 11-40, *infra*.

3. See text accompanying notes 41-49, *infra*.

4. Cases holding the set-aside *constitutional* are *Constructors Association of W. Pa. v. Secretary of Commerce*, 441 F. Supp. 936 (W.D. Pa. 1977), *aff'd*, 573 F.2d 811 (3d Cir. 1978); *Gen. Bldg. Contractors v. Kreps*, No. 77-3682 (E.D. Pa., filed Dec. 9, 1977); *Rhode Island Ch., Ass'd Gen. Contractors v. Kreps*, 446 F. Supp. 553 (D. R.I. 1978). Cases finding the set-aside *unconstitutional* are *Ass'd Gen. Contractors of Calif. v. Secretary of Commerce*, 441 F. Supp. 955 (C.D. Calif. 1977), *judgment vacated and remanded*, 98 S. Ct. 3132 (1978); *Fullilove v. Kreps*, 443 F. Supp. 253 (S.D.N.Y. 1977) *petition for cert. filed*, No. 78-1007 47 U.S.L.W. 3563 [Feb. 2, 1979]; *Wright Farms Constr. Co. v. Kreps*, 444 F. Supp. 1023 (D. Vt. 1977). *Procedural dispositions* have been made in *Ass'd Gen. Contractors v. Secretary of Commerce*, No. C77-222 (D. Wyo., filed Nov. 4, 1977) (temporary restrain-order denied); *Beaver Falls Pa. v. Economic Dev. Admin.*, 439 F. Supp. 851 (W.D. Pa. 1977) (injunction denied); *Carolina's Branch, Ass'd Gen. Contractors v. Kreps*, 442 F. Supp. 392 (D. S.C. 1977) (injunction denied); *Fla. E. Coast Ch., Ass'd Gen. Contractors v. Secretary of Commerce*, No. 77-8351 (S.D. Fla. filed Nov. 7, 1977) (preliminary injunction denied); *Montana Contractors Assoc. v. Secretary of Commerce*, 439 F. Supp. 1331 (D. Mont. 1977) (temporary injunction denied); *Ohio Contractors Assoc. v. Economic Dev. Admin.*, 452 F. Supp. 1013 (S.D. Ohio 1977) (preliminary injunction denied); *Va. Ch., Ass'd Gen. Contractors v. Kreps*, 444 F. Supp. 1167 (W.D. Va. 1978) (preliminary injunction denied); No decision has been reached in *Ass'd Gen. Contractors v. Kreps*, No. 77-2326 (D.S.C., filed Dec. 13, 1977).

5. 441 F. Supp. 955 (C.D. Calif. 1977).

judgment without addressing the merits.<sup>6</sup> Although the joint opinion of Justices Marshall, Brennan, Blackmun and White in *University of California v. Bakke*<sup>7</sup> contains language favorable to the MBE,<sup>8</sup> the case itself is not entirely dispositive of the constitutionality of the legislation.<sup>9</sup>

This Note will review the legislative history of the Public Works Employment Act and summarize challenges to the MBE provision. The decision by Judge Snyder of the Pennsylvania Federal District Court in *Constructors Association of Western Pennsylvania v. Kreps*,<sup>10</sup> will be discussed. An assessment of the impact of *Bakke* on racially sensitive requirements such as that contained in the PWE will then be offered.

## II. THE LEGISLATIVE HISTORY

In response to the unemployment crisis which followed the 1974-75 recession, Congress enacted the Local Public Works Capital Development and Investment Act of 1976 [LPW].<sup>11</sup> The legislation had a dual purpose: "(1) to alleviate the problem of national unemployment, and (2) to stimulate the national economy by assisting state and local governments in building badly needed public facilities."<sup>12</sup> The particular focus of the LPW was on the construction industry which had "borne a substantial part of the impact of the recession. In the area of construction, the unemployment rate [was] 15.4%; twice the national average."<sup>13</sup> The Act provided 100 percent federal funding for public works projects of state and local political subdivisions which were required to contract the work to private firms by competitive bidding.<sup>14</sup> As expected, competition for funds was overwhelming, and by December 3, 1976, the appropriation was exhausted.<sup>15</sup>

On January 31, 1977, President Carter proposed a two-year \$31.2 billion economic recovery package, including \$4 billion for the LPW program.<sup>16</sup> However, after the previous year's implementation of LPW, some disparities were exposed which undercut the legislative purpose in drafting the public works program. "In the course of 6 days of public hearings . . . it became clear that major changes must be made in the 1976 Act in order to

6. 98 S. Ct. 3132 (1978).

7. 98 S. Ct. 2733 (1978).

8. *Id.* at 2778-79.

9. See text accompanying notes 78-97, *infra*.

10. 441 F. Supp. 955 (W.D. Pa. 1977), *aff'd*, 573 F.2d. 811 (3d Cir. 1978).

11. 42 U.S.C. § 6701 *et. seq.* (1976).

12. H.R. REP. NO. 94-1077, 94th Cong., 2d Sess. 1747, *reprinted in* [1976] U.S. CODE CONG. & ADMIN. NEWS 1747, 1747.

13. *Id.* at 1746.

14. Pursuant to LPW, seventy percent of the funds authorized thereunder were to go to states or local governments having unemployment averages in excess of the national average where the national average equalled or exceeded six and one-half percent. The remaining thirty percent was to go to applicants having an unemployment average in excess of six and one-half percent but less than the national average. No single state could receive less than one-half of one percent or more than twelve and one-half percent of the funds allocated under the Act. 42 U.S.C. § 6707(a) and (c).

15. At the close of the filing period the Economic Development Administration (EDA) had reviewed some 24,000 applications requesting \$24 billion in funds. Of these only 1,988 were approved which absorbed the initial \$2 billion authorization. ECONOMIC DEVELOPMENT ADMINISTRATION, U.S. DEP'T. OF COMMERCE, LOCAL PUBLIC WORKS PROGRAM: STATUS REPORT (January 1978), [hereinafter STATUS REPORT].

16. *Id.* at 7.

target the federal assistance more accurately into the area of greatest need."<sup>17</sup> In addition, problems arose as a consequence of the inequitable distribution of funds under the statutory formulae.<sup>18</sup> Congress addressed these concerns by amending Title I of the LPW Act of 1976 with the Public Works Employment Act of 1977, which became effective on May 13, 1977.<sup>19</sup>

With several provisions, the PWE sought to eliminate the inequitable distribution which had occurred under LPW.<sup>20</sup> In particular, the 1977 legislation attempted to meet the failure of LPW to direct funds to areas of special need by (1) giving preference to applicants who proposed to employ qualified disabled and Vietnam veterans;<sup>21</sup> (2) earmarking 2.5 percent of the authorized funds exclusively for use by Indian and native Alaskan communities;<sup>22</sup> and (3) by requiring that applicants give assurances that a minimum of ten percent of the amount of each grant requested be expended for minority business enterprises.<sup>23</sup> The latter provision is popularly known as the ten percent set-aside requirement.<sup>24</sup>

Introduced in the house during floor debate by Maryland Representative Parren Mitchell, then Chairman of the Congressional Black Caucus,<sup>25</sup> and later in the Senate by the former Massachusetts Senator Edward Brooke,<sup>26</sup> the set-aside, contained in Section 103 (f)(2) of the PWE, provides:

Except to the extent that the Secretary determines otherwise, no grant shall be made under this Act for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 percentum of the amount of each grant shall be extended for minority business enterprises. For purposes of this paragraph, the term 'minority business enterprise' means a business at least 50 percentum of which is owned by minority group members or, in the case of a publicly owned business, at least 51 percentum 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.<sup>27</sup>

Since Blacks and other oppressed racial minorities usually suffer higher than average unemployment,<sup>28</sup> the MBE is consistent with the overall purpose of the PWE "[t]o target projects, to the greatest degree possible, to those areas

17. H.R. REP. NO. 95-20, 95th Cong., 1st Sess. (1977).

18. See note 14 *supra*.

19. Pub. L. No. 95-28, 91 Stat. 116 (amending 42 U.S.C. § 6701).

20. Instead of the 70/30 allocation scheme as provided in LPW, a 65/35 priority division was instituted in PWE. Sixty-five percent of PWE funds are to be distributed according to the ratio that the number of unemployed persons within a state bears to the national unemployment figure. The remaining thirty-five percent is to be allocated to those states having an average unemployment rate in excess of 6.5%. In calculating unemployment, rather than using the three most recent consecutive months, PWE requires that unemployment averages be taken from the preceding twelve month period. In an effort to uniformly allocate funds between states, no state may receive less than 0.75% of funds and is held to a maximum of 12.5%. The minimum allocation for American insular territories to 0.5%. Where a state submits more than one project, it is required to designate the priority given to each request. See 42 U.S.C. §§ 6706-6707.

21. 42 U.S.C. § 6706 (1977).

22. 42 U.S.C. § 6707 (1977).

23. 42 U.S.C. § 6705 (f) (2) (1977).

24. *Id.*

25. 123 CONG. REC. 1441 (daily ed. Feb. 24, 1977).

26. 123 CONG. REC. 3910 (daily ed. Mar. 10, 1977).

27. 42 U.S.C. § 6705 (1977).

28. In March 1978, the unemployment rate for Blacks and other minorities was 12.4% com-

of greatest unemployment."<sup>29</sup> In addition, the provision was designed to foster the development of minority businesses which have historically received a miniscule share of the funds spent for federal procurement and construction.<sup>30</sup>

Under guidelines issued by the Economic Development Administration [EDA] of the Commerce Department, qualified minority enterprises are those which "can perform the services or supply the materials that are needed."<sup>31</sup> Grantees of PWE funds and their contractors are "expected to use MBE's with less experience than available nonminority enterprises"<sup>32</sup> and to provide technical assistance. Through various cooperative programs with other federal agencies and nongovernmental organizations, EDA will provide assistance to minority enterprises in financing and bonding, among other services.<sup>33</sup>

Because the PWE was the continuation of LPW, designed as an economic stimulus measure, the development of guidelines, processing of applications and commencement of construction were all required to be accomplished within a few months after passage of the legislation.<sup>34</sup> Project selection closed on September 30, 1977 and by January, 1978 almost 85 percent of the PWE projects were under construction.<sup>35</sup> Also, all public works funds under PWE are required to be appropriated by December 31, 1978.<sup>36</sup>

Unlike the 2.6 percent set-aside for Indian and Alaskan communities in another section of the PWE,<sup>37</sup> the MBE provision is not absolute. Representative Roe added the statutory language permitting the Secretary of Commerce to waive the requirement where the ten percent allotment of minority business enterprises cannot be filled,<sup>38</sup> and over 1,000 waiver applications

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pared to 5.3% for Whites. See U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, MONTHLY LABOR REVIEW 1-611 (May 1978).

29. 42 Fed. Reg. 27432 (May 27, 1977).

30. 123 CONG. REC. § 3910 (Mar. 10, 1977) (Sen. Brooke). The House MBE sponsor, Rep. Mitchell, stated the rationale for the provision:

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 a piece of the action, [sic] 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 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.

123 CONG. REC. H 1436 (daily ed., Feb. 24, 1977).

31. 13 C.F.R. § 317.

32. *Id.*

33. STATUS REPORT, *supra* note 15, at 46-47.

34. 42 U.S.C. § 6706 (1977).

35. STATUS REPORT, *supra* note 15, at 48.

36. 42 U.S.C. § 6710 (1977).

37. 42 U.S.C. § 6707(h) (1977).

38. Under the applicable regulations, waivers can be obtained when "the Assistant Secretary makes a determination that the ten percent set aside cannot be filled by minority businesses located within a reasonable trade area determined in relation to the nature of the services or the supplies intended to be procured." 13 C.F.R. § 317.19(b) (1978). Waivers can only be requested by the grantee. *Id.*

were filed even prior to the beginning of the bidding process for PWE grants,<sup>39</sup> which is known as "Round II".<sup>40</sup> Even though the LPW, as extended by the PWE, is of limited duration, a third round is possible. Thus, it is important to review challenges to the MBE in the legislative and judicial arenas.

### III. CHALLENGES TO MBE

Direct attacks on the MBE were made by the Associated General Contractors of America [AGC] during hearings to consider extension of the LPW into "Round III".<sup>41</sup> Among the AGC arguments were these: The set-aside artificially limits competition and thus wastes taxpayers' money; the supply of minority contractors is insufficient; contracts always ought to be awarded to the lowest responsible bidder; and the MBE undermines the free enterprise system.<sup>42</sup>

Taking opposition to the AGC was the National Association of Minority Contractors [NAMC] which supported continuation of the MBE set-aside with these arguments, among others:<sup>43</sup> Economic waste results from AGC's collective bargaining arrangements and labor management practices which cause unnecessary unemployment and increase construction costs; lists of available minority contractors are maintained by both governmental and private sources; contracts are not generally automatically awarded to the lowest bidder, since the term "responsible" includes other factors; and the PWE contains other non-construction related requirements.<sup>44</sup>

The AGC testimony represents only part of its aggressive and sustained opposition to the MBE. The Association is formally committed to seeking Supreme Court invalidation of the MBE set-aside.<sup>45</sup> Toward this end, a

39. STATUS REPORT, *supra* note 15, at 48. Of the 32 timely requests made prior to January, 1978, 16 were approved, 12 denied and 4 were pending when the Status Report was issued. *Id.*

40. The period from October 26, 1976 to February 9, 1977 in which applications were processed under LPW is known as "Round I". Competition for the funds authorized by PWE is referred to as "Round II", although the time period for filing requests (October 26, 1976 to December 3, 1976) overlaps with Round I. STATUS REPORT, *supra* note 15, at 4.

41. *Proposed Extension of the Public Works Employment Act: Hearings on 42 U.S.C. § 6705 before the House Sub comm. on Economic Development 96th Cong. 1st Sess. (1978)* [hereinafter *Extension Hearings*]. AGC is a national association representing more than 8,300 general construction firms. These firms perform approximately 60 percent of the annual contract construction volume in America representing the entire spectrum of the construction industry.

42. Testimony of Roger J. Au for AGC, *Extension Hearings, supra* note 41, at 2-4.

43. NAMC is a national association representing minority contractors and sub contractors.

44. Testimony of Paul King Jr. for NAMC, *Extension Hearings, supra* note 41, at 9-10. In addition to the MBE set-aside, PWE had a "Buy American" provision, 42 U.S.C. § 6705(f). For other preferences and priorities, see text accompanying notes 21 and 22, *supra*.

45. A resolution adopted at an AGC convention in September, 1977 states:

The Board of Directors of the Associated General Contractors of America, at its September 1977 meeting unanimously voted to take legal action to oppose the 10% Minority Business Enterprise quota requirement in the Public Works Employment Act of 1977. This Convention approves that Board Action, and commends those AGC chapters which have challenged, in court, the constitutionality of the MBE requirement. We are dedicated to the pursuit of a conclusive ruling by the Supreme Court of the United States. . . .

Statement of the Associated General Contractors of America, before the, Subcommittee on Economic Development and the Subcommittee on Investigations and Review, House Public Works and Transportation Committee (March 9, 1978), at p. 10 [hereinafter, AGC statement].

model brief<sup>46</sup> was circulated by the AGC to its regional affiliates for use in court challenges to invalidate the program in various jurisdictions.<sup>47</sup> The strategy underlying circulation of the brief was to maximize the number of legal actions around the country and to achieve a high degree of uniformity in the ultimate issues to be presented to the Supreme Court.<sup>48</sup> Many of the decided and pending cases involving the MBE were instituted by local affiliates of the AGC, with mixed results.<sup>49</sup> The challenge launched by its Western Pennsylvania Chapter, described in the next section, was not successful.

#### IV. THE WESTERN PENNSYLVANIA CASE

On September 8, 1977 an AGC local chapter, Constructors Association of Western Pennsylvania [CAWP] brought suit against the Secretary of Commerce and local grantees of PWE funds in a federal district court.<sup>50</sup> CAWP is a non-profit organization whose ninety-five members in thirty-three counties in Western Pennsylvania are general and sub-contracting firms which are engaged primarily in heavy and highway construction projects.<sup>51</sup> The suit sought a declaratory judgment on the constitutionality of the MBE and an injunction preventing the grantees of the PWE funds, the State of Pennsylvania and the City of Pittsburgh from conditioning participation in the program upon adherence to the MBE set-aside requirement.<sup>52</sup>

Defendants' motion for dismissal based on plaintiff's alleged failure to exhaust administrative remedies, lack of standing and laches was denied by Judge Snyder.<sup>53</sup> The court also denied plaintiff's request for a preliminary injunction, concluding that the MBE set-aside was not invalid under the fifth amendment's right to equal protection.<sup>54</sup> On appeal, the Third Circuit affirmed Judge Snyder's refusal to issue an injunction and concurred in this approach to the constitutional issue.<sup>55</sup>

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46. The brief, on file with the Black Law Journal, Northwestern Univ. Sch. of Law, was prepared by the Washington, D.C. firm of Kirling, Campbell and Keating. It outlines legal arguments in support of a motion for summary judgment on the constitutionality of the set-aside statute.

47. Letter from Robert J. Hickey, resident partner, Kirlin, Campbell and Keating to John Ellis, Assistant Executive Director, Associated General Contractors of America, Oct. 4, 1977, on file with the Black Law Journal, Northwestern Univ. Sch. of Law.

48. Letter from John-Ellis, Assistant Executive Director, AGC, to the Board of Directors, Chapter Presidents and Vice Presidents, Chapter Managers and Members of Equal Employment Opportunity Committee, Oct. 5, 1977, on file with the Black Law Journal, Northwestern Univ. Sch. of Law.

49. See note 4, *supra*.

50. Constructors Ass'n of W. Pa. v. Kreps, 441 F. Supp. 936 (W.D. Pa. 1977).

51. In 1976 CAWP firms were awarded 86% of the heavy and highway construction of the Pennsylvania Department of Transportation in the 33 county region. 441 F. Supp. at 939, n.1.

52. The state transportation department (PennDOT) had approval for 7 projects totaling over \$11 million while the City of Pittsburgh had obtained approval for 15 grants totaling about \$9 million. At the time of hearing three of PennDOT's projects had been bid. 441 F. Supp. at 942.

53. 441 F. Supp. at 943-946. A discussion of these issues is beyond the scope of this note.

54. Although an equal protection clause is not explicitly contained in the Fifth Amendment, such a prohibition has been construed to be included therein by way of the Fourteenth Amendment. See *Washington v. Davis*, 426 U.S. 229 (1976); *Johnson v. Robinson*, 415 U.S. 361 (1974); *Bolling v. Sharpe* 347 U.S. 497 (1954).

55. Constructors Assn. of W. Pa. v. Kreps, 573 F.2d. 811 (1978). It is important to note that the appellate court "interpret[ed] Judge Snyder's discussion of the constitutionality of the MBE as an evaluation of the plaintiff's likelihood of a success on the merits' in the context of a denial of preliminary injunctive relief, rather than in the context of a declaratory judgment." *Id.* at 814 n.4.

The district court began its constitutional analysis with the well settled principle that the use of racial classifications is inherently suspect, thereby invoking a strict scrutiny standard of review.<sup>56</sup> Such a classification must be shown to serve a compelling state interest and employ the least discriminatory means available to reach the governmental objective to avoid constitutional infirmity.<sup>57</sup> Strict scrutiny does not compel the conclusion that racial classifications are *per se* unconstitutional. What is required is that the court carefully appraise the purpose of the statute and the means used to effectuate it. The courts have noted that race has frequently been used as a criterion for participation in programs designed to remedy the effects of past discrimination.<sup>58</sup> However, according to the court, "racial categorization remains suspect even in a benign cloak, and more than a rational basis is needed to constitutionally justify the legislation."<sup>59</sup>

Looking to the purpose of the MBE set-aside, the Pennsylvania court found that the program was intended by Congress to remedy the negligible participation of minority business enterprises in projects funded under the LPW rather than to discriminate against non-minorities.<sup>60</sup> The court also pointed out that there is an overall scarcity of minority businesses in the national economy,<sup>61</sup> and that minority enterprises have historically been awarded very few government contracts.<sup>62</sup> Judge Snyder acknowledged that the lack of minority business participation in the country is directly attributable to past and present discrimination.<sup>63</sup> That discrimination gives rise to a need for remedial relief which the court described as "compelling." Though noting that the lack of legislative history to support the purpose of the statute was "troublesome", the court nevertheless concluded "that the 10% minority business provision was enacted pursuant to a compelling governmental interest of remedying the past and present effects of discrimination endured by minority business enterprises."<sup>64</sup>

Having established a compelling governmental interest in Congress' enactment of the MBE set-aside, Judge Snyder then examined the issue of

56. *Korematsu v. United States*, 323 U.S. 214 (1944).

57. *Loving v. Virginia*, 388 U.S. 1 (1967).

58. 441 F. Supp. at 947. Particular attention has been paid to the various state and federal plans requiring affirmative action in public construction contracts, typified by the Philadelphia plan established by Executive Order 11246, 30 Fed. Reg. 12319 (1965). See generally Comment, *The Philadelphia Plan: A Study in the Dynamics of Executive Power*, 39 U. CHI. L. REV. 723 (1972). See also Railroad Revitalization Act, 49 U.S.C. § 1657a (1976); Comment, *Minority Construction Contractors*, 12 HARV. CIV. RIGHTS - CIV. LIB. L. REV. 693 (1977).

59. 441 F. Supp. at 950.

60. *Id.* at 951.

61. "Despite a minority population of about 17%, minority individuals control about 4% of the businesses in the United States, and minority businesses account for less than 1% of national gross business receipts and total business assets." 441 F. Supp. at 951. The court relied on INTER-AGENCY REPORT ON THE FEDERAL BUSINESS DEVELOPMENT PROGRAMS 24 (Mar. 1974); MINORITY BUSINESS OPPORTUNITY COMMITTEE HANDBOOK I-1 (Aug. 1976); and U.S. COMM'N ON CIVIL RIGHTS, MINORITIES AND WOMEN AS GOVERNMENT CONTRACTORS (May, 1975). See also 122 CONG. REC. S 17907-08 (Oct. 1, 1976) (remarks of Sen. Glenn); 122 CONG. REC. S 7144 (MAY 13, 1976) (REMARKS OF SEN. BROOKE).

62. It has been observed that prior to the enactment of the MBE set-aside, minority firms accounted for less than one percent of all governmental contracts let in any fiscal year. 123 CONG. REC. H1436 (daily ed. Feb. 24, 1977) (remarks of Rep. Mitchell).

63. 441 F. Supp. at 952.

64. *Id.*

whether the provision is warranted as the least discriminatory means of pursuing the governmental interest. The judge observed that earlier federally mandated schemes for promoting minority business development have had little impact.<sup>65</sup> The prior programs thus provided no guidance to the court in its attempt to determine whether a less restrictive alternative to the MBE set-aside exists. Finding no alternative, Judge Snyder then concluded that a "percentage set-aside is the only effective way to crack the competitive barriers and end the cycle which continually excludes minority businesses from proportionate participation."<sup>66</sup> Moreover, the court stated that:

Racial classification is the only workable way to create this set aside. A more generalized classification such as 'disadvantaged businesses' would be more difficult to apply efficiently and would not focus only on those businesses suffering because of past discrimination. Such overinclusiveness in the preferred class would be even more detrimental to the nonpreferred majority than the present classification. While some minorities may argue they have been capriciously excluded from the preferred class, . . . the Court is not willing to say that Congress cannot focus on those groups it finds to be most grievously affected, even though others have also been affected.<sup>67</sup>

In addition to the above, the court offered four other reasons to support its finding that the MBE set-aside is the least restrictive means of promoting minority business enterprise under PWE: (1) The set-aside is limited to ten percent of available PWE funds, while minorities represent seventeen percent of the national population;<sup>68</sup> (2) The programs apply only to PWE funded projects and not to all federal construction or other contracts;<sup>69</sup> (3) The set-aside provision is effective for only a limited period of time, ending December 31, 1978;<sup>70</sup> and, (4) The requirement of a ten percent set-aside can be waived where no qualified minority businesses are available.<sup>71</sup>

Thus, the court was able to conclude that the MBE set-aside program will afford minority businesses the heretofore lacking opportunity to acquire experience, establish a reputation, and rebut misconceptions about minority business capability,<sup>72</sup> thereby contributing to an end to the cycle which has excluded minority businesses from participation in government-sponsored construction.

Judge Snyder's opinion represents an application of the traditional approach to equal protection analysis where racial classifications are challenged, although the court appears to have intermingled two distinct governmental interests for the MBE set-aside. The first of these interests, is in remedying past discrimination; the second one is in assisting minority businesses to achieve economic parity, *i.e.*, to be fairly represented among those businesses which benefit from government sponsored construction.

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65. *Id.* at 951-53. The court reviewed the overall scheme of federal assistance to minority business, *Id.* at 951, n.8; referred to the level of minority participation in the LPW; and noted that "capital and technical assistance programs do nothing to overcome barriers existing due to lack of confidence in minority business ability or racial prejudice and misconceptions." *Id.* at 953.

66. 441 F. Supp. at 953.

67. *Id.* at 953 n.10.

68. *Id.* at 953.

69. *Id.*

70. *Id.* See text accompanying notes 34-36, *supra*.

71. 441 F. Supp. at 954. See text accompanying notes 38-40, *supra*.

72. 441 F. Supp. at 954.

The legislative history cited by the court provides only legislators' statements to support these interests,<sup>73</sup> but the court correctly looked to various studies and statistics which reveal disparities between the white majority and racial minorities.<sup>74</sup>

Since discrimination against minorities in the economic arena is a pervasive phenomenon in this country, the court might properly have taken judicial notice of its existence. "That a matter is judicially noticed means merely that it is taken as true without the offering of evidence by the party who should ordinarily have done so."<sup>75</sup> It does not require actual or present knowledge by the judge.<sup>76</sup> Moreover, judicial notice has a significant function in determining the constitutionality of legislative action. "[I]f any state of facts reasonably can be conceived that would sustain [legislative action], there is a presumption of the existence of that state of facts, and one who assails the classification must carry the burden of showing . . . that the action is arbitrary."<sup>77</sup> However, the Supreme Court's *Bakke* decision might be read to mean that judicial notice of a generalized pattern of societal discrimination, without focus on a particular industry, is an insufficient basis for remedial racial classifications. The next section will examine the impact of that case on the MBE set-aside.

#### V. IMPACT OF BAKKE ON THE MBE

Since *University of California v. Bakke*<sup>78</sup> reflects the Supreme Court's position on racially sensitive statutes and programs, it forecasts the Court's attitude toward the MBE set-aside. The only specific language on the MBE is in the joint opinion of Justices Brennan, White, Marshall and Blackmun, [hereinafter joint opinion].<sup>79</sup> That provision is discussed to support the proposition that Title VI does not prohibit "the consideration of race as part of a remedy for societal discrimination even where there is no showing that the institution extending the preference has been guilty of past discrimination or any judicial finding that the particular beneficiaries of the racial preference have been adversely affected by societal discrimination."<sup>80</sup> This reference to the MBE set-aside could be considered an implicit ratification by four of the Justices of its validity under the Civil Rights Act of 1964.<sup>81</sup> Four other justices, however, would probably hold that the MBE conflicted

73. 116 CONG. REC. 18886-87, (June 9, 1970) (Remarks to Sen. Bayh); 122 CONG. REC. S 17907-08 (Oct. 1, 1976) (Remarks of Sen. Glenn). See also 122 CONG. REC. S 7144 (May 13, 1976) (Remarks of Sen. Brooke); 123 CONG. REC. H 1423 (Feb. 24, 1977) (Remarks of Rep. Stokes).

74. See note 61, *supra*. Numerous cases have held that a court may conclude a history of past discrimination from statistics which reveal current disparities among races. See e.g. *Jones v. Lee Way Motor Freight Inc.*, 431 F.2d 245, 247 (10th Cir. 1970), *cert. den.*, 401 U.S. 954 (1971); *Carter v. Gallagher*, 452 F.2d 315, 323 (3d Cir. 1971), *cert. den.*, 406 U.S. 950 (1972); *Parham v. Southwestern Bell Telephone Co.*, 433 F.2d 421, 426 (8th Cir. 1970); *Ass'd Gen. Contractors of Mass. v. Atshuler*, 490 F.2d 9, 18 (1st Cir. 1973) *cert. den.*, 416 U.S. 957 (1974).

75. WIGMORE ON EVIDENCE, § 2567 (3d ed. 1940).

76. *In Re Malcolm*, 129 F.2d 529, 533 (1942).

77. *Pacific States Co. v. White*, 296 U.S. 176, 185 (1935); *Borden Farms Products v. Baldwin* 293 U.S. 194, 207 (1934).

78. 98 S. Ct. 2733 (1978).

79. *Id.* at 2766.

80. *Id.* at 2778.

81. 42 U.S.C. § 2000 *et. seq.* (1964) (prohibits discrimination on the basis of race by programs receiving federal funds).

with that statute.<sup>82</sup> Justice Powell's position can be stated simply: "Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause of the Fifth Amendment."<sup>83</sup>

Both Justice Powell, writing for the plurality, and the joint opinion confirm the need for a constitutional standard of review in cases involving benign racial classifications more stringent than the rational relationship test, although they differ in its exact formulation and application.<sup>84</sup> Also, both opinions confirm the legitimacy of racial classifications where the purpose is to remedy past discrimination, as established by legislative, judicial or administrative findings. In fact, Justice Powell cites cases involving the remediation of discrimination in the construction industry,<sup>85</sup> and notes that the Court has "previously recognized the special competence of Congress to make findings with respect to the effects of identified past discrimination and its discretionary authority to take appropriate remedial measures."<sup>86</sup> The joint opinion goes even further than Powell and approves race-conscious programs "if there is reason to believe that the disparate impact [on minorities] is itself the product of past discrimination, whether its own [the government] or that of society at large."<sup>87</sup>

Thus, as a result of *Bakke*, it can be argued that a majority of the Supreme Court would approve the *Constructors* decision since Judge Snyder based his conclusion on a determination that the MBE was a remedy for past discrimination. One area of uncertainty, however, is the sufficiency of the legislative finding of past discrimination in *Constructors*, the paucity of which Judge Snyder found "troublesome". The questions center around whether the statements by the sponsor of MBE, Representative Parren Mitchell, and other legislators<sup>88</sup> constitute a congressional finding of past discrimination and whether or not it was appropriate for Judge Snyder to refer to findings of other governmental agencies.<sup>89</sup>

*Constructors* might also be viewed as resting upon a finding of compelling governmental interest in promoting economic parity. As the MBE is a fixed percentage which may be waived only where there are no minorities reasonably available, the question arises whether economic parity may be achieved by using race as one factor in the competitive equation. In *Bakke*, Powell concluded that the University's interest in a diverse student body would be served by merely using race as one admissions factor, among

82. 98 S. Ct. at 2809 (Concurring and dissenting opinion of Justice Stevens, joined by Chief Justice Burger and Justices Rehnquist and White).

83. *Id.* at 2747.

84. See note, *The Right to Education, supra* at pp. —.

85. *Id.* at 2754-5, n.40. These cases include: *Bridgeport Guardians, Inc. v. Civil Service Commission*, 482 F.2d 1333 (2d Cir. 1973), *cert. denied*, 421 U.S. 991 (1975); *Carter v. Gallagher*, 452 F.2d 315 (8th Cir.), modified on rehearing *en banc*, 452 F.2d 327 (8th Cir. 1972). Also, *Contractors Association of Eastern Pennsylvania v. Secretary of Labor*, 442 F.2d 159 (3rd Cir.), *cert. denied*, 404 U.S. 854 (1971); *Associated General Contractors of Massachusetts, Inc. v. Altshuler* 490 F.2d 9 (1st Cir. 1973), *cert. denied*, 416 U.S. 957 (1974); *cf. Katzenbach v. Morgan*, 384 U.S. 641 (1966)(recognizing Congressional discretion to determine the need for and nature of remedial legislation).

86. 98 S. Ct. at 2755, n.41.

87. *Id.* at 2789.

88. See note 73, *supra*.

89. See notes 61 and 74, *supra* and accompanying text.

others.<sup>90</sup> The joint opinion asserted that, for constitutional purposes, there is no viable distinction between a set-aside quota and giving weighted consideration to race in a manner which is intended to ultimately provide minorities with the same level of participation.<sup>91</sup> The joint opinion also rejected the substitution of the general category "disadvantaged" for the fixed percentage.<sup>92</sup> In this respect, the latter opinion confirms the views expressed by Judge Snyder in *Constructors*.<sup>93</sup>

If one were to apply Powell's suggestion to public contracts, the competitive advantage enjoyed by white contractors and their tendency to continue established subcontracting relationships would persist in posing a bar to minority participation. Contractors can not be expected to benignly take race into consideration when allocating the contract dollar as readily as would an admissions board in structuring the composition of its incoming class. The contractor is presented with a potential economic loss in allocating funds to MBEs and the admissions administrator is not. By admitting minorities, the goal of the school in having a diverse study body is promoted, while including minorities in public works construction will not likely be viewed by contractors as consistent with their personal goals, *i.e.*, realizing a profit.<sup>94</sup>

There is another important distinction between the MBE set-aside and the academic admissions program involved in *Bakke*. The University's interest in a diverse study body is associated with academic freedom which, "though not a specifically enumerated constitutional right, long has been viewed as a special concern of the first amendment."<sup>95</sup> Contractors, on the other hand, do not have a constitutionally protected right to obtain governmental contracts.<sup>96</sup> Instead, they "are merely incidental beneficiaries of these funds."<sup>97</sup> When the contractors' personal concerns, *i.e.*, maximizing his/her individual profits, are weighed against the societal interest in achieving economic parity, the latter ought to prevail. However, where remedying past discrimination is not the legislative purpose, supported by findings, the issue remains as to whether legislators will have to qualify future set-aside language with terms such as "up to" or "not more than" a particular level or percent of minority participation in order to find a safe constitutional harbor. *Bakke* has not conclusively answered that question.

90. 98 S. Ct. at 2763.

91. *Id.* at 2793.

92. *Id.* at 2792-93.

93. See text accompanying notes 67, *supra*.

94. The AGC's opposition to the MBE suggests the difficulties in a voluntary approach. See notes 41-48. Additionally, it has been reported that a document entitled "How to Evade Affirmative Action Programs for Minority Contractors or (How To Drive Compliance Officers Off Their Rockers)" was available at a white contractor's convention. See JET, July 27, 1977 at 8. The document reportedly advised contractors, "Perhaps you should do everything in your power to frustrate this affirmative action program, that is, without getting exposed. . . ." *Id.* But see Letter from AGC to Paul King, Dec. 27, 1977 (AGC recognizes MBE is the law and assists members in compliance).

95. 98 S. Ct. at 2760, n.28 (Powell, J.).

96. The AGC model brief, however, asserts that the right to do business is a fundamental right, citing the Slaughterhouse Cases, 83 U.S. (16 Wall.) 36 (1873).

97. *Town of Hope Mills v. Kreps*, C.A. 77-0040 (E.D.N.C., August 16, 1977) as quoted in *City of Beaver Falls v. E.D.A.*, 439 F. Supp. 851, 853 (W.D. Pa. 1977). These cases relate to the grantee-state/local government's "right" to public works funds. The principle is also applicable to nonminority contractors.

## VI. CONCLUSION

Provisions such as the MBE set-aside are vital to the achievement of economic parity for minorities. This can be seen by comparing minimal minority participation in the 1976 public works legislation, without a set-aside provision and their increased levels of participation under the 1977 PWE which did contain the MBE.<sup>98</sup> "The construction industry . . . has traditionally served as a vehicle for upward mobility for a steady parade of Americans of varying backgrounds . . . [and] has great potential as a vehicle for more rapid improvement in the economic posture of non-white Americans."<sup>99</sup> The set-aside provision can also ultimately promote free economic competition since it "provides access to experiences . . . on a limited amount of work . . . which, in turn, . . . can then lead to the competition called for."<sup>100</sup> Until the economic status of non-whites improves, and until the competitive advantage now enjoyed by whites has been neutralized, then set-asides for racial minorities are essential and should be upheld by the courts. To do so would be an exercise of judicial social responsibility.

EDWARD F. HONESTY, JR.

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98. It is estimated that minorities obtained less than 1% (or approximately \$200,000) of the \$2 billion spent under LPW. See note 62, *supra*. According to the Secretary of Commerce, "Thanks to the set-aside amendment . . . some \$480 million in local public works commitments have already been made to minority firms, and we expect that figure to rise further." Kreps, Government, Minority Businesses Aid Communities, *Twin Cities Courier*, July 13, 1978, at 5, col. 3. See also *MINORITY BUILDER*, 1st Q., 1975 (documenting incremental growth of minority involvement in public construction in Chicago as a result of special government programs).

99. 116 CONG. REC. 18885-86 (June 9, 1970) (Remarks of Sen. Bayh).

100. Statement of Paul King, Jr. before the Subcommittee on Economic Development of the House Committee on Public Works and Transportation, Mar. 9, 1978.